

Industrial democracy in South Africa's transition

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1 INTRODUCTION: SOUTH AFRICA IN A CHANGING WORLD

The dramatic changes in South Africa since 1990 have been the outcome of a series of interconnected processes. Most evident has been the tumultuous political transition from the announcement of apartheid's demise in February 1990 to the democratic elections of April 1994. But, as is generally appreciated, this transition was preceded by, or coincided with, other changes of a socio-economic nature; and it has, in turn, triggered new processes of change.

One direct and very important consequence of political democratisation has been South Africa's reintegration into the world market. For decades the country had been sheltered against international market forces by protectionist policies. Economic sanctions, imposed from the 1960s onwards to put pressure on the apartheid economy, provided an added degree of insulation. Since 1990 this insulation has progressively been dismantled. Not only in export markets, but also in domestic markets, producers have increasingly found themselves exposed to the pressure of international competition. It was a pressure which many were, and are, ill-equipped to withstand. The world market which South Africa re-entered was a different and less hospitable place from that which it had known in the past. In the first place, Anstey argues, South Africa re-entered

"at a moment of intense economic competitiveness within and between nations and – as importantly – between huge transnationals whose interests span those of individual nations. Crises of competitiveness face major industries in saturated global markets . . ." (Anstey 1995: 6).

But, even more importantly, the rules of the game had changed considerably since the post-war boom years of the 1950s and 1960s. The nature of such changes have been the subject of voluminous research and contradictory analysis.¹ Underpinning the process was an increasing and unprecedented integration of world markets which, by the 1980s, reached the level of synthesis referred to as "globalisation".² An influential body of writers concluded that the pattern of mass production, mass consumption

1 A full examination of the topic falls beyond the scope of this paper. For a concise review, see Haralambos & Holborn 1990: 337-351. For discussion from a South African perspective, see Ewert 1992; Anstey 1995: 6-22.

2 See, eg, Reich 1992.

and rigid lines of command in the workplace,³ which became the paradigm at least in certain manufacturing industries in the decades before and after World War II, had increasingly been overtaken by new technologies and new trends in the labour market. More skilled labour required different, more effective types of management. The new wave took various forms, starting with “lean production” in Japan, and has been analysed in various ways – for example, as “flexible specialisation”.⁴ Certain features, however, have been common to these innovative trends and are regarded by many as the hallmark of enlightened and effective managerial practice for the 1990s. These include

- the use of flexible technologies
- some form of worker participation⁵ or teamwork
- substantial worker education and training
- flexible deployment of workers
- narrowing the gap between workers and managers in education and decision-making
- quality consciousness
- an active role for trade union and representative employee committees in achieving performance goals (Anstey 1995: 31; Appelbaum & Batt 1994).

In comparison with traditional work practices, thus, increased flexibility in production, increased human resources development and increased involvement of employees in managerial decision-making stand out as cardinal features of the new school of industrial relations. Anstey notes: “Just as collective bargaining was the appropriate process for the needs of the 1930s, so it is argued, participative management fits the requirements of the 1980s”⁶ (Anstey 1995:17). From this perspective, “participation is a business imperative within the social and economic realities of the modern world. It is the vehicle for a futurist labour-management system” (Anstey 1995: 17; Weiler 1990, esp ch 1).

1.1 The economic rationale of the new Labour Relations Act

The implication for South Africa is, clearly, that those enterprises which intend to compete on the open market will need to take the lessons of

3 Also known as “Fordism”, and associated with the top-down managerial system pioneered by Frederick W Taylor in the USA (“Taylorism”).

4 Some argue that “Fordism” was by no means the rule prior to the 1970s and that the extent of subsequent changes has been exaggerated: cf Anstey 1995: 10-22; Haralambos & Holborn 1990: 346-351.

5 The term “worker participation” has been applied to various forms of participative management. In this article, unless otherwise indicated, it will be used specifically to describe employee involvement in managerial decision-making. Cf Torres 1991: 61.

6 Though reference here is to the USA in particular, the argument is of broader relevance to the extent that changes in technology and managerial practices transcend national boundaries, particularly in the context of transnational corporations. Lawler adds: “Some form of participative management makes the most sense because it fits well with the major changes. Participative management suits the current workforce, technologies and societal conditions better than any other alternative . . .” (Lawler 1991: 19-20, quoted by Anstey 1995: 31).

international experience to heart.⁷ In particular, they will need to upgrade competitiveness through increased worker training, increased flexibility, and the increased involvement of workers or their representatives in planning and achieving organisational goals.

From this point of view, South Africa enters the race with a serious handicap. During the years of struggle against apartheid, organised labour had a militant role thrust upon it. The consequence has been a highly polarised industrial relations system. The riddle, and the challenge, is how to move from intense adversarialism in the workplace towards rational co-operation at least on those production-related issues where co-operation is possible.

The drafters of South Africa's new labour statute, the Labour Relations Act 66 of 1995, took the need to become competitive within the changed global environment as one of their critical starting points. The Explanatory Memorandum which accompanied the Act in its original draft form made clear what was, for them, the central significance of the discourse:

"South Africa's re-entry into international markets and the imperatives of a more open international economy demand that we produce value-added products and improve productivity levels. To achieve this, a major restructuring process is required. Studies of how other countries have responded to restructuring warn us that our system of adversarial industrial relations, designed in the 1920s, is not suited to this massive task . . . If we are to have any hope of successfully restructuring our industries and economy, then management and labour must find new ways of dealing with each other."⁸ (Ministry of Labour 1995: 135.)

Increased management-labour co-operation in the workplace thus emerges not so much as an integral feature of a transformed industrial relations system but as a means towards a more limited end: industrial restructuring. Such restructuring, it is implied, is likely to be resisted by trade unions in the course of collective bargaining. An alternative channel of communication is necessary to involve workers in identifying the measures that require to be taken and gaining their acceptance. Workplace forums are proposed by the Act as organs of worker participation through which this is to be accomplished.⁹

7 It is not proposed here to enter into the argument whether it is "appropriate" for a semi-developed country like South Africa to compete in the arena of "world-class production" rather than concentrating on job creation by means of labour-intensive industry. It is accepted that there is considerable need for basic consumer goods and services which can be produced by traditional methods. But an increasing range of more sophisticated goods cannot be produced except on the basis of advanced technology. To the extent that such goods are essential for growth, countries such as South Africa must either develop the technical and human resources to produce them, or rely on the export of primary commodities to import them. The government has left no doubt about the direction it intends to pursue: it is committed to developing "areas of higher productivity and . . . penetration of international markets for these high value commodities" (Mboweni 1995: 2).

8 In general see Du Toit *et al* 1996: 227-231.

9 The functions, rights and powers of workplace forums, and their relationship to trade unions, are regulated by Ch V of the Act.

1.2 The democratic imperative

“Worker participation” cannot be understood in purely economic terms; it has manifest political and social implications. The brief of the drafting team, indeed, had been to give effect *inter alia* to “government policy as reflected in the Reconstruction and Development Programme (RDP)”, relevant conventions of the International Labour Organisation and the interim Constitution.¹⁰ The RDP called for legislation to “facilitate worker participation and decision-making in the world of work”, including “an obligation on employers to negotiate substantial changes concerning production matters or workplace organisation within a nationally negotiated framework” (para 4.8.9). The subsequent RDP White Paper explained:

“Industrial democracy will facilitate greater worker participation and decision-making in the workplace. The empowerment of workers will be enhanced through access to company information. Human resource development, and education and training are key inputs into policies aimed at higher employment, the introduction of more advanced technologies, and reduced inequalities. Discrimination on the grounds of race and gender must end. Parties to collective bargaining will be encouraged to negotiate affirmative action policies to address discrimination and the disparities of power between workers and employers.” (Para 3.11.4.)

These objectives were duly written into the Act. The overarching purpose of the Act, according to its objectives clause, is “to advance economic development, social justice, labour peace and the democratisation of the workplace” (s 1). The effect is that all provisions of the Act, including the functions of workplace forums, need to be interpreted in this light.

Nowhere does the Act define “democratisation of the workplace”; nor does the RDP White Paper spell out what is meant by “industrial democracy” except in the somewhat ambiguous terms quoted above. It is a phrase that has been given different meanings at different times and in different contexts.¹¹ It cannot be explained meaningfully in terms of institutions or structures, any more than “political democracy” can be defined in terms of a parliamentary or presidential system of government. For present purposes it will be treated as a series of objectives, or criteria, against which the institutions created by the Act, and workplace forums in particular, can be tested. Included among the criteria should be those mentioned by the RDP White Paper.

In particular, it is submitted, industrial democracy is concerned with redressing “disparities of power between employers and workers”. Historically and legally, employers have enjoyed unilateral powers of command over workers. In this context industrial democracy must be understood as a project of worker empowerment; and the various objectives

¹⁰ Act 200 of 1993. See Draft Bill 110-111; Anstey 1995: 2-4.

¹¹ Cf Salamon 1987: 295-296; D du Toit 1993: 325-331. It may be argued that the familiar term “industrial democracy” is, strictly speaking, unsatisfactory in that the process it refers to is not confined to “industry” or the manufacturing sector. It is assumed, however, that the term will not be understood in this narrow sense; and it is used in this article as equivalent to “employment democratisation”.

mentioned above (giving workers access to information, abolition of discrimination, etc) may be regarded as means towards this end.

1.3 Worker participation

Worker participation¹² is not equivalent to industrial democracy¹³. It does not, in any conventional meaning of the term, redress the disparity of power between employers and workers. Decisive power in the workplace continues to reside with the employer. Worker participation may represent a greater or lesser degree of democratisation evolving within a matrix of contradictory interests and expectations. Not only employers and workers (and sub-groups of each) compete with one another; organisations such as trade unions have institutional interests which may be different from those of their members, let alone employers. Stakeholders outside the enterprise, such as consumers or environmental groups, may also bring pressure to bear. Finally, the workplace is exposed to market forces and political pressures over which employers and employees have little or no control. Worker participation must seek to give expression to worker interests in the context of these contradictory dynamics, subject to the employer's residual power of command.

Like every form of democratisation, worker participation is concerned with empowerment and human development. At the same time it is rooted in the world of work. If it is to be viable, it should enhance not only the quality of working life but also the product, and productivity, of labour.

The ways in which worker participation may help to achieve this have been widely analysed and discussed.¹³ The drafters of the Act recognised its potential as a means of facilitating the restructuring of industry. This presupposes employee involvement in planning and implementing change, and hence a higher degree of employee commitment to the consequences of change. There are other advantages also; for example, drawing on employees' innovative abilities (Hanami & Monat 1987: 251-252). At the same time the relationship between the economic and what may be termed the social aspects of employment democratisation is a reciprocal one. Five classical aims of worker participation, Kester argues, are "*humanisation* of work and of workplace social relations, *democratisation* of decision-making, improvement of *productivity* and *efficiency*, greater *economic equity* with respect to income and jobs, and *solidarity*" (Kester 1995: 3). These aims are inter-related: in other words, the economic potential of worker participation ("productivity", "efficiency") cannot be realised without investing in the necessary "social" infrastructure ("humanisation", "democratisation", "economic equity", "solidarity"). Or, to put it differently, greater productivity cannot be achieved by the instrumentalist route of merely establishing structures and expecting them to work.

The remainder of this article will examine the ways and means by which the Act sets out to fashion a system of worker participation in this

12 See fn 5.

13 Cf 1-3 *supra*.

broader context. It will consider the extent to which the scope for employees to participate in managerial decision-making has been extended by the institution of workplace forums and the extent to which the objectives of worker participation and employment democratisation are promoted. One important question it will *not* deal with is the likely impact of workplace forums on investor confidence, economic performance and industrial relations in the short term. Though of great practical interest, it would require a different kind of article to do justice to it. The question will, however, be returned to briefly in an Endnote.

2 WORKPLACE FORUMS, MANAGERIAL PREROGATIVE AND THE DUTY TO CONSULT

Under the previous dispensation, collective bargaining was the principal mechanism for worker participation in all manner of work-related matters including, at least in principle, managerial decision-making (O'Regan 1991). The Labour Relations Act 28 of 1956 (like the present Act) permitted industrial councils to reach collective agreements on "any matter whatsoever of mutual interest to employers and employees" (s 24(1)). This potentially unlimited agenda extended, by implication, to bargaining at plant level also.

In itself this was unremarkable. The limits of the bargaining agenda are in most countries established in practice rather than by statute. What complicated matters in South Africa was the emergence of a duty to bargain in the jurisprudence of the industrial court. By the late 1980s it was settled that refusal or failure to bargain with a representative trade union was, in certain circumstances, an unfair labour practice (*Food & Allied Workers' Union v Spekenham Supreme*;¹⁴ Du Toit *et al* 1996: 116-118). In other words: not only could unions try to persuade employers to negotiate over any matter of mutual concern, if needs be through the use of power; as an alternative, they could seek a court order compelling the employer to do so.

The judge-made duty to bargain, while of assistance to weaker trade unions in particular, gave rise to numerous uncertainties. It was left to the court to decide (or decline to decide) in each case whether a union was sufficiently representative, what the bargaining unit should be or at what level bargaining should take place. Thus, whether there was a duty to bargain "on any particular issue [depended] on the court's conception of the collective bargaining process and the ambit of the managerial prerogative" (Thompson 1992: 39).

In practice, no clear rule evolved as to the topics on which an employer could legally be obliged to negotiate. On the whole, the courts interpreted the compulsory bargaining agenda in a restrictive sense and confined it, basically, to the range of distributive issues which are generally considered

14 (1988) 9 ILJ 628 (IC).

to be the proper subject matter of collective bargaining.¹⁵ In at least one case the judge appeared to deny the existence of a duty to bargain altogether (*Bester Homes (Pty) Ltd v Cele*).¹⁶ More disturbingly, the court in some cases used its jurisdiction to rule that certain demands raised by unions in the course of collective bargaining themselves constituted unfair labour practices. Thus, the court claimed the right to strike down bargaining demands and/or prohibit strike action over demands which it considered to be "unlawful or illegitimate" (*Dunlop Tyres (Pty) Ltd v National Union of Metalworkers of SA*),¹⁷ not reasonably capable of achievement (*Barlows Manufacturing Co Ltd v Metal and Allied Workers' Union*),¹⁸ or "unconscionable" or "outrageous" (*Buthelezi v Labour for Africa (Pty) Ltd*).¹⁹

The law thus offered only a limited and uncertain right to representative trade unions to participate, by means of collective bargaining, in managerial decision-making. Strong unions could persuade employers to enter into collective agreements which extended rights of this nature (Smith 1990), but this was the exception.

2.1 The duty to consult

The only area where the industrial court saw a clear need for workers or their representatives to be involved in managerial decision-making was in the context of dismissals for operational reasons. Following the relevant recommendation of the International Labour Organisation,²⁰ the court in the early 1980s laid down the rule that dismissal, in order to be fair, must have a fair reason ("substantive fairness") and follow a fair procedure ("procedural fairness") (*National Automobile & Allied Workers' Union v Pretoria Precision Castings*).²¹ Misconduct, incapacity and operational requirements of the enterprise ("retrenchments") became recognised as valid grounds for dismissal. In the case of retrenchments, procedural fairness required *inter alia* that consultation should take place with the employees concerned and/or the trade union representing them (Rycroft and Jordaan 1992: ch 5).

This broad rule left some important questions unanswered. For example: should consultation take place prior to the decision to retrench, or was that a matter of managerial prerogative? Did the employer have to consult about the merits of the decision to retrench, or only about its implementation? After a number of contradictory decisions, the courts came down firmly to the position that the employer is under a duty to consult prior to taking a definite decision to retrench. Upholding this rule, the country's

15 In *SA Society of Bank Officials v Standard Bank* (1993) 14 ILJ 706 (IC), eg, the court resolved the dispute in hand with reference to the distinction drawn in US labour law between "mandatory" and "permissive" bargaining subjects.

16 (1992) 13 ILJ 877 (LAC).

17 (1990) 10 ILJ 149 (IC).

18 (1990) 11 ILJ 35 (T).

19 (1991) 12 ILJ 588 (IC).

20 Termination of Employment Recommendation 119 of 1963; subsequently superseded by Recommendation 166 of 1982 and Convention 158 of 1982.

21 (1985) 6 ILJ 369 (IC).

highest court also elaborated on the meaning of consultation (*Atlantis Diesel Engines v National Union of Metalworkers of SA*).²² It was, the Appellate Division accepted, more than a duty merely to take counsel or to hear representations; it was a “joint problem solving exercise with the parties striving for consensus where possible”. Lagrange interpreted this to mean a process in which parties “see their differences in the form of joint problems to which both parties are committed to seek solutions, rather than simply pursuing their own respective positions in a manner which excludes the other party’s interests as well” (Lagrange 1995: 517).

This interpretation, it is submitted, describes the essential distinction between “adversarial” collective bargaining and worker participation in the sense that the terms are generally used. It is in this respect, with reference to its quality rather than its subject matter or the structures within which it takes place, that worker participation is most clearly distinguishable from collective bargaining.

With regard to managerial decisions to retrench, then, the law required worker participation in the form of consultation. *Inter alia*, trade unions or employees had to be consulted on possible measures to avoid retrenchments. This presupposed an ability on the part of employees to offer insights on questions of managerial policy and strategy as well as organisational detail which might, theoretically, have been utilised to enhance a broader range of managerial decisions. The right to be consulted with regard to retrenchments, however, remained very much the exception to the rule. Its rationale was the extreme nature of the prejudice spelled by termination of employment and the fact that the employees concerned were without fault. It was rooted, in other words, in equity more than in economic rationality or in the principles of worker participation. In this the previous Act clearly revealed its contractual antecedents and its absence of any real perspective of employment democratisation.

2.2 Workplace forums

The Act does not define “workplace forum” in any specific sense. In general, it means a body of employee representatives constituted in terms of section 80 or 81 of the Act and with the broad functions described in section 79 of the Act.²³ On closer inspection, however, it becomes clear that these two sections permit an almost unlimited variety of forms and functions. There is no prescribed model of workplace forum with standard rights, powers and duties comparable to works councils in Germany or the Netherlands. Only if an employer and a trade union cannot agree on the constitution of a workplace forum does the Act provide a statutory model.

The reason for the lack of prescription was obviously the legislature’s desire to accommodate the concerns of employers and trade unions over an institution which, in negotiations preceding the enactment of the

22 (1994) *ILJ* 1247 (A).

23 The content of these sections, and other provisions relating to workplace forums, are discussed below.

statute, had proved to be controversial. Many trade unionists saw in workplace forums a threat to trade union organisation at local level. Many employers saw them as a threat to managerial prerogative. The Act addresses trade union fears by the extensive – some would say dominant – influence which is accorded to trade unions over the composition, the operation and the very existence of workplace forums. Employers' fears are addressed by the relatively limited powers of joint decision-making which are provided for in the bottom-line statutory model.

Workplace forums thus emerge as creatures of compromise. The question is to what extent they are equipped to carry forward the limited objectives described in the Explanatory Memorandum²⁴ or the broader objectives of worker participation and industrial democracy. A detailed examination of the operation of workplace forums falls beyond the scope of this article.²⁵ Some light may be shed on the question, however, by examining the way that workplace forums are established and the powers they enjoy. Both these matters, as will be seen, have a great deal to do with the relationship between workplace forums and trade unions.

2.3 Trade unions and workplace forums

The Act places no general duty on employers to establish workplace forums. In a major departure from international precedent, it provides that a workplace forum can only be established at the request of a registered trade union which is "representative". The latter term is defined as meaning one or more trade unions with, between them, a majority of employees in the workplace as members (s 78).²⁶ A second hurdle is that workplace forums can only be established in workplaces with over 100 employees.²⁷

The practical result is that workplace forums will be confined to larger workplaces with an established trade union presence; the vast majority of workplaces will be excluded. Particularly anomalous is the fact that it will be left to unions to decide whether or not institutions which are central to the government's objective of promoting restructuring in the economy will come into existence or not. It is, however, explicable in the context of South African industrial relations. The trade union movement is a powerful player in the shaping of socio-economic policy at national as well as local level. No serious attempt at reform is likely to succeed in the face of union opposition.

To commit trade unions as well as employers to the new co-operative project, the drafters of the Act calculated, it is necessary to disarm their

24 Principally, that of facilitating the restructuring of export industries: see para 1.1 above.

25 For a fuller discussion see Cheadle 1995; Du Toit *et al* 1996: ch VI.

26 "Employee" is defined as excluding senior managerial employees.

27 This was clearly intended as another concession to employers. It is specifically listed as one of the ways in which the new statute accommodates the "needs" of small business: Explanatory Memorandum 117. Given the important benefits that workplace forums are said to offer in terms of industrial relations, productivity and competitiveness (Explanatory Memorandum 135-136) the argument is ironical.

fears. Even if the results are incongruous in some respects, the policy will be vindicated and problems can be ironed out in the longer term. To begin with the aim is to establish workplace forums in an environment where they are most likely to succeed. Having once demonstrated their viability, it will be possible to amend the Act in order to permit their introduction on a broader scale.²⁸

2.4 Establishing a workplace forum

A majority union(s) can trigger the establishment of a workplace forum by applying to the Commission for Conciliation, Mediation and Arbitration (CCMA). Provided the statutory conditions are met, the establishment of a workplace forum is mandatory. A commissioner must be appointed to facilitate the process. From this point onward, depending on the circumstances, four different outcomes are possible.

2.4.1 *A workplace forum established by collective agreement*

The first task of the commissioner is to convene a meeting of the applicant union, the employer and any other registered union with members in the workplace, to try to conclude a collective agreement involving all the parties, or at least the applicant and the employer (s 80(7)). Though the Act does not spell it out, such an agreement is clearly intended to regulate all or any aspects of the governance and participative rights of the workplace forum that the parties want to determine. If such an agreement is reached, the provisions of Chapter V are automatically excluded.²⁹

The first option is, in other words, for the parties themselves to design a workplace forum according to their own preferences. This could give rise to a broad diversity of customised workplace forums which would clearly promote flexibility but, on the other hand, could complicate the development of coherent government policy. Only if the parties fail to reach agreement does the Act begin to define their options for them.

2.4.2 *A workplace forum with a negotiated constitution*

In the absence of a collective agreement, the commissioner must try to “facilitate agreement” among the parties, or at least between the applicant union(s) and the employer, “on the provisions of the constitution of a workplace forum in accordance with this Chapter” (s 80(9)). The participative rights of such a workplace forum, in other words, will be those laid

28 In the meantime, nothing prevents employers and trade unions from establishing participative structures by means of collective agreement. Such agreements will be legally enforceable in terms of the Act (s 23) and the effect may be identical to that of a workplace forum established by collective agreement in terms of s 80 (see para 2.4.1 *infra*).

29 This would, on the face of it, also apply to the requirements of a minimum of 100 employees and a majority trade union or unions in the workplace. Since these requirements need to be satisfied before a collective agreement in terms of s 80(7) can be entered into, however, the point is academic.

down in sections 83-87 of the Act (discussed *infra*). But the parties are given the opportunity of deciding on its governance themselves.

Such a constitution must, however, conform to section 82 of the Act which requires it to regulate the structure of the workplace forum, election procedures, the frequency of elections, the nomination of candidates for election, the removal of members and, last but not least, the rights of workplace forums and their members in carrying out their functions. Certain minimum rights and duties are prescribed (eg, that the employer must provide "facilities" for the workplace forum). Section 82 does, however, permit the parties considerable latitude in working out the details of the various rules (eg, what precisely those facilities will consist of).

It is noteworthy that the basic organisational rights of workplace forums are left to be defined in their constitutions rather than by the Act itself. The legislature clearly did not wish to be seen to place financial or other burdens on employers, and hence opted for a more indirect method. To make this work, it is provided that the constitutions of workplace forums shall bind employers also (s 82(3)), and Schedule 2 to the Act lays down recommended guidelines for the way that the open-ended provisions of the constitution might be filled in. Even so, the sensitivity of the legislature towards employer perceptions has resulted in some noteworthy omissions. In particular, while Schedule 2 suggests that reasonable costs of training workplace forum members should be paid by the employer, there is no legal duty to do so. And, while workplace forums have the right to invite experts to their meetings, there is provision and no indication of any kind how this will be paid for.³⁰

Training and recourse to expert advice will clearly be indispensable if workers are to participate meaningfully in consultation or negotiation with management about organisational, economic or technical questions which, in a country with little or no prior tradition of worker participation, they have not been exposed to before. The legislature's voluntarist approach to these issues is manifestly at odds with the requirements of worker participation.³¹

2.4.3 A workplace forum with a constitution determined by the commissioner

If no agreement can be reached concerning all or any provisions of the constitution, a third scenario is activated: the commissioner is required to

30 Kester comments: "The impression that lingers strong in the draft bill and the memorandum is that participation has to be justified before a business community audience: participation is good for you, there will be a lot of bother but it will pay in the end . . . But there is no well-founded positive participation policy which could find an enthusiastic response among workers and trade unions." (Kester 1995: 25.)

31 The oversight cannot convincingly be explained with reference to the fact that South Africa is a semi-developed country. Corporate employers are, generally, in no worse a position to afford the reasonable costs of training and expert advice for workplace forums than their counterparts in Europe. It is submitted that the reasons were political rather than economic: the legislature's silence on these issues was part of the political balancing of interests that took place in order to secure endorsement of the Act by business as well as labour.

determine such provisions – once again, in accordance with the requirements of section 82 and the guidelines of Schedule 2. Since the parties will effectively be in dispute about the contested provisions, this may be regarded as a form of automatic arbitration. It will also offer potential solutions to the problems identified above: the commissioner will be at liberty to write in the constitution, for example, that the employer should carry the cost of expert advice to the workplace forum within reasonable limits. A great deal will therefore depend on the policy emanating from the CCMA, the priority attached to the short-term perceptions and interests of employers and trade unions as opposed to longer-term policy objectives, and the preparedness of individual commissioners to overrule views which they consider to be mistaken.

2.4.4 A trade union based workplace forum

The Act also provides for a fourth variant of workplace forum which is possibly without precedent. Where a majority trade union is recognised in terms of a collective agreement as sole bargaining agent for all the employees in a workplace, that trade union may “choose the members of the workplace forum from among its elected representatives in the workplace” (s 81). On the face of it, this provision corresponds to the trade union demand that the “composition of the workplace forum shall be the shop stewards’ committee” (COSATU, NACTU and FEDSAL 1995: 17). There is, however, a catch. There are few if any instances where a single union is recognised as bargaining agent for “all employees” in a workplace. In practice, this option will be confined to situations where two or more unions are representative in this sense and are able to co-operate to the necessary extent. Even so, criticism has been directed at the conflation of bargaining and participative structures which is implicit in the notion of a trade union based workplace forum.

2.5 Powers of participation

The “general functions” of workplace forums are to seek to represent the interests of all employees in the workplace; to seek to enhance efficiency in the workplace; to be consulted by the employer, “with a view to reaching consensus”, on the matters set out in section 84 of the Act; and to engage in joint decision-making³² on the matters set out in section 86 (s 79). This follows the well-established pattern of works councils on the continent of Europe, and includes the right to information necessary for workplace forums to engage in consultation and/or joint decision-making.³³ These “general functions”, like the objectives of the Act as a whole, must be read as qualifying the specific rights and powers described below. Thus, conduct by a workplace forum which discriminates against a particular group of employees would be in conflict with the requirement to represent the interests of all employees.

³² Also referred to as the right of “consent” in European jurisdictions.

³³ Consultation in the event of retrenchments is regulated separately: see para 2.5.4 *infra*.

The Act then goes on to regulate the rights of consultation, joint decision-making and access to information in detail. Though it does not make for lively reading, a brief overview of these provisions is necessary to provide some framework of reference for evaluating the practical significance of workplace forums.

2.5.1 Consultation

Section 84 says that a workplace forum is entitled to be consulted by an employer on "proposals" relating to any of the following matters, unless they are subject to a collective agreement:

- restructuring the workplace (including new technology or working methods);
- changes in work organisation;
- plant closures;
- mergers or transfers to the extent that they affect employees;³⁴
- retrenchments;
- exemptions from any collective agreement or law;
- job grading;
- criteria for merit increases or discretionary bonuses;
- education and training;
- product development plans; and
- export promotion.

This list may be expanded by bargaining council agreement or local collective agreement.

The Act further requires the employer to meet "regularly" with the workplace forum, to report on its financial and employment situation, past performance and anticipated performance, and to consult the workplace forum on any matter arising from the report that may affect employees (s 83 (2)). Potentially, this is an extremely broad provision which could involve the workplace forum in consultation on a virtually open-ended range of topics.

Following the decision in *Atlantis Diesel Engines v National Union of Metalworkers of SA*,³⁵ the Act defines "consultation" as a process involving (a) an attempt to reach consensus; (b) an opportunity for the workplace forum to make representations and advance alternative proposals; (c) consideration of such representations or alternatives by the employer, and (d) a response by the employer. If the employer does not agree, it must state its reasons for disagreeing. Finally, if there is no consensus, the employer must exhaust any agreed deadlock-breaking procedure before implementing its decision.

³⁴ S 197 of the Act provides that, when an enterprise is transferred as a going concern, the employment contracts of all employees will automatically be transferred with it unless agreement to the contrary is reached.

³⁵ (1994) *ILJ* 1247 (A).

Taken together, these requirements add up to something closely resembling the duty to bargain in good faith as defined by the industrial court in terms of the previous Act. Should the employer fail to comply with them, the dispute may be referred to arbitration³⁶ and, if the complaint is upheld, the arbitrator may define the standard of conduct expected of the employer in carrying out its obligation to consult. Once the consultation process has duly run its course, the employer is at liberty to implement its proposal. In contrast to the position in Germany and the Netherlands, however, the workplace forum's right to call a strike in these circumstances is not limited in any way.³⁷

2.5.2 Joint decision-making

In terms of section 86, an employer must consult *and reach consensus* with a workplace forum on "proposals" relating to any of the following matters, unless they are subject to a collective agreement, before such proposals may be implemented:

- disciplinary codes and procedures;
- rules for regulating the workplace (other than rules relating to work performance);
- affirmative action measures; and
- changes to the rules regulating social benefit schemes.

Again, topics may be added to, or – unlike in the case of consultation – removed from this list by collective agreement.

If no consensus is reached, the employer may either abide by the workplace forum's veto, or it may refer the matter to conciliation and, if that fails, arbitration. In this event the arbitrator may make an award which will, in effect, uphold or set aside the decision of the workplace forum. It will also rule out the right to strike.

A conspicuous difference between the right of joint decision-making and its European equivalents is the extremely limited number of topics which it encompasses.³⁸ This can be attributed to resistance by employers to what constitutes, in the South African legal context, a dramatic incursion into the employer's common-law rights.

2.5.3 Information

Section 89 requires the employer to disclose to the workplace forum all relevant information that will allow it to engage effectively in consultation and joint decision-making. This duty is subject to a number of limitations

36 By following the procedure laid down in s 94.

37 The Act vests a right to strike in every employee, and limits this right *inter alia* if the issue in dispute is one that may be referred to arbitration or if the issue in dispute is the subject of an arbitration award or collective agreement (s 65(1)(c), (3)(a)). Neither of these limitations would apply in the circumstances just described.

38 Cf ss 87 and 91 of the (German) Works Constitution Act of 1952; s 27 of the (Dutch) Works Councils Act of 1971.

(s 89(2)).³⁹ In particular, the employer is not required to disclose information which is confidential and, if disclosed, may cause substantial harm to an employee or to the employer. Should an employer refuse to disclose information on these or other grounds, the dispute may be referred to conciliation and, if necessary, arbitration. The Act provides in some detail for the procedure to be followed and lays down penalties for breach of confidentiality by the workplace forum.⁴⁰

2.5.4 Consultation in the event of retrenchments

Section 189 of the Act largely codifies the rules developed by the industrial court in respect of dismissals based on operational requirements. The topics of consultation and the disclosure of information are regulated in detail (s 189(2) and (3)), and the nature of the consultation process is defined in terms similar to those outlined in paragraph 2.5.1 *supra* (s 189(5) and (6)).

Following the reasoning of the court in the *Atlantis Diesel Engines*⁴¹ case, the consulting parties are required to try to reach consensus on, *inter alia*, appropriate measures to avoid the dismissals. The duty to consult thus arises at the point where the employer "contemplates" retrenching one or more employees. This clearly means that the employer should initiate the process before any final decision has been taken and at a stage when different options are still open.

The major procedural difference is that workplace forums have now entered the picture. In the first instance the employer is required to consult with any "person" identified for the purpose in a collective agreement – in other words, the trade union concerned – but, failing such an agreement, a workplace forum must be consulted.⁴²

2.6 The relationship between trade unions and workplace forums

The drafters of the Act insisted that "[w]orkplace forums are a secondary channel, supplementary to collective bargaining. It is vital to ensure that they do not replace collective bargaining or undermine trade unionism in any way" (Ministry of Labour 1995: 137). Notwithstanding this unambiguous commitment, and despite far-reaching legal protections included in the Draft Bill, trade union concerns and pressure in the negotiations leading up to the finalisation of the Act resulted in a number of further concessions to the unions (Du Toit *et al* 1996: 29, 31; Anstey 1995: 36-38).

39 The duty to disclose information gave rise to considerable controversy and the procedure described below was inserted into the Act under pressure from employers' organisations.

40 In the form of cancellation or suspension of the right to information: see ss 89(10) and 91.

41 (1994) ILJ 1247 (A).

42 In the absence of a workplace forum, the employer must consult any registered trade union whose members are likely to be affected or, failing that, the employees themselves: s 189(1).

The result has been an array of legal rights and powers vested in trade unions⁴³ in respect of workplace forums that is possibly without precedent in the world. Some have been noted already; it is convenient, however, to recapitulate:

- only a trade union can trigger the establishment (s 80) or dissolution (s 93) of a workplace forum;
- a trade union recognised as bargaining agent for all employees in a workplace may choose the members of the workplace forum from among its own elected representatives (s 81);
- trade unions may nominate candidates for election to workplace forums (s 82(1)(h));
- a trade union may remove any workplace forum member nominated by itself at any time (s 82(1)(l));
- trade union office-bearers or officials may attend any meeting of the workplace forum, including meetings with the employer (s 82(1)(u));
- the trade union and the employer may by collective agreement change the constitution of the workplace forum (s 82(1)(v));
- trade unions and employers may by collective agreement add to the topics of consultation, and add to or remove topics of joint decision-making (ss 84(3) and 86(2));
- the rights of workplace forums to be consulted or take part in joint decision-making fall away if the matter in question is regulated by collective agreement (ss 84 and 86).

2.7 An expansion of industrial democracy?

The extent to which workplace forums represent an expansion of industrial democracy can be judged by comparing the position in a workplace without a workplace forum to that in a workplace where a workplace forum has been established. In the former, managerial prerogative will be limited only by collective agreement (if any) and by the law of contract. Trade unions gain a legal right to be consulted on topics of managerial decision-making only if the employer “contemplates” the retrenchment of workers. The union has no right to be involved in any prior managerial decision that may give rise to the possible need for retrenchments – for example, a decision to invest in new technology. Once such a decision has been taken, however, the need for retrenchments may well be a foregone conclusion.

If a workplace forum exists, on the other hand, it will be entitled to be consulted also about the proposal to invest in new technology. This will place it in a stronger position to work out possible alternatives to retrenchment and, in so doing, empowering the workforce with greater understanding of the context in which they are working. In this sense the

⁴³ Reference throughout this section, unless otherwise stated, is to a registered union or unions acting together with majority membership in the workplace concerned.

frontiers of workplace democracy are shifted to a limited but significant degree.

It is true that the employer's ultimate power of unilateral decision-making is not extinguished. All things being equal, however, that power may be narrowed down to the extent that the workplace forum is able to devise feasible alternatives to the employer's proposals. The employer is under a duty to "consider" such alternatives and its reasons for disagreeing will be *prima facie* evidence of whether it has done so or not. Should the employer be unable to offer convincing reasons for rejecting the workplace forum's proposals, it may arguably be found to have failed in its duty to consult. The delay and possible costs involved in procedural challenges of this nature, it is submitted, may well persuade the astute employer of the wisdom of seriously entertaining any proposal from a workplace forum which might be seen as a genuine attempt at solving the problem in hand.

It may be argued, following Kahn-Freund (Davies and Freedland 1983), that even if all this is true, it is confined to the realm of law. Law is a secondary force in industrial relations; power is what really matters. The underlying question, from this point of view, is the effect that worker participation has on the respective power of the parties. Does it enhance the power of organised labour? Or does it divert workers from relying on their primary instrument, the independent trade union movement, and thus weaken them in the long run? In some countries this question is now of historical interest only; in South Africa it is highly topical. It will be attempted to address it in the concluding section below.

3 WORKPLACE FORUMS, COLLECTIVE BARGAINING AND INDUSTRIAL DEMOCRACY: A BALANCE SHEET

The most problematical aspects of the participatory project in South Africa arise from the overlap between central and plant-level collective bargaining. The convenient division of labour between unions bargaining at industry level and works councils filling in the details at workplace level, so typical of the European model, does not readily apply; workplace forums may find themselves operating side by side with shop stewards' committees which have struggled long and hard to build up their bargaining strength and will resist any encroachment on their functions.

Responses to the problem have tended to be of two kinds. For some, there is an inherent conflict of interest between workplace forums and trade unions at plant level which needs to be resolved by extending the scope of collective bargaining to include topics of co-determination.⁴⁴

44 This view is, understandably, prevalent among trade unionists who see in workplace forums a potential weapon at the disposal of anti-union employers in dividing workers or sidestepping the union. It is a view nurtured by the experience of the pre-1979 period when "works committees" and "liaison committees" established in terms of the Black Labour Relations Regulation Act of 1953 were used in precisely this fashion. History, it is feared, may repeat itself.

Others, broadly speaking, accept the premises of the Act and are concerned with realising the potential of workplace forums as instruments of worker participation side by side with collective bargaining at industry or plant level.

Von Holdt comprehensively expounds the first approach (Von Holdt (1) 1995: 31; Von Holdt (2) 1995: 59). The crux of his argument is that "workplace forums will disrupt South African traditions of representation" (Von Holt (2) 1995: 63) (ie, worker representation by means of trade unions at industry level and shop stewards' committees at workplace level). The solution, he argues, is "a single forum dealing with co-determination and collective bargaining issues". Initially he suggested that this could "either take the form of providing co-determination rights to trade unions in existing collective bargaining forums" or "giving collective bargaining rights to workplace forums" (Von Holdt (1) 1995: 33). Such workplace forums, it was implied, would have to be under trade union control. What Von Holdt envisaged was co-determination *by trade unions* that would "confer important powers on unions to participate and shape decision-making in the workplace" and allow them "to tame and civilise the employers" (Von Holdt (1) 1995: 33).

When the legislature rejected this approach, Von Holdt moved to the view that union structures should be the sole and exclusive form of worker representation in the workplace: "[i]t is essential for both management and employees to coordinate negotiations on all these issues – and the only way to do this on the employee side of the table is through the trade unions." (Von Holdt (2) 1995: 60.)⁴⁵

3.1 Two forums, two agendas?

Worker participation as provided for in the Act is thus, from Von Holdt's point of view, fundamentally flawed. His critique of workplace forums is wide-ranging. Many of his assertions, though stated baldly, raise complex issues which deserve more detailed discussion than the present article will permit. The following, however, appear to be some of the most important objections:⁴⁶

- (a) there are "strong possibilities that the forums could weaken unions" in that workers "may see less need to join a union, since they are guaranteed representation on the forum";
- (b) there is a danger of "demarcation conflicts between [collective bargaining and workplace] forums and confusion among workers and managers. Issues could be shunted back and forth between forums

45 He went on to point out that "trade unions are already *extending* the collective bargaining agenda to a range of production-linked issues, mostly in centralised forums . . . These include training, grading and pay systems, and productivity guidelines" (Von Holdt (2) 1995: 60). This factor was taken into account by the Act which, as noted above, provides that workplace forums are only entitled to be consulted on matters which are *not* regulated by collective agreement.

46 The sequence of these quotations does not necessarily follow that of Von Holdt's argument but seeks merely to achieve simplicity of presentation.

... It could facilitate factionalism and divisions within unions between shopstewards in the workplace forum and shopstewards in the collective bargaining forum”;

- (c) trade unions’ “negotiating strength may be diluted in the forum by the presence of representatives of lower management and other non-members”;
- (d) it is “generally true that stronger forums tend to drive out weaker forums. The workplace forums would be stronger because they have more resources, and so marginalise the weaker collective bargaining forums” (Von Holdt (1) 1995: 32-33; Von Holdt (2) 1995: 61-63).⁴⁷

These concerns are for the most part not new; and most have, arguably, been anticipated by the Act. Thus, the Act seeks to avoid the confusion of functions suggested in (a) and (b) above by demarcating the competence of workplace forums and confining it to production-related issues along lines which, broadly speaking, have proved to be effective in other countries. Where existing bargaining forums or collective agreements deal with topics of consultation, it has been noted, the former will exclude the jurisdiction of the workplace forum. Taking all these factors into account, there appears to be little reason for workers to withdraw support from the institution which negotiates their wages and working conditions (the trade union) in favour of one which is legally precluded from doing this (the workplace forum).⁴⁸

Von Holdt does not agree with this approach. “In the modern economy”, he argues, “the distinction between production and collective bargaining is artificial” (Von Holdt (2) 1995: 60).⁴⁹ Theoretically this may be true, in that an overlap between the two categories in terms of subject matter, agents and process, is generally acknowledged. The divide between collective bargaining and worker participation, however, is not premised on any absolute distinctions along these lines, nor on the presence or absence of adversarial interests.⁵⁰ On the other hand, though difficult to define, it is real enough in practice. The agenda of worker participation, like that of collective bargaining, is complex and sometimes elusive because it is shaped by historical evolution rather than by law. The

47 Von Holdt subsequently qualified his argument that workplace forums will necessarily be “stronger” than collective bargaining forums. Shop stewards, he recognised, have “organisational power, the backing of the union and the exclusive right to engage in collective bargaining over wages and conditions” (Von Holdt (2) 1995: 62).

48 Declining trade union density in countries such as Germany is sometimes cited as anecdotal evidence of the corrosive effect of works councils on trade unionism. Such a view is questionable. Union density has declined even more in countries such as the USA, where no works councils exist. It has also been a phenomenon of comparatively recent years whereas works councils have coexisted with trade unions over a much longer period, including periods of trade union growth.

49 Or even “a management ploy to weaken union involvement in production”.

50 And, conversely, adversarialism or its absence is not a product of the institutions through which employers and workers communicate. As Blanpain observes: “It seems to me that the attitude of the actors, namely if they want to work together or fight, is more important than the structures through which they operate” (Blanpain 1992: 2)

result, nevertheless, has been a process which is clearly different from collective bargaining, with a character and logic of its own.

Would workplace forums "dilute" unions' negotiating strength? Trade union politics in the narrow sense is concerned with the necessary business of defending and extending existing rights and power within existing bargaining units. At the same time, trade unions are constantly confronted with developments in the working environment and in society at large, presenting new problems but also new opportunities of advancing worker interests. The extended bargaining units called into existence by workplace forums, it is submitted, should be seen in this light. One objective of the Act is to promote centralised collective bargaining, and the establishment of industrial unions ("one industry, one union") has long been an aim of the Congress of SA Trade Unions. The purpose is to overcome not only inter-union rivalry but also divisions among different groups of employees in the same industry or workplace. Given the relatively low and possibly declining level of union density in South Africa,⁵¹ the aggregation of employee interests (skilled and unskilled, blue-collar and white-collar) represented by workplace forums would seem to offer a window of opportunity towards this larger goal.⁵²

3.2 "Either" a workplace forum "or" a union?

Are workplace forums really likely to drive union structures out of the workplace? This assertion appears to be particularly unsubstantiated.⁵³ Indeed, it is undermined by Von Holdt's own recognition that "[i]f a union is so weak that it cannot prevent the forum becoming an alternative power centre it is probably too weak to have much impact on the workplace anyway" (Von Holdt (1) 1995: 34). Organised strength rather than formal entitlements, in other words, is the key to trade union influence and power. The Act seeks to promote trade union strength by offering unions a series of organisational rights.⁵⁴ By utilising these rights, it is

51 According to Department of Labour statistics, union membership peaked in 1992 and in 1994 amounted to 23.7% of the economically active population (Finnemore and Van der Merwe 1996: 93). This average figure is, however, distorted by a large informal sector and a relatively large rural population. Union density in certain sectors of industry and mining is considerably higher.

52 Von Holdt believes that an opposite dynamic is likely: the Act creates "the scope for all kinds of divisions and conflicts as different factions vie for support. Eg, the shopstewards could use collective bargaining to undermine or campaign against forum agreements, and vice versa . . . Creating two structures will make it more difficult for the union to build unity and a coherent strategy" (Von Holdt (2) 1995: 61).

53 It is argued that this is what happened in Sweden and Zambia (Von Holdt (2) 1995: 62). Leaving aside the accuracy of this interpretation, the industrial relations context in neither country resembles the South African one. In Sweden the trade union movement is considerably stronger; in Zambia both industry and trade unionism are considerably less developed. This factor alone makes any direct comparison questionable.

54 That is, depending on the union's degree of representivity, the right of access to employers' premises, to hold meetings and ballots on employers' premises, stop order facilities, disclosure of information and, in certain workplaces, the election of trade union representatives with statutory powers (ss 11-16). Employees also enjoy a statutory right to strike, including protection against dismissal (ss 64, 65). With the exception of stop order facilities, none of these rights existed under the previous Act.

assumed, unions will have every opportunity of building up the necessary strength at workplace level to engage in collective bargaining. There is no clear reason for believing that a union under these circumstances is liable to be superseded by another representative body, let alone one that cannot engage in wage bargaining.

The rights and "resources" of workplace forums, by contrast, are geared towards consultation and joint decision-making, not towards building up organisation. A workplace forum's basis of support is limited to the workplace. It lacks legal personality and cannot own property. Theoretically it could be controlled by the employer on which it depends for its resources. In practice it is far more likely to depend on the union which triggered its establishment and could terminate it, whose members make up the majority of employees in the workplace and, in all probability, of the workplace forum also.

Von Holdt's "either/or" scenario⁵⁵ of internecine conflict between trade unions and workplace forums thus seems unlikely to materialise. It has not happened to any significant extent in countries with comparable institutions. In Europe in the 1960s, according to Kester, the "main initial thrust towards workers' participation" (eg, through the extension of the powers of works councils) came from workers and their unions (Kester 1995: 2). In the Netherlands, the *Federatie Nederlandse Vakbeweging (FNV)*⁵⁶ in 1990 "made union participation in [works] councils a strategic priority" (Hanckè and Slomp 1995: 17). In practice it has been found that works councils can assist in facilitating or "legitimising" trade union activity at plant level. At the same time, it is a widely-held view in countries such as Germany and the Netherlands that works councils function best in enterprises with a powerful union presence. An organised union structure alongside a works council, it has been found, can stimulate activity by the council, act as a watchdog and serve as a communication link between the union and the council while, at the same time, performing its own functions of collective bargaining and servicing individual members (Du Toit 1996: 18, 14-15; Anstey 1995: 38-39).

The dependence of works councils on trade unions in countries with established systems of worker participation arises not so much from unions' legal powers over councils (which are generally limited or absent) as from the councils' need for union support in matters such as training and expert advice (Weiss 1989). On the other side of the scale, more than two-thirds of trade union organisers and works council chairpersons covered by a study in the Netherlands had no knowledge of problems arising in practice from an overlap between trade union and works council activities (Koene and Slomp 1991: 55).

It is well to guard against inappropriate comparisons between the outcomes of industrial relations systems which differ in material respects. It is

55 "In other words, the workplace forum will *either* undermine the union, *or* it will be so weak that it is not much use to anyone" (Von Holdt (2) 1995: 62).

56 The FNV is the principal trade union federation in the Netherlands.

submitted, however, that there are no institutional features of the industrial relations system in South Africa which suggest that employees in this country would benefit any less from a co-operative relationship between trade unions and workplace forums than employees in the systems referred to above. The one imponderable is the degree of antagonism manifested from the side of South African trade unions towards workplace forums. If unions do not want them to work, workplace forums cannot work; and since there is no viable alternative to hand, the participatory project would in this event have to be placed on hold.

3.3 An alternative assessment: workplace forums as instruments of union power

For Anstey, the factor just mentioned encapsulates the major contradiction of the provision for worker participation in the Act (Anstey 1995: 39-41). His conclusions are in many ways the opposite of Von Holdt's. A cardinal feature of the Act, in his view, is not the threat it poses to unions but, on the contrary, its accommodation of trade union interests at the expense of promoting genuine worker participation.

The Act, in other words, does not take sufficient cognisance of the essential precondition for worker participation: creating institutions unequivocally dedicated to facilitating co-operative decision-making by employers and employees. This cannot be done by trading off certain interests against others. In developing legitimate structures and processes it is impossible to ignore the real or perceived interests of employers and organised labour. But such interests may not be allowed to predominate, or the system that emerges will be a mere continuation of collective bargaining. Whatever the original intentions of the drafters of the Act, Anstey concludes, it is "doubtful that workplace forums in themselves will move South African industrial relations beyond adversarialism" (Anstey 1995: 41).⁵⁷

Why is it necessary to go "beyond" collective bargaining? In addressing this question, it will not be helpful to infer any suggestion of the now discredited unitarist approach.⁵⁸ The point is not that workers and management have coherent interests; rather, it is that the management of any organisation – whether privately or publicly owned, profit-making or non-profit-making – must at the end of the day take coherent decisions. In doing so it must ideally take cognisance of the diverse and often conflicting interests of the various groups of participants in the organisation. (That is where worker participation comes in.) But it must ultimately resolve on action that achieves the best possible result from the standpoint of the organisation as a whole.

57 In addition, workplace forums fail to go beyond the realm of representative democracy and do not address the need for direct employee involvement in matters of product quality and the like.

58 To the effect, put crudely, that workers have no legitimate interests distinct from those of employers and that workers should therefore wholeheartedly embrace or subjugate themselves to the goals of management. For a scholarly analysis of the unitarist and pluralist approaches, see Rycroft & Jordaan 1992: ch 2.

There is no implication in this that the perceived interests of management must necessarily prevail; neither is it merely a formula for labour to assert its own agenda. Rather, to recall Lagrange's definition of consultation, it requires both sides to "see their differences in the form of joint problems to which both parties are committed to seek solutions, rather than simply pursuing their own respective positions in a manner which excludes the other party's interests as well" (Lagrange 1995: 517).⁵⁹

For trade unions to participate in such a process clearly requires them to step outside their traditional role. Worker participation, it is often said, implies the representation of the workforce as a whole. This is not really the problem. Trade unions may represent the vast majority of employees in a workplace and are often recognised as bargaining agents for members and non-members alike. They are, however, legally and practically bound to defending and advancing the interests of their constituencies. In addition, they may have institutional interests of their own, over and above those of their constituencies, and separate from those of their negotiating partners. They are, in short, partisan organisations, and union representatives are expected to conduct themselves accordingly.

This does not exclude the possibility of union structures being party to decision-making on production-related issues.⁶⁰ It does, however, increase the likelihood that such a process will amount to "a continuation of collective bargaining" rather than "joint problem-solving". This may have value in its own right, and benefits for the union, but is less likely to give rise to coherent decisions. Workplace forums are intended to be places where worker representatives can be involved in managerial decision-making in the sense outlined by Lagrange. Workplace forums which exist at the behest and under the control of trade unions imbued with a spirit of adversarialism, Anstey argues, would be poorly equipped to play this role.

4 SUMMARY AND CONCLUSIONS

In conclusion, it is necessary to recall the question with which this article started: to what extent do the mechanisms created by the Act provide a framework for promoting worker participation as well as the broader aims of industrial democracy?

There is the story of a motorist in a certain country stopping to ask an old man by the roadside the way to his destination. After thinking long

59 This may, of course, be questioned not only from a "class conflict" perspective on industrial relations but also from the Kahn-Freundian position: Davies & Freedland warn: "[T]his belief that there are not really two sides of industry . . . [may also] have a powerful influence on the minds of trade union leaders anxious to blur the line between labour and management, attaching exaggerated hopes to 'participation' and elevating 'co-determination' almost to the level of a religious belief." (Davies and Freedland 1983: 28.) It will not be attempted to resolve this question in the space of a footnote. It goes without saying that there are certain interests which employers and workers have in common at any given time: eg. the physical survival of the enterprise, an unpolluted environment etc. What may be contentious are the terms on which these common interests are to be secured, as well as their significance when weighed up against the distributive or other issues which divide the parties.

60 As, eg. at Volkswagen (Anstey 1995: 39).

and hard, the old man replied: "Well, I wouldn't start from here." That is perhaps the gist of many responses to the question of how South Africa should get to the land of RDP. There is, however, no choice but to start from where we are, and from the industrial relations system as it exists. The Act represents an attempt at doing this; and therein lies the key to many of its features.

A number of restrictions on the establishment as well as the operation of workplace forums have been noted. Given the threshold of 100 employees, only a very small percentage of workplaces (albeit the most important ones) are eligible for the establishment of workplace forums. Add to this the requirement that only a majority trade union can trigger the process, combined with widespread reservations about workplace forums on the part of unions, and it is likely that the participatory project may be off to a halting start in South Africa.

By comparative standards this is peculiar. Implementation of an important element of public policy has effectively been left in private hands. This may be seen as evidence of confidence in the unions' ability to respond to wider social challenges. But it also reflects the fact that the government could see no option but to seek union support for a project which cannot succeed without their voluntary participation.

The provisions relating to the rights and powers of workplace forums also appear problematical. Though training and access to expert advice will be indispensable for workplace forums to perform their functions, the Act does not (as in some other countries) require employers to pay for this within reasonable limits. In practice, the provision of these and other support services to workplace forums will be left to trade unions, non-governmental organisations (both with limited resources) and, of course, willing employers.⁶¹

The scope of worker participation is undoubtedly extended by the powers of consultation and joint decision-making vested in workplace forums. But, while the consultative agenda is broad, the topics of joint decision-making are extremely limited.⁶² It is noteworthy, furthermore, that the role of workplace forums is confined to that of responding to management proposals. Unlike the position in countries such as Germany, the workplace forum has no general right to make proposals of its own in the context of the statutory process. It is free to make suggestions, but there is no duty on the employer to consider and respond to them in the manner laid down by section 85.

On the other hand, it has been argued that workplace forums, where they exist, will be set to operate as little more than extensions of trade

61 It has been argued elsewhere that there is scope for the state to play a more active role in this regard; eg, by subsidising training programmes for workplace forum members by bargaining councils, trade unions or statutory bodies (Du Toit 1997: 18 - 11-12).

62 Weiss suggests that this is not the decisive feature: the fact that workplace forums will have the power to veto management decisions even in respect of a limited number of topics, he argues, will make it important for management to avoid the development of an antagonistic relationship and therefore take the workplace forum seriously in other matters also (Weiss 1994).

unions. The counter-argument, that workplace forums will have the propensity to undermine or drive trade union structures out of the workplace, is unconvincing. The far-reaching legal and practical powers vested in unions to establish, dissolve, determine the functions and influence the day-to-day operation of workplace forums, as well as the political and industrial power of the trade union movement in South Africa, make it likely that workplace forums will operate according to the unions' agenda.

All these peculiar features of workplace forums can be ascribed to the highly adversarial nature of industrial relations in South Africa. A set of constraints was imposed on the participative powers of workplace forums in order to calm management fears of "union interference". Another set of constraints was prompted by union fears of competition by "management-controlled committees". The result has been to blur over the objective of creating special institutions, separate from bargaining forums, for the purpose of participation in managerial decision-making. The question arises whether they are separate and special in name only. Are workplace forums organs of participation, or are they the product of a trade-off in a power struggle that will serve as an arena of ongoing conflict rather than a place of problem-solving?

Whichever way this question is answered, it does not in itself settle the broader question of the significance of workplace forums in the context of employment democratisation. Given the institutionalised imbalance of power between employers and employees, it has been argued, worker empowerment is crucial to the process. To this extent it will retain an element of contest which no bargaining or decision-making forum can be completely immune from.

On the other hand, employment democratisation does not happen in a vacuum. Management and workers are not free and independent agents able to strike any compromise that may suit them. Every decision is taken in a particular socio-economic context and its viability will depend on a range of external factors beyond the control of the parties. To this extent joint decision-making must address criteria over and above the interests or desires of employers and workers.

Worker participation is therefore an educative process. It helps to familiarise workers with the socio-economic context in which their enterprise operates and the constraints determining the possibilities which are open to them at any given time. There is, or need be, nothing static about this process. Awareness gained of external factors which obstruct the solution of problems inside the enterprise will help to focus attention on the question of how those external problems can be addressed. This translates naturally into political thinking and action for political change.⁶³

63 Eg. the severe job losses experienced in the South African garment and textile industries as a result of international competition led the SA Clothing and Textile Workers' Union to address the broader problems of the industry, giving rise to a strategic plan drawn up jointly with employers. In a related development, the National Economic, Development, Labour and Economic Council (a tripartite consultative body on national socio-economic policy) has recommended the inclusion of social clauses in foreign

[continued on next page]

Taken together, these processes may be said to take workers from being mere subordinates in the production process on the road to becoming "industrial citizens" (Jordaan 1995: 176). "Industrial citizenship" of working people, in turn, may be seen as an integral part of citizenship or membership of civil society in the fullest sense of the word.

The establishment of workplace forums will clearly be relevant to the power balance between management and labour. It will be felt directly (to the extent that they influence decision-making) as well as indirectly (to the extent that they reinforce trade unions or employee power in general). To a greater or lesser extent, workplace forums will also advance the educative and integrative function of employment democratisation. This effect might be minimal in workplaces where management and labour habitually make contradictory proposals, reach deadlock and move into dispute-resolution mode. But there is no reason to believe that this will turn out to be the norm.

The real question is the extent to which trade unions will activate the establishment of workplace forums. Officially, many unions register reservations and an intention to remain aloof. Locally, many shop stewards show interest. They are aware of the practical advantages it would give them to be elected on to workplace forums – for example, more access to information and involvement in decisions on investment plans. It is early days yet.

5 ENDNOTE

To many, the issues discussed in this paper will be of interest only to the extent that they shed light on certain practical questions: what will workplace forums mean for the investment climate? Will they make workers more militant, or less? Will they drive wages up, or will they make workers more productive?

These questions belong to the short and medium term. They will be decided by a range of industrial relations determinants of which workplace forums is only one; wages and other distributive issues are likely to be far more important in this context. This article is concerned with a process that will work itself out over a longer period, a process which is part of a number of initiatives aimed at creating a more productive society as well as a more equal one. Employment democratisation is conceived of as a means of promoting the optimal utilisation of human resources and, from the individual point of view, the fullest possible development and integration of workers into the decision-making process. Anstey reflects on the stage we have reached:

"I have the impression that this focus on the customer and business survival has had a greater impact on the participation debate than years of squabbling over concepts of industrial democracy. Greater levels of participation have

trade agreements aimed at eliminating the import of products of exploited or unprotected labour. The basic problem of job security, in other words, involved workers in a process of policy formulation ranging from sectoral development to international trade.

been achieved not by reason of demands but because it is the *best route for purposes of competitiveness* in many instances – it is a spinoff from the process of demanding more from every employee and having to educate and train them to this end as well as organisational restructuring.” (Anstey 1995: 32.)

But the process is an open-ended one. It will not necessarily achieve, or stop at, at the stage envisaged by the RDP. It is in the nature of change that new horizons open up when new vantage points are reached.

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