Reforming labour

lessons from the USA

PAUL BENJAMIN focuses on two controversial areas in the draft Bill — the "duty to bargain" and the workplace forums. He sheds some light on the debates by looking at labour law reform initiatives in the United States of America.

Duty to bargain

The Bill proposes to end the concept of a legally enforceable duty to bargain. This idea entered our labour law in the mid-1980s as a result of the Industrial Court borrowing from the American National Labour Relations Act. Since the 1930s, this Act has required American employers to bargain exclusively with unions that are able to prove in a ballot that they have majority membership in a particular bargaining unit.

For the last two years, a commission of inquiry appointed by President Clinton, the Dunlop Commission, has been studying American labour law and collective bargaining. This comes at a time when the US labour movement is weaker than at any other time in the last 60 years — union membership in the private sector has fallen below 10%

The commission concluded that two aspects of American labour law linked to the duty to bargain have hampered the development of collective bargaining The first is the requirement for a ballot of employees to prove their support for the union seeking recognition. This has allowed anti-union employers to pressurise employees not to vote for the union or to use litigation to delay the commencement of bargaining for many years. The second — a tendency of particular relevance here — is that a third of unions who win recognition against these odds are not able to conclude first agreements.

In South Africa the duty to bargain is not tied (as in the USA) to majoritarianism Although the first duty to bargain cases involved majority unions seeking recognition from hostile employers, many recent cases have granted extremely small unions the right to bargain — what has been called the "one employee, one bargaining unit" approach. This has allowed employers to undermine majority unions — through the recognition of smaller unions, many of whom cannot bargain effectively.

The main criticism of the absence of a duty to bargain in the Bill is that recognition disputes will again become "disputes of interest". This may lead to increased industrial action undermining the purpose of the Bill. Most importantly, it will mean that many weaker and smaller unions will not be able to gain recognition and collective bargaining as their members will not be able to win these trials of strength.

Organisational rights

This line of criticism fails to take account of the impact of the Bill on recognition battles as an area of dispute. It is worth reflecting on the nature of the central recognition disputes of the 1970s and 80s. These were disputes over basic rights: access by union officials to company premises, shopsteward recognition and stop orders. These rights were won by the conclusion of a recognition agreement Managements used this process to extract their pound of flesh — insisting on the recognition of managerial prerogatives, preparing excessively detailed dispute procedures and where possible delaying the start of wage bargaining. These basic organisational rights will now be in the new Act and can be claimed by any union achieving a threshold level of membership. The need for the old style recognition dispute therefore falls away.

The Act does not say in so many words that trade unions who win these organisational rights can start bargaining over wages and conditions of employment. Critics say that, for this reason, the new approach will not assist workers who operate under severe power imbalances — such as farmworkers and workers in small businesses — achieve collective bargaining. Even with the organisational rights they can win through the statute and the right to stage a legal strike with protection against dismissal, these groups of workers will not be able to force their employer to bargain with them.

The fault in this argument is the assumption that trade unions need to win some form of recognition in order to initiate wage bargaining — this is not true. A trade union can submit a demand to the employer for improved wages and conditions of employment. It can do this whether or not it has claimed organisational rights and regardless of the size of membership. The employer's response to the wage demand (or a demand for recognition) will depend upon its assessment of the union's power. A legally enforceable duty to bargain allows an outside institution (at the moment the Industrial Court) to order an employer to start negotiations. Logically, a duty to bargain is of value only to those unions who are unlikely to be able to secure better conditions of employment for their members through collective bargaining. A union that cannot force employers to bargain will not be able to force them to offer the type of improvements in wages and conditions of employment its members want.

This is why the statistic referred to above, that one-third of US unions that are recognised never achieve first agreements, is so significant. The duty to bargain cannot guarantee either effective bargaining or a fair agreement. The Dunlop Commission proposes that a wide range of forms of assistance such as mediation should be available in difficult first negotiations and that in exceptional cases there should be a possibility of "first contract" arbitration — in effect a form of compulsory arbitration on the content of the first agreement.

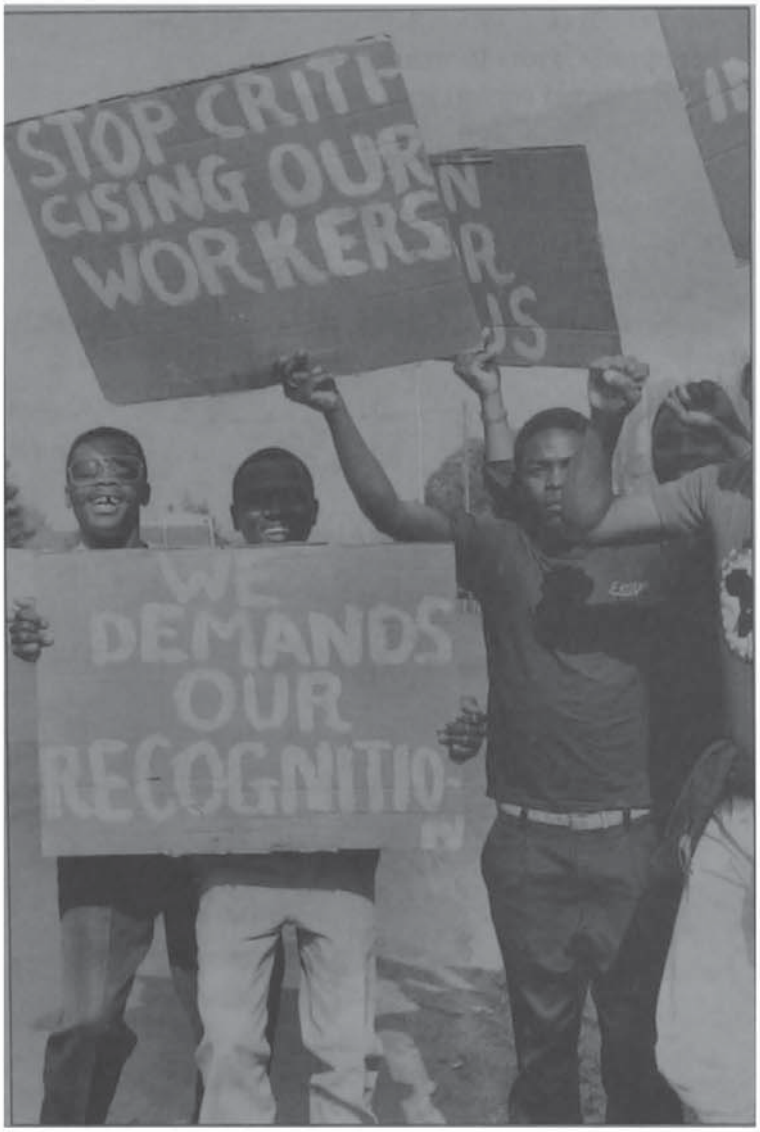
Basic worker rights

In debating the duty to bargain, it is important to separate the role of trade union organisation from that of labour law in achieving collective bargaining. The trade union movement has been unsuccessful in organising many groups of workers — those in small enterprises, farmworkers and particularly domestic workers. The successful organisation of these workers may require different strategies and even organisations from those that have served industrial, mining and commercial workers in the past. For the last year, farmworkers and their unions have had the benefit of both the unfair labour practice and compulsory arbitration in interest disputes to

win basic rights and improve conditions of employment. It does not appear that full use has been taken of these opportunities

One must also consider which problems can be addressed by a labour relations law and which require changes to other types of labour law. There are a range of legal reforms that can improve the position of workers who are difficult to organise The most obvious are the extension of a rejuvenated Wage Act and stricter enforcement of the Basic Conditions of Employment Act. In addition, the government could be persuaded to adopt policies that will encourage farmers and operators of small businesses to improve conditions of employment and recognise trade unions. For example, these could include required acceptable labour practices as a condition for loans from organisations assisting agriculture and small businesses

Finally, one suggestion has been that the duty to bargain could be defined in some detail in the statute which would then be developed by a legitimate labour court. But what would go in the statute? South Africa has such a wide diversity of bargaining practices that there is little prospect of developing a meaningful set of rules in the statute



The need for old style recognition disputes falls away

Bargaining practices

In the previous section, we suggested that a duty to bargain is not required in the Act to assist unions establish negotiating relationships with employers. This is adequately catered for by the organisational rights in the new Bill coupled with the protected right to strike. But the unions have not used the unfair labour practice only to force unwilling employers to bargain. They have also used it to prevent employers acting unfairly during collective bargaining. The best known example of this is the Ergo case in which the Appellate Division confirmed that the industrial court was correct in holding that it was an unfair labour practice for an employer to "by-pass" a trade union and make offers directly to union members

Unions have also established important rules about the conduct of collective bargaining in cases where employers adopted strategies that favoured non-union workers at the expense of majority unions But, like everything in labour law, the collective bargaining unfair labour practice cuts both ways: employers have made extensive use of the unfair labour practice to challenge what they view as unfair bargaining practices and tactics by trade unions

Many of the issues that the unions have attempted to resolve in the past through the industrial court are now dealt with in the Act

photo Cedric Nunn

Other legal options should be explored to improve the position of groups like farmworkers

— for instance, the duty to disclose information for the purposes of collective bargaining. The Bill's solution is that the remaining rules of collective bargaining will be sorted out in the cut and thrust of collective bargaining.

Are there alternative approaches?

The reintroduction of a full unfair labour practice covering the conduct of bargaining would clearly undermine the advances made in the Bill. Some commentators have nevertheless suggested that the Bill should contain a provision that would outlaw practices that are totally subversive of collective bargaining. A less prescriptive approach would be to allow NEDLAC or the Mediation, Conciliation and Arbitration Commission to draw up a code of bargaining practice.

Workplace forums

The Dunlop Commission was asked to look at methods to enhance workplace productivity through greater labour-management co-operation and employee participation. It concluded that there was overwhelming evidence that "employee participation and labour-management partnerships are good for workers, firms, and the national economy". What the Commission terms the "Twenty-First Century Workplace" requires greater participation and co-operation and, very importantly, worker participation in a wider range of decisions. These views are very similar to those expressed in the Explanatory Memorandum published with South Africa's draft Bill.

The Dunlop Commission's proposals for legislative changes to facilitate greater participation are not immediately relevant to our debates. They are influenced by the prohibition in American labour law on many forms of direct communication between employers and employees — a provision introduced to prevent company unions. Likewise, the South African Bill prevents employers from using workplace forums to stop unionisation or as modern-day versions of the old liaison

committees by giving the "trigger" to set up a forum to a union (or unions) representing the majority of workers in a workplace.

Composition

Any debate on the workplace forums should distinguish between the composition of the workplace forums, on the one hand, and their functions and powers on the other. So far most of the union response has concentrated on the composition: unions have criticised the Bill's proposals because the forums are separate from union collective bargaining structures and that the worker representatives on the forums will be chosen in elections held across the workplace as a whole. It is unnecessary for the Bill to suggest a single approach to the composition of workplace forums Many trade unions may prefer to nominate members in proportion to their membership and allow elections amongst unorganised workers. There should be greater freedom for arrangements to be negotiated The Act should permit this but include a formula to apply if there is no agreement.

Functions and powers

The functions of workplace forums are divided into consultation and joint decision-making. One criticism has been that they are not allowed to negotiate — but in practice this makes no real difference. Neither consultation nor negotiation require the employer to agree to any proposal made by the union The right to take industrial action is reserved in respect of all matters in which there is no right to compulsory adjudication (ie a binding decision by a third party such as a court or an arbitrator). The Bill proposes for the first time that certain issues (to be determined in the NEDLAC negotiations) that have traditionally been part of managerial power may be sent to third-party adjudication if a resolution cannot be agreed at the workplace forum.

The significance of the Bill must be evaluated against current patterns of collective bargaining. Most bargaining in South Africa is confined to wages and conditions of employment. Few unions have succeeded in negotiating over matters such as the organisation and arrangement of work. Compared to other countries, our unions bargain on a limited range of issues. The observation of the Dunlop Commission that there is a need for worker participation in a wider range of decisions is as true for South Africa as it is for the USA Traditional collective bargaining has not achieved this and is unlikely to do so in the economic climate that will prevail in the next few years. Workplace forums will permit informed consultation (and on some issues joint decision-making) on matters where currently there is no negotiation and employers act unilaterally.

Information disclosure

Employers are required to disclose information about their business to members of the workplace forum. The value of this will be understood by all who have tried to save jobs in retrenchment consultations. These usually take place against a backdrop of almost certain dismissal and employers are able to use the urgency that they claim exists to avoid proper disclosure and to prevent unions from having a proper opportunity to study the situation and propose alternatives. Where information is disclosed, it is done to show how badly the company is doing. On the other hand, workplace forums will receive this information regularly and employers will not be able to get their way by leaving things to the last minute or by isolating the discussion of potential retrenchments from the company's general performance.

The workplace forums are designed to facilitate the flow of information both from management to the workforce and from the workforce to management. The importance of the second aspect cannot be over-stressed. Workers have an unequalled knowledge of the operation of the plant they work in but little of this information from their employer. Employers, on the other hand, are dismissive of the knowledge of relatively uneducated and unskilled workers. These attitudes are the result of many factors, including the conflictual nature of industrial relations and the racial structure of the workplace. The result is that workers do not contribute to improved

decision-making in their workplace, hampering both productivity and the quality of their working life.

Embracing all workers

How should unions respond to the requirement that minority unions and non-unionised workers participate in the workplace forums? One approach is to see this as an opportunity to counter workplace apartheid. It will give workers who have traditionally rejected COSATU because the SABC or their employer told them it was "political" the opportunity to work with and benefit from a majority union. This could allow unions to begin recruiting members outside of their traditional categories. In addition, unorganised workers and members of smaller unions may bring skills into the workplace forums that union representatives have not previously had access to. At a macro-level, traditional labour segregation is breaking down with the move of unions like SASBO and the Boilermakers' Union into COSATU. The workplace forum creates this potential at shopfloor level. A union that feels it can take advantage of these opportunities can call for a forum to be created.

Conclusion

We have mentioned some of the recommendations of the Dunlop Commission that have relevance to the reform of South African labour law. By the time the commission made its final report, the Republican Party had achieved a majority in the Congress and the recommendations are unlikely to be implemented. Hopefully, that will not be the fate of the Labour Relations Bill. ☆