The LRA and the common law

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1 INTRODUCTION

Being asked to speak to a group of labour lawyers on the common law is akin to being invited to sample the delights of a hornets' nest. For many labour lawyers any reference to the common law seems to conjure up nightmares of a retreat to legal formalism and an abandonment of fairness as the keystone for resolving the disputes that inevitably arise in the course of the relationship between employer and employee and between trade unions and employers. In fact for some, I suspect that what they would welcome hearing from me today is a rapid obituary for the common law insofar as labour law is concerned.

In one sense this jaundiced view of the common law is not surprising. The common law in the form of the law of contract postulates the creation of formal legal relationships by freely negotiated agreements and in arriving at any agreement the relative bargaining strength of the parties is a crucial determinant of the outcome of the process. When it comes to the negotiation of employment contracts in a country with vast reserves of relatively unskilled workers desperate for jobs, the imbalances of bargaining power all favour the side of the employer. A legal system that sought to govern employment relationships solely by means of the outcome of the process of formation of the employment contract would inevitably fail to strike an acceptable balance between the competing interests of workers and employers that lie at the heart of the relationship as well as the interests of the wider public in a viable economy.

Typical of the flaws that exist in a purely contractual analysis of employment was the view espoused in a number of cases prior to, and indeed during, the developing stages of our current jurisprudence, that participation in a strike entitled the employer as a matter of right to terminate the contract of employment.[1] The law of contract does not provide an adequate vehicle for ensuring fairness in dismissal. Certain matters that we regard as basic to all employment such as annual leave and sick leave and limitations on hours of work in the interests of the health of workers, and the establishment of a basic floor of fair employment conditions, are simply not achievable by an individualised process of forming employment

1 *R v Smit* 1955 (1) SA 239 (C). Whilst there are persuasive arguments that this approach was incorrect (see Wallis *Labour and Employment Law*, para 48) it was the prevailing view at the time, and in any event a purely contractual analysis must in the end result in a right to terminate the contracts of the striking workers.

contracts. There are also difficulties in shaping appropriate rules for collective action such as strikes, picketing[2] or boycotts[3] within the framework of the common law of delict. To suggest that the common law alone should govern labour relations is manifestly an untenable proposition. What is intriguing, bearing in mind the attacks levelled at this proposition, is that it is difficult to find anyone who espouses it. It is always easier to knock down a skittle that no-one else has bothered to erect.

Does that, however, mean that the common law has no role to play in the field of labour law? Judging by some of the colourful expressions used to describe its role that one encounters in academic writing one might judge that it should be entirely excluded. Sir Otto Kahn-Freund described the contract of employment as 'a command disguised as an agreement'[4] and referred to the contract of employment as 'that indispensable figment of the legal mind'.[5] Lord Wedderburn's criticism of the role of the common law in employment is scathing and his references to the 'mentality of the common law' are undoubtedly pejorative.[6] Recently, in an address in this country, a distinguished academic spoke of 'the undermining influences of the common law'.[7] South African lawyers were quick to adopt the same theme[8] with a certain disregard for the fundamental differences between the different origins of English and South African law on employment.[9] They seem to have paid little regard to the position in Europe

2 *Deneys Reitz v South African Commercial Catering and Allied Workers' Union* 1991 (2) SA 685 (W).

3 *Murdoch v Bullough* 1923 TPD 495.

4 Introduction to Renner K *The institutions of private law and their social functions* (1949) 28.

5 Davies P and Freedland M (eds) *Labour and the Law* 3 ed (1984) 18.

6 Lord Wedderburn *The worker and the law* 3ed (1986) 3. The full flavour of his hostility to the common law can only be captured by reading the entire book. Elsewhere (*Employment rights in Britain and Europe*, (1991) 19) he wrote of: 'This ability of the common law to engender new threats to the legality of trade union activities which lie like landmines until a plaintiff activates them and in the interim create uncertainty . . .'.

7 Professor Sir Bob Hepple QC 'Can collective labour law transplants work? The South African example' (1999) 20 *ILJ* 1at 2.

8 See, for example, Rycroft A and Jordaan B in *A guide to South African labour law* 1 ed (1990) Chap 1 where the contract model is compared with a 'property' model and a 'status' model. The difficulty is that the practical application of these alternative models to the employment situation and their capacity to provide answers to the real questions that arise in the course of disputes between employees and trade unions on the one hand and employers on the other is not spelled out. (Professor Jordaan's views appear to have changed by the time the second edition was published in 1992 particularly in regard to the notion of the employment relationship as one of status. See 29-32.) One finds similar critical overtones in Davis, 'Refusing to stray beyond the confines of contract: The jurisprudence of Adv Erasmus SC' (1985) 6 *ILJ* 425. Professor Davis, as he then was, quotes (at 429) with approval a reference by John Brand to 'bondage to the common law'. See also Professor Davis' article 'The juridification of industrial relations in South Africa - or Mike Tyson v Johannes Voet' (1991) 12 *ILJ* 1181. It is not however clear from the article why the comparison between a pugilist and a jurist was thought to be appropriate as neither is thereafter referred to.

9 For example that South African law, going back to its Roman law origins, has always treated employment as contractual in nature whilst this is a relatively recent view in England adopted during the Victorian era as employment moved away from its feudal

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where it appears that there is less debate over this issue because of the acceptance of the regulated contract and the existence of codes of labour law and constitutionally entrenched labour rights.[10]

Whilst accepting the force of some of this body of criticism and its usefulness in describing the social and economic realities of employment, from a legal perspective it is essentially a criticism, based on the results in particular cases, of what is perceived to be a 'common law' approach. Its weakness as a tool in practice is illustrated by a note on a decision of the old Labour Appeal Court. The author says the decision 'provides a good illustration of just how destructive a common-law oriented approach to industrial relations can be'.[11] This comment arose from the interpretation given by the court to the definition of 'employee' in the old LRA that excluded people who had been dismissed, but were the potential beneficiaries of an agreement between the employer and the trade union for them to be 'called back' if the employer decided to employ additional workers. The problem is that on an application of the self-same common law principles the then Appellate Division had no difficulty in overturning the judgement and giving a far broader interpretation to the word 'employee'.[12] In turn it was following a judgment given some 60 years before. What is one to make of this from the perspective of the influence of the common law on the law of employment? It surely cannot be suggested that the judges in the appeal court were not common lawyers steeped in the common law and the patterns of thought that it engenders.[13] The rules they applied in interpreting the legislation were common law rules not unique to labour matters. Why is the one to be categorised as flowing from an adherence to an 'antediluvian commitment to the common law'[14]

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background and the view of service as a status relationship to be enforced by criminal sanction. Professor Jordaan has highlighted some of these issues in his contribution on employment law in Zimmerman R and Visser D (eds) *Southern cross: Civil law and Common law in South Africa* 389 415. The early flirtation with the English rule that there could be no order for specific performance of a contract of employment was disposed of by the judgment in *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 (4) SA 151 (T) by an appeal to common law principles.

10 In Europe the contract of employment or employment relationship as defined by national law is the foundation of employment rights. Blanpain R *European labour law* 8 ed (2002) 301–318. In Catherine Barnard's book *EC Employment Law* 2 ed (2000) the contract of employment scarcely warrants a mention although there is a directive, Directive 91/533/EEC, on proof of the contract of employment.

11 The case was *Borg-Warner SA (Pty) Ltd v National Automobile and Allied Workers' Union (now known as National Metalworkers Union of South Africa)* (1991)12 *ILJ* 549 (LAC). The note is Jordaan, 'Selective re-employment revisited' (1991) 12 *ILJ* 1192.

12 *National Automobile and Allied Workers' Union (now known as National Union of Metalworkers of SA) v Borg-Warner SA (Pty) Ltd* 1994 (3) SA 15 (A).

13 The judges were Joubert JA, Nestadt JA and van den Heever JA who gave the judgment of the court. The fact that it was only a three judge court suggests that the issues were not regarded as particularly complex.

14 The expression is that of Professor Davis (*supra* n 8, 1189). Again, the judgment he was criticising for its common law overtones was overturned on appeal by a group of common law judges who did not regard fairness as a question of law! See *Media Workers Association of SA and others v The Press Corporation of SA Ltd* (1992) 13 *ILJ* 1391 (A). When the matter returned to the LAC the decision by the Industrial Court was upheld

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and the other passes without comment? If the fault truly lies with the common law then surely the least we can expect of it is that it should not provide a moving target for our criticism, sometimes oppressing the worker and sometimes not?[15]

This is not the place to explore this field in depth but may I suggest that part of the problem lies with expecting too much of general common law constructs in the field of labour law. Firstly, let us understand that when Lord Wedderburn writes of the common law he is writing of English common law which in many respects is very different from our civil law system derived from the Roman Dutch heritage of South African law. Thus, it is far easier in South Africa to recognise and give effect to the results of collective bargaining because unlike England we recognise a contract for the benefit of a third party and are not bound by a strict doctrine of contractual privity.[16] It is accordingly unnecessary for collective agreements between trade unions and employers to be regarded as 'gentlemen's agreements' not binding in law.[17] That in turn makes it easier for the results of collective bargaining to be incorporated into the workers' contracts of employment. In many instances that has been a substantial weapon on the side of trade unions seeking to resist changes to working conditions such as shift patterns because they can claim that this involves a change in the terms of the workers' contracts of employment which cannot be effected unilaterally.

Secondly, it is important to recognise that general legal constructs such as the law of contract or the law of delict, particularly in a civilian legal

although the judge did not change his view. See (1993) 14 *ILJ* 938 (LAC). It is suggested that the attitude that Professor Davis was rightly criticising was not so much an adherence to common law but a narrow-minded attitude to the role of industrial action in labour disputes. That says something about the judge but little about the common law.

15 It is this aspect of a moving target that suggests that the common law is more a mixed blessing than the sole villain of the piece. Lord Wedderburn seems dismissive of the employer's obligation of good faith (*The Worker and the Law*, *supra* n 6, 180 *et seq*) but it is on this foundation in conjunction with the common law concept of repudiation of contracts that the notion of constructive dismissal has been built. The implied term has been of benefit to workers in the context of their pension rights: *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd and others* [1991] 2 All ER 597 (Ch D); and in the recent recognition of a right not to have one's reputation in the market place injured by the employer's misconduct. *Malik v Bank of Credit and Commerce International SA (in liquidation)* [1997] 3 All ER 1 (HL).

16 Taking an example from a different field of law the result of this difference is that a South African court had no difficulty in giving effect to a Himalaya clause in a bill of lading, *Santam Insurance Co Ltd v SA Stevedores Ltd* 1989 (1) SA 182 (D). One can compare this with the difficulties experienced in England in obtaining recognition and acceptance of the same clause. *Scruttons Ltd v Midland Silicones Ltd* [1962] 1 All ER 1 (HL) and *New Zealand Shipping Co Ltd v A M Satterthwaite and Co Ltd* [1974] 1 All ER 1015 (PC).

17 Lord Wedderburn, *The Worker and the Law*, *supra* n 6, 318–322 and *Ford Motor Company v AUEF and TGWU* [1969] 2 All ER 481. Whilst Booysen J in *Consolidated Frame Cotton Corporation Ltd v Minister of Manpower* 1985 (1) SA 191 (D) referred to these authorities and said that he saw no reason why they should not apply in South Africa, he gave no reason for that view and there are many cases subsequently when such agreements have been enforced by the courts. See also Wallis, *supra* n 1, para 43.

system that is based on broad principles rather than a case by case development of the law as in England, will rarely be capable of responding to all situations that fall within their general purview in a way that is universally satisfactory.[18] Civilian systems, which are now largely codified, recognise the concept of a regulated contract where the contract is established by a blend of negotiation between the parties and imperative standards usually having their source in legislative measures. There is no reason why South African lawyers cannot recognise and accept the same approach. However as Kahn-Freund pointed out some years ago[19] this approach has

18 The point is made by Marais J (as he then was) in *Martin v Murray* (1995) 16 *ILJ* 589 (C) at 600 in colourful language that matches that of the protagonists on the other side of the fence: 'The common law does not swing about like a weathervane in whatever direction any passing gust of wind may blow. It is not designed to be, and is inherently incapable of being, responsive to volatile social and economic circumstances of a kind which frequently reverse themselves during relatively short periods of time . . . The ebb and flow of demand and supply in the field of employment, the waxing and waning of respective bargaining strengths, and the impact which extraneous circumstances . . . can have upon the respective positions of employer and employee, are all factors to which the common law cannot reasonably be expected to respond as they occur. It would require so frequent and kaleidoscopic a shifting of obligations that there would be no certainty or stability in the common law . . . It is of course so that the common law should not be regarded as an ossified code of immutable principles which only the legislature can alter, but there is virtue in stability and predictability in the law, and it is a virtue that should not be undervalued'.

19 In a note entitled '*A note on status and contract in British labour law*' (1967) 30 *MLR* 635. It is worth quoting some of what he said: 'The labour law of Great Britain shares with that of the other nations in our orbit of civilisation two essential jurisprudential features: It is based on the contractual foundation of the obligation to work and of the obligation to pay wages, and it is at the same time permeated by a tendency to formulate an ever-growing number of imperative norms for the protection of the worker, norms which the parties to the contract cannot validly set aside to the detriment of the economically weaker party. This dual insistence on agreement as the legal basis of at least some of the essential rights and obligations and on mandatory regulation as the source of the content of the relationship has given rise to a jurisprudential dilemma which has so far not been clearly faced in the literature on the subject . . .'

How can we explain the conceptual confusion between two legal phenomena as different as the imposition of rights and duties irrespective of the volition of the person concerned and the shaping of a legal relation into which he has freely entered . . . Why, then do English lawyers see a reversion to "status" in rules which leave the parties free to contract or not to contract, but restrict their freedom to contract except on certain minimum terms?

The reason must be found in a gap in the conceptual equipment of English law which itself reflects the social and jurisprudential principles of its growth. The distinction between *jus cogens* and *jus dispositivum*, between 'imperative' and 'optional' norms of the law of contract, is familiar to every practising lawyer in any Continental legal system. It fits naturally into the thinking of lawyers brought up and working in a world of legal thought in which the systematic regulation of the law of contract through general norms applicable to all contracts and special norms applicable to defined types has for almost two centuries been commonplace. The distinction is not commonly used in English legal practice . . . The reason appears to be that the positive regulation of the substance of the contractual relationship has only within fairly recent times become one of the recognised functions of the legislature. The law of contract was developed by the courts, and the principal conceptual instruments which they handled were the intention of the parties (which to a large extent fulfilled and still fulfils the function of the *jus dispositivum* on the Continent) and public policy which, in a few extreme cases, may destroy a contract, but which cannot mould it. Thus the idea of the positive regulation by law of the content of contractual relations is, as English legal history goes, fairly new'.

not hitherto commended itself to English common lawyers who tend to regard the contract and the legislation as two separate sources of authority in competition with one another.

Thirdly, once it is recognised that common law concepts are capable of accommodating collective agreements but will not alone suffice to resolve all issues of labour law in an acceptable fashion, it is possible to move from an 'either/or' approach that places the common law and particularly the law of contract in permanent conflict with other sources of law, such as collective agreements and legislation, to a 'both/and' analysis that recognises that in this field no single source will enjoy primacy. That will tend to make the search for the applicable rule in any particular situation complex but the overall system will give greater recognition to the competing interests of the participants and the ongoing need to strike a balance between them in the greater interests of society as a whole. Where the balance is struck will always be a matter of contestation in any democratic state and will fluctuate over time with changes in government. This is the very type of contest that is at present underway in South Africa with the promised review by government of labour laws with a view to simplifying their impact on small and medium-sized business. As with most forms of political debate both sides state their case in extreme terms. For employers it is a matter of removing 'the dead hand of bureaucracy' and freeing up enterprise that 'provides jobs and keeps the economy running'. For the trade unions it is a matter of 'defending rights won in a lengthy struggle'. The language on both sides is the language of 'either/or'[20] but the result is always a compromise between the two. An analysis of labour law that views it solely from one or other perspective presents an inadequate picture of the task that confronts the labour lawyer, whether in practice in advising and representing clients, or in the reality of the workplace and the negotiating forum or in advancing the process of law reform.

20 This way of framing the debate in terms of stark contrasts is appealing at least in helping to identify the issues in debate. For example, Collins H *Employment Law* (2003, Clarendon Press) 21 (drawing upon his article *'Labour Law as a Vocation'* (1989) 105 *LQR* 468) writes of the 'unceasing struggle between these two paradigms' which he describes as 'a liberal framework emphasis[ing] the importance of efficient and competitive business' and an 'industrial pluralist framework emphasis[ing] for reasons of fairness and respect for the dignity of workers the importance of institutional arrangements that achieve joint regulation of the workplace or industrial sector'. Its appeal in terms of describing a debate in which each side is struggling for advantage should not however blind us to the reality that, as Collins says, contemporary employment law consists of 'an embedded series of historic compromises and pragmatic solutions'. To a practising lawyer involved on a day to day basis with attempts to find a legal resolution to the issues facing employers and employees (or perhaps being used by them as weapons in an ongoing war) such stark contrasts are rarely of assistance. An acceptance that labour law is the product of a variety of social, political and economic forces which ebb and flow in the light of changing events, rarely reaching any fixed equilibrium, combined with an understanding of the different forces at play is more likely to assist in reaching a balanced solution acceptable in the long term to all parties. See in this regard Creighton B, Ford and Mitchell R *Labour law: Text and materials*, 2 ed (1993), paras 1.4–1.5 and 2.23–2.25.

The concept of balance between the competing forces in the employment arena, in accordance with a constitutional imperative that gave protection to fair labour practices, is in my view what was sought in the drafting of the LRA. In looking for that balance there was a recognition of the necessary blend between competing legal sources. The starting point inescapably was the nature of the employment relationship that should attract the application of the Act. Here the unequivocal choice of the LRA is that all employment relationships, other than those between an employer and an independent contractor (the *locatio conductio operis* of our common law), make a person an employee under the Act. In a sense this reversed the usual approach in prior legislation that started with the contract of employment and was then interpreted to exclude independent contractors.[21] It is arguable that the result may have been to expand slightly the concept of an employee for the purposes of the LRA but for my purposes today the point is that the entire operation of the LRA is embedded in the common law. In order to answer the threshold question; 'To whom does the LRA apply?' one must resort to the common law. In the end South Africa accepted, as every other jurisdiction I have encountered has done, that the contract of employment is the key relationship to the application of its labour relations legislation.[22]

This recognition that a contractual relationship lies at the heart of employment is not confined to the threshold issue of the application of the LRA. The controversial issue of the application of collective agreements in relation to the individual employee is tackled in sections 23 and 31 of the LRA, read with section 199, which makes the terms of all such agreements binding upon the members of the contracting parties, that is, the members of the trade union or unions and the employer members of any employer body that is party to the agreement, where the agreement

21 *Oak Industries (SA) (Pty) Ltd v John NO* 1987 (4) SA 702 (N) 706 D–E; *SA Dental Technicians Association v Dental Association of South Africa* 1970 (3) SA 733 (A) 741A–F. The approach adopted in the definition of 'employee' is also consistent with decisions in the old LAC such as *Boumat Ltd v Vaughan* (1992) 13 *ILJ* 934 (LAC) and *Camdons Realty (Pty) Ltd v Hart* (1993) 14 *ILJ* 934 (LAC). See also s 200A of the LRA.

22 It is suggested that if and when the Constitutional Court has to grapple with the concept of a 'worker' in section 23 of the Constitution it will be driven to accept this reality. There is nothing unusual about this although it demonstrates the impossibility of the attempt to excise labour law from the embrace of the common law. I venture to suggest that Kahn-Freund's 'figment of the legal imagination' owed more to rhetoric than to fact and that his equally famous description of the contract of employment as 'the cornerstone of the edifice of labour law' was rather more accurate. As Mark Freedland points out in his recent magisterial work *Personal Employment Contract:*
'English law is deeply, perhaps irrevocably, committed to a contractual analysis of the employment relationship'.
Similarly another well-known English writer Stephen Anderman in *Labour law: Management decisions and workers' rights* 4 ed (2000) 36 wrote that:
'. . . a thorough understanding of the characteristics of the contract of employment is a virtual precondition to an understanding of the subject of labour law'.
See also Smith IT and Thomas GH eds *Smith and Woods' industrial law* 8 ed 100–1, where they say that 'The contract theory remains paramount'. The law in other countries appears to accept the same starting point although with apparently less need for any traumatic debate.

regulates terms and conditions of employment or the conduct of employers towards employees and *vice versa*.[23] The agreements themselves are legally binding thereby dispelling any notion imported from the UK that they are not intended to be legally binding. In adopting this approach the LRA squarely accepts the role of contract in relation not only to the individual employee but also in relation to the interaction between trade unions and employees. This is not to say that the contractual model may not generate problems. Of course it does. Take the simple case of a disciplinary code that is made contractually binding in this way. Time and again CCMA arbitrators and the Labour Court are confronted with situations where in a last throw of the dice it is claimed that an entirely justifiable dismissal following upon an entirely fair hearing is nonetheless flawed because of non-compliance with some provision of the code that in no way affected the course of the proceedings. The argument is available because the contractual term is breached even though the breach is irrelevant to the outcome of the disciplinary process. It forces the adjudicator to grapple with concepts such as waiver and the consequences of breach which would not otherwise be relevant.

The acceptance of the common law and its rules in these areas does not mean that it reigns supreme over our labour law or that the LRA is subordinate to its dictates. In the field of unfair dismissal to which Chapter VIII applies it is clear that the requirement that dismissals must be for a fair reason and must be preceded by a fair procedure addresses an issue that the common law could not. It is easy then to say that the common law has been displaced and that we need only have reference to the statute, but is this really so? I looked again at the section of a book dealing with the common law grounds for summary termination of a contract of employment[24] and found that it listed the following general categories of conduct that might at common law justify a person's summary dismissal: assault, insubordination, insolence, negligence and incompetence, dishonesty, intoxication and drug abuse, breach of the duty of good faith, absence from work and finally misconduct in terms of a disciplinary code. Few disciplinary codes would ignore the items in that list and arbitrators in the CCMA wrestle with them daily. It appears then that the common law was not perhaps entirely wide of the mark in identifying the grounds for terminating a contract of employment.

I would suggest that a more significant change in the law relating to dismissal relates to termination on notice. The old grounds for summary termination by and large remain open although the employer is now required to justify their invocation, which is a procedural rather than a substantive matter. In many ways the requirements for retrenchment are also procedural matters rather than substantive as the labour courts have consistently held that they are not in a position to second guess employers'

23 The result is similar to Art L 135-2 of the French Code du Travail cited by Lord Wedderburn in his 1993 Sinzheimer lecture published in Lord Wedderburn '*Labour law and freedom*' 302.

24 Wallis, *supra* n 1, para 35. See also Grogan *Dismissal* Chapter 8.

views on desirable staffing levels. It follows that if the proper procedures are followed the employer will ordinarily be able to retrench if it wishes to do so. However, the ability of the employer to resort to termination in a situation less extreme than summary dismissal has been substantially curtailed. General dissatisfaction with an employee, the fact that a person is a disruptive influence or has a personality clash with colleagues, below par work performance or doing just enough but no more, can no longer be dealt with by simply giving the employee notice and suggesting that they would be well advised to devote their undoubted talents to some other enterprise. This will not pass muster under the LRA. In effect all employment contracts have become indefinite from the side of the employer and subject only to termination for cause. The common law of summary dismissal is now the law of dismissal.

The LRA also made a deliberate choice in favour of conciliation and arbitration as the preferred method of dispute resolution in most of the common situations where disputes can arise in relation to employment and particularly in relation to dismissals. In so doing it elected to use language that it drew directly from laws governing arbitration.[25] The effect is to import into this vital aspect of our labour law a body of common law developed by the courts and embodied in legislation dealing in similar language with ordinary commercial arbitrations.[26] This common law applies not only to the question of reviewability of arbitrations under section 145 but to the very manner in which they are conducted under section 138.[27] Again, it is clear that in a fashion that is consistent with the entire development of South African law there is borrowing of what is useful in another area in order to meet the specific needs of labour law. This is entirely consistent with a civil law system that tends to see the law as an entire system rather than a series of discrete compartments with its constant consequent search for the appropriate pigeonhole for any given problem.

The balancing act between the common law and a fair labour regime in which the importance of collective action is accepted and protected is maintained in chapter IV of the LRA in the provisions dealing with strikes and other forms of collective action. Section 67(6) is important in this regard. It prevents the institution of civil legal action against any person

25 Attention was drawn to this in an address to the inaugural meeting of the South African Society for Labour Law published under the title '*The new LRA - how decisive a break with the past?*' in (1997) 18 *ILJ* 902.

26 The common law is set out in *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 174-5. Much of the relevant law is collected in my judgment in *Shoprite Checkers (Pty) Ltd v Ramdaw NO and others* (2000) 21 *ILJ* 1232 (LC) and is not dealt with or challenged in the subsequent decision of the LAC. This is not the occasion on which to comment on the latter judgment although its correctness is highly debatable.

27 *Naraindath v CCMA and another* (2000) 21 *ILJ* 1151 (LC). Regrettably, proceedings before the CCMA have become far too similar to the litigation model of courts for the aims of arbitration as a summary and expeditious means of resolving labour disputes to have been satisfactorily fulfilled. In addition, the freedom with which arbitration awards can be challenged results in many cases dragging on endlessly thereby creating the very problems that the LRA set out to avoid. It has also burdened the Labour Court with a workload that it continues to have difficulty coping with.

participating in a protected strike or lockout or any conduct in furtherance of such a strike or lockout. It seems to me that this goes further than the old system of immunities transplanted to South Africa from the English Trade Disputes Act of 1906. No civil action may be undertaken because the strike or lockout in question is protected or, in other words, lawful. Since unlawfulness is an essential component of any claim for damages under our law of delict the absence of unlawfulness will preclude such an action. Again there is a synthesis between the common law and what Justice Holmes referred to as 'the felt necessities of the time'.[28]

One last thought before I close. We live in a constitutional state and much of our labour law is statutory. That means that it falls to be interpreted by the courts but there are no special rules applicable to labour legislation as opposed to any other form of legislation. The rules of statutory interpretation are rules evolved by the courts in a gradual process over time. Even if we were able to isolate and codify all our labour law in statutes and eliminate any need to have resort to common law principles of contract and delict and arbitral process the embrace of the common law cannot be entirely avoided as its rules will determine the scope, extent and meaning of rights and obligations expressed elsewhere. There are many annoying things in life that we try to suppress only to have them pop up to surprise us somewhere else. Perhaps the time has come for us to stop trying to suppress the common law in the area of labour law and to accept that it is a part of life that needs regulation and adaptation but like death and taxes it is always with us.

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