

Article

A nightmare on the brain of the living? The endurance and limits of the collective bargaining regime

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Abstract

Despite pressures to liberalise its economy and strong resistance to union bargaining rights from domestic constituencies, South Africa has maintained, for more than two decades, a labour relations regime which offers trade unions and workers generous rights. The article seeks to explain the bargaining system's survival in seemingly unlikely circumstances. It argues that racial politics combined with the emergence of a trade union movement relatively independent of its nationalist ally have made the political costs of denying or retreating from a generous set of union rights prohibitive. But, while the implicit bargain may enable unions to negotiate wages and working conditions, this does not automatically mean gains for workers or the poor, for the bargaining system has proved incapable of fully resolving the conflict caused by a path dependence which ensures the persistence of racial domination in the economy.

Introduction

How does a new democracy under pressure to liberalise its economy maintain its labour relations system for at least two decades in apparent defiance of international trends and constant domestic pressure because the system offers trade unions and workers generous rights?

This question has been rarely if ever asked in South Africa: the labour relations system is taken for granted – or labelled as biased towards business (Interview Hartford). But, by international standards, it is relatively labour-friendly. Since democracy's advent in 1994, no measure has been enacted

reducing union prerogatives and worker protections. In 2013, despite a widespread (albeit inaccurate) perception of a tidal wave of labour militancy (Bhorat and Tseng 2013), attempts by organised business and labour lawyers to secure changes to the law which would dilute union prerogatives failed (Ensor 2013).

The most obvious explanation of this rarity is the Congress of South African Trade Unions' (Cosatu) alliance with the African National Congress (ANC). But South Africa is not the only country in which a post-authoritarian coalition between a governing party and a labour movement has faced pressures for liberalisation – in some, the alliance has fallen apart, in others labour's interests were largely ignored (Levitsky and Way 1998). Here relations between Cosatu and the ANC have been shaped by an implicit bargain in which the union movement enjoys a veto over labour law changes while the ANC shapes economic policy. The bargain has proved robust, but its origins and rationale are far from clear.

This article will try to explain the labour regime's survival. It will argue that racial politics combined with the emergence of a trade union movement relatively independent of its nationalist ally to make the political costs of denying or retreating from union rights prohibitive. But, while the implicit bargain may enable unions to negotiate wages and working conditions, this does not automatically mean gains for workers or the poor. And so it will examine the thesis that the bargaining system has proved incapable of resolving the conflict caused by the persistence of racial domination in the economy (Webster 2013: 211).

Roots of the present: a brief history of the labour dispensation

The nature of racial domination before 1994 helps to explain why the ANC, a nationalist 'liberation' movement, sought an alliance with unions and made full bargaining rights for workers a key goal – even though its brand of nationalism had a distinctly elitist flavour (Davis and Fine 1985: 41).

Industrialisation in the late nineteenth century triggered class conflict which soon developed a racial hue. After a white miners' strike in 1922, an election in which almost all black people could not vote produced a government which reserved key skilled jobs for white workers. In 1924, the government enacted the Industrial Conciliation Act which allowed unions representing racial minorities to bargain legally binding agreements with employer associations but denied this right to unions representing black African

workers. While successive waves of black trade unionism emerged, they were denied bargaining rights.

In the 1950s, the ANC formed an alliance with the SA Congress of Trade Unions (Sactu) which became as much a source of recruitment for the ANC as a vehicle for worker interests (Friedman 1985: 26-33). The key reason for the alliance was that labour relations were shaped by economic apartheid – a key goal of the fight for ‘national liberation’ was to win for everyone the rights which white people enjoyed. The SA Communist Party (SACP) was allied to the ANC; it saw unionism as a key vehicle in the fight against apartheid. Nationalists and the left within the ANC shared an interest in working with unions.

The unions which emerged after bargaining rights were extended to black workers in 1980 formed Cosatu which supported the ANC’s fight against minority rule (Baskin 1991: 78). But it was never a ‘conveyer belt’ for the nationalist movement. It had independent funding, its own support base and leverage in the economy (Baskin 2000: 48). Perhaps its most important contribution to the fight to end apartheid was a campaign to defend union rights. In 1988, the apartheid government responded to labour militancy by seeking to curtail rights protected by the Labour Relations Act. Among the proposed changes were: lengthening the procedures which made strikes legal; limiting a second strike over the same issue within 12 months; banning strikes over issues not in dispute with the relevant employer and consumer boycotts; and a clause allowing employers to sue unions which struck legally. Since a state of emergency was in force, the government may have believed unions would be unable to mobilise a response (Webster and Adler 1995: 82). But Cosatu organised a three-day general strike in June, 1988, described as ‘the biggest withdrawal of labour in South Africa’s history at the time’ (Godfrey and Goldberg 1996).

Initially, this simply halted the attempt to roll back union rights. But, after the ANC was unbanned in 1990, Cosatu’s resistance to the changes triggered a process which culminated in labour laws which have become identified with the post-1994 order. Employers, seeking to calm workplace militancy and build relationships with an emergent political elite, began negotiations with labour which culminated in the Laboria Minute, an agreement between business, labour and government: all labour laws would be considered by employers’ bodies and the union movement prior to going to parliament; unions would participate in a reconstructed National Manpower Commission; and labour rights would be extended to those previously excluded from the

bargaining system, including farm and domestic workers and public servants (Adler and Webster 1995: 94, 1999). This set the parameters for the new law after democracy was achieved.

The Laboria Minute was signed at the beginning of the negotiation period, when there was a strong common interest between Cosatu and the ANC. The apartheid government remained in office and it was a core ANC goal to resist ‘unilateral restructuring’ (Kaplan 1995: 72), changes which would constrain a majority government. Cosatu’s insistence on a veto on changes which affected its members dovetailed with this ANC strategy. It was Cosatu which led the charge against ‘unilateral restructuring’: shortly after negotiations began in early 1990, it demanded the right to negotiate economic policy with business and the government (Friedman and Shaw 2000: 192). After a conflict-ridden process closely linked to the ebbs and flows of political negotiations, this culminated in the establishment of the National Economic Forum in October, 1992 (de Villiers and Anstey 2000: 33). Soon after, sectoral forums which sought to bargain social policy were established. They achieved few agreements but are credited with preventing the minority government presenting its successors with *faits accompli* and with forcing representatives of the black majority into the policy process (Friedman and Shaw 2000: 196).

If its role in this process showed Cosatu’s usefulness to the ANC, constitutional negotiations showed that it could take independent positions, albeit in a less than elegant fashion. Negotiators inserted in the draft Bill of Rights a right to strike – and to lock out workers. The ANC rejected the lockout right: it ‘had no precedent in international law and will form a scab’s charter’. The issue was referred to a technical committee which resolved deadlocks: it insisted that there were no grounds for including the one right and not the other but agreed to an ANC and SACP proposal that it add that existing labour law (which limited lock-outs) could not be ruled unconstitutional. Cosatu rejected this and threatened a general strike. The ANC was taken aback – earlier, the compromise had been endorsed by Cosatu and it thought it was doing what its labour ally wanted – Cosatu appeared to be responding to pressure from unionists who felt the negotiations were ‘selling out’ labour. Eventually a deal was reached stipulating that employers’ recourse to lock-outs should not be impaired subject to existing labour law (Atkinson 1994: 140-1). This was the subject of much ridicule among Cosatu militants, for it had settled for much the same as the technical committee had recommended. But ultimately Cosatu achieved

its goal. The Constitution retained the right to strike but the lock-out was excluded 'as it was not a universally recognised fundamental right' (Mubangizi 2005: 125) Cosatu was able to impose its independent stamp on the Constitution.

The events of the negotiation period laid the foundation for the Labour Relations Act of 1995. Its architect was the first Labour minister of the democratic era, Tito Mboweni, who wanted a bargaining regime sympathetic to labour but negotiated with business. Initially attempts to draft a new law led to a deadlock between labour and business: unions mobilised marches to press home demands (Adler and Webster 2000: 4). Mboweni famously invited business and labour negotiators to a Johannesburg hotel and refused to let them go home until they reached agreement. The law introduced: one bargaining system covering all workers, including farm and domestic workers; guaranteed union organisational rights in the workplace; 'dramatically' overhauled dispute procedures and a Commission for Conciliation, Mediation and Arbitration (CCMA) to resolve disputes; rules protecting workers from unfair dismissal; and an attempt to encourage joint decision-making in the workplace by allowing unions to apply for the establishment of workplace forums. To this was later added laws protecting unorganised workers, promoting training and mandating processes to achieve employment equity (Webster 2013: 215).

Mboweni's gesture may have persuaded organised business to approve the new arrangements. But it did not create the consensus in support of the law for which he hoped. Not long afterwards, a document produced by the SA Foundation, representing corporate business, urged more business-friendly labour law (Interview Buhlungu). Almost two decades later, business leaders, commentators and labour lawyers still blame 'labour market inflexibility' for stunting economic growth (Stanlib 2014), and campaign to reduce union power (Paton 2014). The official opposition, the Democratic Alliance (DA), supports curbs not only on unions but on workers' protection against dismissal (DA 2013).

The law did enhance worker and union rights. But the 'new system' was hardly new: its foundation was much the same as that of the 1924 Act, now extended to all workers. The only systemic innovation was workplace forums – which, presumably because they were novel, have largely been ignored (Interview Buhlungu). In one view, the strike right in the apartheid-era law was more expansive than that in the 1995 version (Interview Hartford). So the 'creation of a new system' after 1994 was largely an illusion. What needs

explanation is the system's survival intact despite the adoption of the relatively business-friendly Growth, Employment and Redistribution (GEAR) policy in 1996 (Masiza and Ngqungwana 2001).

Race and class: behind the history

A key reason is the mix between race, more specifically an African nationalist alliance against racial domination, and class – Cosatu's independent mobilisation of workers in support of their specific interests.

A former unionist believes that a new labour relations regime was forged by independent worker mobilisation and organisation: 'I don't recall forging alliances in the 1990s. Our allies were our members and our own vision'. The outcome was determined by the 'class struggle' at the time (Interview Hartford). This may partly describe the initial breakthrough in which the apartheid state conceded bargaining rights in 1980. But it is a less plausible account of later developments.

One view of how unions achieved the improvements in the 1995 law acknowledges the role of Cosatu's alliance with the ANC – but sees it as purely a means of strengthening already existing union power. Noting that the law was shaped by pro-labour academics who advised Mboweni's Department of Labour and of worker marches to government offices, it asserts that labour was 'on the streets and inside the centres of power' (Adler and Webster 2000: 4): the alliance is here a strategic resource in a process initiated by Cosatu. The labour movement 'strengthen(ed) its political position by drawing on its independent power base – a mobilizable constituency no other actor possesses' (Adler and Webster 2000: 5).

But this notion that Cosatu went into an alliance with the ANC with eyes wide open, seeking strategic advantage for its members, is challenged by Joe Foster, a former general secretary of Cosatu's forerunner, Fosatu: 'In 1992/3 when we decided to go into parliament, there was no agreement or election pact with the ANC. Everyone was in a hurry'. A pact, he argued, would have given unions leverage (Interview Foster). The view that the alliance is dominated by the ANC is supported by the 1997 September Commission appointed by Cosatu which complained that the ANC in government had changed policy 'without adequate consultation'; that '(d)uring negotiations... in relation to labour legislation, it is not always clear which side of the table the Alliance partners are sitting on'; that the Alliance failed to meet regularly 'if at all'; and that in some instances policy was decided in 'a unilateral way' (Cosatu 1997). Complaints that Cosatu is not taken

seriously enough by its partner in government have been a constant refrain ever since.

Why did unions accept this? Because the arrangement was not the product of strategic calculation by a movement independently weighing up its options – Cosatu’s very formation was a product of the fact that black workers saw racial domination as at least as important as its economic equivalent and so identified with the ANC. Fosatu, which Foster led, hoped to build a worker movement entirely independent of the nationalist ANC (Foster 1987). The quest was a chimera – by the mid-1980s, as mobilisation against minority rule gathered pace, pressure among members to align with the nationalist fight against apartheid became irresistible. A study by Karl von Holdt of union action in a metal plant showed how the battle against apartheid was at least as important to workers as that against their employer (von Holdt 2003). The unions ‘contributed leaders and members to the underground and to other sectors of the mass democratic movement’ and Cosatu ‘helped ensure an overwhelming election victory for the ANC’ (Baskin 2000: 44). Key Cosatu leaders were elected to parliament on the ANC’s list. The alliance between Cosatu, the ANC and SACP was less a bargain between separate entities than a way of structuring relations within a common political camp.

This alliance did not enable Cosatu to move ANC social and economic policy leftward, as it had hoped. Prior to the 1994 election, Cosatu, concerned that the ANC was moving close to business, pushed it to adopt a Reconstruction and Development Programme (RDP) which was meant to bind it to redistributing power and privilege. The RDP was adopted – but in a much diluted form. It was a fudge between the pro-market and redistributive wings of the ANC: ‘The story of the ... RDP is the story of Cosatu’s progressive loss of control over its conceptualizing process, and an attendant loss of focus in its content’ (Gotz 2000: 169). Even this diluted document was soon replaced by GEAR. But this does not mean that the alliance offered Cosatu nothing. Given its failure to prevent the shift in ANC economic policy, it would not have been able to defend the bargaining system through organised power alone. And so it seems probable that the system was protected by the ANC not because it feared Cosatu but because it considered this essential to the nationalist alliance over which it presided. Cosatu delivered votes to the ANC and in return the ANC defended labour law – but shared bonds were as important as pure calculation.

The unions’ gains were not the product of interaction between two

organisations – Cosatu and the ANC – whose interests differ. The ANC did initially acquire the support of the strongest organised movement in the country and Cosatu gained the symbolic legitimacy which an alliance with the ANC offered. But this was not the principal rationale. South Africa is not the only new democracy built partly on an alliance between a political and labour movement – Poland and Argentina are two others (Levitsky and Way 1998). In all cases, a key foundation of the alliance was ‘shared identities and networks of close personal ties’ (Levitsky and Way 1998: 172). Unionists and politicians have fought alongside each other and see each other less as strategic allies, more as wings of the same movement. Later, when unions clashed with president Thabo Mbeki, union leaders seemed more concerned about allegations that they were disloyal to the ANC than the loss of strategic advantage.¹ The alliance was about a common political identity, not an instrumental bargain.

When Cosatu’s bargaining power was strengthened, so too was the alliance which the ANC led. And so Cosatu’s role in an alliance with the ‘national liberation’ movement, made possible because race remained a core issue (Friedman 2014a), does much to explain the retention of the bargaining system. Yet, had Cosatu simply seen itself as an obedient wing of the nationalist alliance, union rights may not have endured: it also mobilised independently for objectives which are its own – the metal workers von Holdt studied also fought workplace battles for better wages and a greater say (von Holdt 2003). Because Cosatu retained a relative independence, it was better able to protect its prerogatives.

Cosatu was, during the late 1980s and early 1990s, the country’s most organised popular movement – while the ANC enjoyed great symbolic legitimacy, its membership and organisational capacity were always significantly less than Cosatu’s. By the late 1990s, Cosatu was reported to represent three million members out of an eligible workforce of eight million. If domestic service and agriculture were excluded, 47 per cent of the workforce was unionised (Baskin 2000: 44-5). It was widely believed to be the fastest-growing union movement in the world (Pottie 1992: 31). This reality, too, was related to the peculiar way in which race and class combine in South Africa.

The unions’ rise was a consequence of the increasing incompatibility between the growth of an industrial economy and the racial exclusion imposed by apartheid. Restricting skilled jobs to white workers began to become untenable in the late 1960s – as black workers began to gravitate to

more skilled positions, their bargaining power grew and this made it harder to fire the strikers of 1973. The government was forced to seek to accommodate worker organisation and, after several attempts to quell industrial conflict without recognising unions, embarked from 1979 on an unsuccessful attempt to recognise but constrain them (Friedman 1985: 149ff). This created space for unions to organise and to create bargaining arrangements which could only be ended at the expense of industrial peace. It ensured their growth despite the conflict and repression of the 1980s.

But they were helped too by the ubiquity of racial domination. Unions were often the one form of popular resistance which could operate openly (and so an attractive vehicle for mobilisation). The incentive to organise was greatly enhanced by what von Holdt calls the ‘apartheid workplace regime’, workplace relations structured by racial domination. Its consequence was to import society’s divisions into the workplace – its features were an authoritarian managerial style, low levels of trust and ‘workers’ near-total non-identification with the goals of the firm’ (Webster and Adler 2000: 12, von Holdt 2000: 106-8). Unions gave black workers apartheid society’s only legally recognised outlet to express themselves – the continuation of apartheid in the workplace was a continued incentive to militancy. The result was a confrontational bargaining system and a growing labour movement.

While Cosatu unions were broadly loyal to the ANC, their size, organisation and the fact that internal democratic structures forced leadership to respond to membership meant that they acted independently. Intellectuals committed to an independent union movement were very influential in its early period. They stressed the need for an independent, worker controlled, movement (Friedman 2014b). The ethos which developed in Cosatu placed a value on independent action shaped by members’ choices and so, even in alliance with the ANC, Cosatu often chose its own course. The ANC accepted this as a cost of maintaining the alliance (Friedman 2013). And so the bargaining system was preserved both by Cosatu’s links to the ANC and its independence from it. Race and class both mattered – class partly because race still did.

That the bargaining system was not new may also have been important – employers may not have liked it but they were used to it and seeking to end it would have seemed overly radical. The ANC needed to adjust its economic thinking to the demand from local and international business for liberalisation. But this did not extend to dismantling a system which benefited its ally, particularly as it did not preclude liberalisation – Adler and Webster use the term ‘bargained liberalisation’ to describe a process in which unions

participate (Webster and Adler 1999). Levitsky and Way point to a similar trajectory, although in different circumstances, in post-democratisation Peronist Argentina (1998: 182-5).

There are significant similarities between the incentives offered labour to remain in an alliance with the governing party in South Africa and Argentina. In both there is important 'organisational and leadership overlap' and the strength of the governing party makes defection to the opposition unattractive (in South Africa, the appeal of nationalism has tended to make defection seem unthinkable). But the most striking similarity is that between the situations of their union federations. In Argentina, the law recognises only one national federation – which was allied to the Peronist party when liberalisation was in progress. In 1992, a rival emerged but it was not seen as a threat to the Peronist federation (Levitsky and Way 1998: 183). While South African law does not require only one federation, the Argentine situation – a federation allied to the governing party which faces no serious competition – is very similar to Cosatu's circumstances in the period under discussion. In both cases, the governing party was likely to support the labour system, regardless of pressures for liberalisation, because it strengthened an important ally.

Finally, the relationship between government and business over the two decades since democracy's advent is more complex than the narrative which sees them as 'neo-liberal' co-conspirators. The ANC did not adopt GEAR because it had become convinced of the wonders of the market: it was a response to crisis. Twenty years after democracy's advent the financial press still claims that much of the ANC is 'anti-business' (Bruce 2014). While this partly assumes that the governing party should do whatever business wants, it also reflects reality: the ANC still does not trust established business. It is still led by white people who are assumed to doubt the competence of black-run government – major corporations are also seen to have co-operated with apartheid. Since the apartheid economy used the law to exclude black people, most ANC politicians experienced business, particularly the corporate variety, as a forbidden world. While there is a left intellectual consensus that the policy trajectory since 1996 has been 'neo-liberal', the evidence suggests otherwise – social spending has been high (Manuel 2000), and government has continued to regulate business (Grant Thornton 2012). This does not mean that policy effectively attacked poverty and inequality – but the claim that the ANC has pinned its faith on markets and those who wield power in them does not fit the evidence. A government

which distrusts business is far less likely to change a bargaining system which strengthens a key ally in the private economy.

From the 1980s, most corporate businesses began to oppose apartheid because they saw that it was becoming increasingly costly (Lipton 1986); they later sought an accommodation with the new political (and labour) elite. Through much of this period, the black representatives with whom business had most contact were unionists (some of whom later joined the businesses against which they had mobilised). The bargaining system came to be seen as a key bulwark against more serious conflict. From the 1970s companies were under pressure to show they were ending apartheid labour practices – they adopted or were forced to comply with codes of practice designed to show their non-racial credentials; some advocated recognising unions (Interview Hartford). While, until 1979, this suggestion was largely honoured in the breach, it established a climate in which bargaining with unions was seen as evidence of business's anti-apartheid credentials.

The internationalisation of the fight for bargaining rights in the 1970s also contributed. Labour movements in Europe in particular supported the fight for trade union rights in South Africa – the provision for workplace forums was influenced by German law and practice (Interview Hartford). The openness of the economy and the strong influence of opinion in the global North on elites on both sides of the racial divide made adopting the norms of the International Labour Organisation and labour relations practice in Western Europe a sign of movement from apartheid (Friedman 1993: 156). Again, while observance was sometimes only rhetorical, this strengthened the assumption that to erode bargaining rights was to revive apartheid.

Despite talk of 'inflexible labour markets', much of business sees negotiating with unions and dealing with strikes as a necessity of doing business in a racially divided society. At a time when perceptions that labour conflict has escalated exercised journalists and investment analysts, a survey found that strikes are bottom of the list of the concerns of Gauteng businesses (Grant Thornton 2013). Whatever the prejudices of many in business, racial discrimination was delegitimised by 1994 – no major business would contemplate being seen to condone racism. The bargaining system may well be seen as a form of industrial enfranchisement; to suggest its dismemberment may be equivalent to opposing political enfranchisement. And so, despite the public noise, business may not see diluting the bargaining system as a priority.

A Pyrrhic victory? The impact of the labour dispensation

South African experience shows that generous union bargaining rights can be maintained amidst substantial pressure for liberalisation. But this does seem to require an alliance between a governing party and a labour movement. Given that, in much of the South, formal sector workers are a minority, the European labour trajectory, in which union strength creates a potential governing party (Przeworski 1985), is implausible. Rather, an alliance with a governing party not rooted in the labour movement is the key to maintaining bargaining rights.

More generally, a perennial question in South African social analysis is whether class or race explain social reality. This analysis of why the bargaining system survives shows that the answer is – both.

But can a bargaining system which recognises union rights make a significant contribution to addressing poverty and inequality in a racially divided society? On one level, the answer in South Africa is a clear ‘yes’. Formal sector workers have gained from unionism’s growth. After bargaining rights were conceded, black workers’ wages increased substantially: an analysis in the late 1990s found that, among black African men workers in the bottom decile of distribution, the wages of union members were 145 per cent higher than those of comparable non-union workers (Schultz and Mwabu 1998: 680).

Although unions have not influenced the macro-economic policy debate, the issues they have raised have influenced policy. The best example is social security. Cosatu has led the Basic Income Grant (BIG) campaign (Cosatu 2003); while it has not achieved the grant, it has pressed the government to expand the range of grants available to people living in poverty and has thus extended social security (Hagen-Zanker and Morgan with Meth 2011). Cosatu also played a significant role in the campaign to extend free treatment to people living with HIV and AIDS.²

On another level, the evidence of success is far less clear. If South Africa’s particular combination of racial and economic domination enables us to explain why the bargaining regime endures, it may also limit the degree to which it can offer an adequate antidote to the realities which gave birth to it – minority domination in the economy and society. Scholars and activists close to the union movement argue that the bargaining system has not substantially eroded the maldistribution of power and privilege – and that it may now be buckling under the weight imposed on it by the realities it seeks to challenge.

This implies that the realities which sustain the relationship between Cosatu and the ANC on which the bargaining system's survival depends may also sharply circumscribe the degree to which bargaining rights can alter the effects of past patterns on the workplace and the economy.

On the path of the past?

The August, 2012, Marikana killings were seen as a sign that the inequities which created the bargaining system are still alive— particularly since they seemed part of a trend towards more bitter industrial conflict.³ Two issues in particular dominated later analysis of the events. First, a widespread view that a gap had opened between union leaders and members which was severely undermining labour relations. This was not new – for some years, research by Buhlungu has revealed the degree to which trade union office was becoming more a ticket into the middle class than a means of representing workers (Buhlungu 2002). Research by Beresford (2012) has shown how union office is a conduit to management jobs. These advancement opportunities are not available to all union members and so the result was a 'social distance' between officials and members. In the view of many union members, their representatives had become 'too cosy with the bosses' (Interview Ehrenreich).

The bargaining system seemed to be buckling under the pressure of the economic environment. Worker militancy appeared to be fuelled by 'unsecured lending', a euphemism for the fact that workers were borrowing more than they could afford.⁴ There were two reasons. First, the society's inequalities created a culture in which conspicuous consumption is a measure of personal status – according to the 2011 census, more households own television sets than refrigerators.⁵ Since many workers cannot afford the goods which confer status, they borrow more than they can repay. Second, poverty and unemployment compel workers to share their pay with those who cannot find work – it is estimated that on average each miner's wage feeds eight to ten people (Stoddard and Harvey 2014). This suggests that formal sector pay (with social grants) cushions the victims of poverty from its worst effects – and that the bargaining system is cracking under the strain of playing this role (Interview Hartford). A Cosatu unionist observes that unions 'are caught between their members and the owners. They also have to take account of the surrounding environment' (Interview Ehrenreich).

Using Douglass North's notion of 'path dependence',⁶ Webster thus argues that 'the founding interlocking apartheid institutions of the Mineral

Energy Complex (MEC) have ensured continuity beyond the change in political regime in 1994' (Webster 2013: 211). And so, in response, a 'surge in militancy over the past five years' has prompted the re-emergence of violent industrial conflict. Strikers are by-passing the established institutions and employers are 'hostile to the institutions of collective bargaining'. For Webster, 'legacies of the past' which place pressure on bargaining are: the persistence of migrant labour; a 'predominantly white management and a black labour force'; high structural unemployment; and 'most importantly....a labour market deeply segmented by race, gender and ethnicity'. The labour market's core, where workers earn regular wages and enjoy union rights, is 'increasingly under threat from those workers who are either outsourced into precarious and lower-paid jobs, or who are retrenched and become desperate job seekers'. Beyond this 'new working poor' lies a third zone of unemployment and 'informal subsistence activities' (Webster 2013: 216-9). Bargaining is providing a subsistence lifeline to the unemployed – but the power of workers in the formal system is eroded by unemployment and poverty, prompting heightened conflict. For Webster, the remedy is not changing the bargaining system but a social pact which could chart a new path (2013: 225ff).

Former unionist, Gavin Hartford, partly agrees, arguing that the law is not the cause of continued and escalating conflict. The problem is the way in which employers and unions have used it: 'Every single issue is a fight – the social partners fail to engage honestly, effectively, and to their best ability' (Interview Hartford). Foster suggests that unions are not taking advantage of opportunities: new technologies such as cellular telephones which could allow them to mobilise quicker. They should also be pressing for representation on company boards, a right which German unions enjoy (Interview Foster).

Like Webster, Hartford argues that adversarialism is a consequence of poverty and inequality (Interview Hartford). Echoing von Holdt's insistence that the 'apartheid workplace regime' persists, he adds: 'No country in the world has a productive economy if frontline management is regarded with suspicion by the workforce. No country can build a productive economy if the employment relationship is as broken and flawed as it is here' (Interview Hartford). The parties are locked in conflict, largely unable to generate bargains which would allow growth in jobs and resources. A Cosatu unionist makes a similar point – referring to violent strikes on farms in 2013 which produced a significant wage increase, he notes that farm owners immediately

threatened to lay off workers ‘because it is a fight over the surplus’ (Interview Ehrenreich). There is just so much that collective action and bargaining can do where power relations have not been substantially altered.

Other voices suggest that the bargaining system is part of the problem. Hartford, despite his belief that the system is essentially sound, adds that it does not balance rights and obligations ‘in a way that propels the employer to perform basic functions in relation to employees irrespective of whether they belong to a union’ (Interview Hartford). Buhlungu goes further. The much-vaunted Labour Relations Act was ‘patch work’ which is ‘being exposed’ because it assumed ‘a system in which strong unions talk to strong employers and a functional (government) plays many roles – coordinator, facilitator and regulator’ (Interview Buhlungu). In his view, none of these elements exist. The benefits which the law offers majority unions (a source of conflict on the mines) assumed that workplaces would be formalised in much the same way as those in the global North; this is not possible in a society with severe inequalities. The bargaining system has encouraged complacency among unions who ‘only go through the motions’ of serving their members. It must be overhauled because ‘it cannot carry the labour relations of today’.

Among Buhlungu’s reasons for advocating change are: procedures required by the law are now ignored; the difference between a ‘protected’ and unprotected strike (a protected strike is one in which workers cannot be dismissed because the procedures have been followed) have blurred; employers are enjoying ‘an era of impunity’ – they are refusing to accept CCMA rulings complaining that the commissioners who work for it are under-qualified and under-resourced: ‘Employers have taken every award (against them) on review’. Unions have also learned to bypass the law but the system has weakened them – Cosatu ‘has been weak for ten years’: the increase in strike violence shows that unions are not sufficiently organised. The Employment Equity Act, which seeks to redress racial imbalances, has achieved less than a Mining Charter which the industry adopted in response to pressure from the government and black business (Interview Buhlungu).

But it is unclear from Buhlungu’s critique that the bargaining system is the problem. He complains that alternatives which would challenge inequality have not been tried, that social dialogue between business and labour ‘is dead and buried’, and that government is unable to play its required role even if it wanted to do so (Interview Buhlungu). These points could equally well

be cited as evidence for the need to see the bargaining system's travails as a symptom rather than a cause of the ills he analyses.

Conclusion: a new start?

The labour relations system is no panacea for 'path dependence'.

It has much improved the economic position of formal sector workers, cushioned poverty and unemployment by providing a lifeline to workers' adult dependents, and provided unions an organisational beachhead. That is why a vocal pro-business lobby insists it is too sympathetic to unions. But the patterns of the past place pressure on the system and limit its capacity to resolve conflict.

What is less clear is whether this is an indictment of the bargaining system or evidence that there are limits to what industrial bargaining can achieve when many are excluded from the formal economy. Hartford's view that the law could do more to protect workers who are not unionised and Buhlungu's criticism of majoritarianism may be valid, but neither would require a substantial overhaul of the system. And much of Buhlungu's critique could be read as a damning analysis of the state of the union movement rather than the bargaining system – he does argue that employer behaviour is a large part of the problem but a better organised and more effective union movement might be able to curb it. The remedy may be not a new bargaining system but a reinvigorated labour movement.

There are tentative signs that a reinvigoration may be under way. Tensions within Cosatu, triggered by a divide between those who see closeness to the ANC as the key to influence and those who argue for the need to demonstrate strength by mobilising collective action have prompted the expulsion of its largest union, the National Union of Metalworkers (Numsa) (Friedman 2012). A new labour federation to Cosatu's left (which may also form a political party) may emerge.

These events could be seen as an example, in South African conditions, of a phenomenon with which students of industrial relations history are familiar, the shop stewards' rebellion (Hinton 1973). This describes a pattern in which union leaders become too compliant; members, convinced that leadership is not interested in their concerns, rebel and engage in 'wildcat' industrial action, ignoring the agreements between the union and employers. This reinvigorates the unions and the bargaining system. Union leaders who ignore members are replaced by others willing to listen – those who hear their message become more responsive. And so the gap between leaders and

members narrows and bargaining more closely reflects worker demands. Elsewhere, the rebellion was led by elected workplace representatives, and the effect was to change the approach of individual unions. But, in South Africa, a federation on Cosatu's left may play the same role, supplanting it if it fails to hear the voice from below, or prompting it to begin listening.

But even this would not be enough to resolve conflict. A revitalised union movement would be better at dealing with the pressures which history has placed upon it but would be unable to change the society's economic path – it might not even be able to undo the link between trade unionism and personal economic advancement which Buhlungu and Beresford analyse and which has played a role in heightening tensions within Cosatu (Friedman 2012). The bargaining system will be unable to play more than a containing role and deeper structural change is needed. Much has changed in South Africa since 1994, but the racial and class divisions which history bequeathed remain. This analysis has argued that the manner in which these divisions have manifested explains the survival of the bargaining system. But it explains too why the system can soften the impact of path dependence but cannot end it.

The route out of this impasse is bargaining between the key economic interests. Since 1994, post-apartheid South Africa has faced a core challenge – how to address poverty and inequality in a manner which does not deprive the society of the capital needed to sustain investment. Since that can only be achieved by a compromise between the interests of those who seek change and those who own capital, it requires negotiation. This process would diverge from the European corporatist route (Baskin 2000) – it is likely to be not the grand comprehensive bargaining of the sort which launched Swedish social democracy but a protracted engagement between labour, business and government generating agreements which build momentum for a new path.

This would be difficult but not impossible – negotiated compromises in particular industries have indicated that, in some circumstances, the parties can find outcomes with which both can live (Pakhathi 2012). This prognosis is made possible by over three decades of bargaining which, while often highly adversarial and subject to the flaws discussed here, has helped some to move out of penury and powerlessness and has partly stabilised a society in which economic conflict is a constant reality. Ironically, the 'path dependence' created by decades of bargaining may provide a platform from which to abandon that created by centuries of racial domination.

Notes

1. Author's discussions with trade unionists, 2006.
2. Motsoaledi: ARVs for 4.8m in SA by 2016 health 24 <http://www.health24.com/News/Public-Health/Motsoaledi-ARVs-for-48m-in-SA-20140130> (accessed March 9, 2014).
3. SA History Online Timeline of the Marikana Massacre 2012-2013 <http://www.sahistory.org.za/article/timeline-marikana-massacre-2012-2013> (accessed March 9, 2014).
4. 'SARB: Unsecured lending on the rise' Fin24 28 June 2013 <http://www.fin24.com/Debt/News/Sarb-Unsecured-lending-on-the-rise-20130628> (accessed March 9, 2014).
5. South Africa.info 'South Africa improves access to services', October 30, 2012 http://www.southafrica.info/about/social/census-301012b.htm#.UxzX685_Fec (accessed March 9, 2014).
6. 'Path dependence' seeks to explain why economic and social patterns persist despite changes in political system. It argues that 'behavioral routines, social connections (and) cognitive structures' create expectations of how social actors should behave and what they should value which survive political change. Scott E Page 'Path Dependence' *Quarterly Journal of Political Science*, 2006, 1: 87-115.

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Interviews

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- Tony Ehrenreich, Cosatu trade unionist.
- Joe Foster, former general secretary, Federation of SA Trade Unions.
- Gavin Hartford, labour consultant and former trade unionist.