The LRA and work-place forums: Legislative provisions, origins, and transformative possibilities

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> "It is in our interest to make the LRA work. We should not wait for employers . . . we need to identify strategic industries and enterprises in order to establish union centred work-place forums and at the same time clearly work out what can be achieved and what is required" Sam Shilowa, General Secretary, COSATU (Interview: October 1996)."
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> "Work-place forums are essentially co-operative bodies and to work you have to have real co-operation and if you end up with litigated work-place forums, and this is the danger with the union trigger, they are not going to work. This is an opportunity for parties to sit down and do straight talking . . ." Bokkie Botha, Business South Africa Negotiator in NEDLAC (Interview: February 1997)."

1 INTRODUCTION

Work in the modern South African economy – in a factory, on a mechanised farm or in a hi-tech office environment – has generally been characterised by exploitation, hierarchical work arrangements and managerial dominance. Industrial democracy, supposedly realisable through collective bargaining, did not, over the past few years, extend beyond a narrow bargaining agenda. Fundamental work-place issues like production planning, investment decisions and work organisation did not feature prominently on the bargaining agenda. Nevertheless, for the first time in South Africa's industrial relations and labour law history is it possible to fundamentally change decision-making and management within the work-place. This is as a result of the legal provision for a work-place democratisation institution, known as the work-place forum, in Chapter 5 of the Labour Relations Act (LRA) of 1995.

Although not blind to dangers in Chapter 5, both labour and business are clearly aware of the opportunities it holds out for their different agendas. According to Sam Shilowa, union decisiveness and strategic engagement with Chapter 5 are essential to advance the interests of the labour movement, while for Bokkie Botha it is essential to harness the co-operative thrust of work-place forums to make these institutions viable (see quotes above). No matter where one sits in terms of the class divide, it is apparent that the LRA, and in particular Chapter 5, is legally crafted so that industrial relations and labour law reform are now at the threshold of

a new frontier. This will become more apparent when the legislative provisions contained in Chapter 5 are unpacked. Such a descriptive overview is presented in the first section of this article.

In the second section, to explore the potentialities work-place forums hold out for the labour movement to democratise the work-place, there is an attempt to probe beyond the surface appearance of the law. For Karl Klare this amounts to situating law in its social context to fully grasp its contingency: the impact of politics and – in the ultimate sense – power on law (Klare, 1990: 68). This would entail an enquiry into some of the following questions: Where did Chapter 5 come from? Was it the result of a "Newtonian" quantum leap in the collective mind of the legal drafting team or was it part of the new government's labour market policy? What were the underlying policy reasons for making legislative provision for work-place forums? How did the negotiations between the social partners contribute to defining the work-place forum concept?

Although much of the debate pertaining to work-place forums has amounted to defending and promoting the co-determinist philosophy of statutory work-place forums as the absolute horizon of democratisation, it is important to recognise the limitations of equating co-determination with democratisation. At the same time, given the historical commitment of the trade union movement to extending the frontiers of worker control beyond procedural and substantive checks on disciplinary issues, the achievement of labour standards generally and accountability of union leadership, it is essential to highlight the important challenges and preconditions that have to be satisfied if worker control is to be used to redefine democratisation to extend beyond co-determination. This is discussed as the third aspect of this article.

Finally, stemming from this analytical exercise is an attempt to define possibilities for worker-initiated work-place forums, anchored within a transformative perspective of democratisation, that includes the possibility of work-place forums being designed as institutions of autonomous worker self management.

2 LEGISLATIVE PROVISIONS: CO-DETERMINATION AND THE LAW

After the involved and animated negotiations over the LRA, it is reasonable to assert that Chapter 5, read with Schedule 2 of the Act, prompts several questions related to the realisation and establishment of work-place forums. The obvious questions are the following: what are the powers or competencies of work-place forums? What would be the agenda for information disclosure, consultation and joint decision-making? What are the practical steps that are necessary to establish a work-place forum? Can it be voluntary or does it have to be statutory? Who would compose it? How would it operate on a day to day basis? Can it be established in the public service? How would disputes be resolved?

Theoretically, the work-place forum is an industrial relations institution, intended to promote worker participation in work-place decision-making.

It is envisaged as an institution that would be solely composed of workers and would open up a separate channel, distinct from collective bargaining, for information disclosure, consultation and joint decision-making. With the South African work-place long dominated by managerial prerogative, providing work-place forums with such powers or competencies enables a fundamental inroad into managerial decision-making.

Joint decision-making or co-determination fundamentally breaks with unilateralism and hierarchical decision-making in the work-place in that it allows workers to prevent management from deciding on a particular issue unless the consent of the work-place forum has been obtained. In general, for worker power in South Africa this amounts to an advance beyond legally sanctioned collective bargaining or "soft" consultation regarding retrenchments, to a legal duty to co-manage. Consultation, as a power of the work-place forum, encroaches on managerial power to a slighter degree than joint decision-making. Essentially, consultation requires the employer to present proposals before implementation to the work-place forum, with a view to reaching consensus.

Besides having the legal power jointly to decide certain matters and consultation over others, the actual effectiveness of work-place forums depends on what matters (or agenda items) fall within the ambit of the different powers. It is the struggle around the actual content of joint decision-making, consultation and information disclosure that would actually define the balance between worker and managerial power within the work-place. In Chapter 5 the matters for joint decision-making and consultation are not set in stone. They are open to variation – expansion or limitation – through a collective agreement between the representative union and the employer (which could include health and safety issues in terms of the applicable occupational health and safety legislation), a bargaining council and any other law that may confer additional matters.

This means that matters or agenda items that were once dealt with through consultation could be shifted to joint decision-making. Within the statutory make-up of Chapter 5, the matters that would immediately be subject to consultation include the following:

- restructuring of the work-place;
- changes in the organisation of work;
- partial or total plant closures;
- mergers and transfers of ownership in so far as they have an impact on the employees;
- the dismissal of employees based on operational requirements;
- 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.

Joint decision-making in Chapter 5, if achieved in terms of the law, would immediately apply to:

- disciplinary codes and procedures;
- rules related to the regulation of the work-place;
- employment equity measures; and
- changes to rules regulating social benefit schemes.

Although on the face of it the statutory provision for joint decision-making matters might seem arbitrary, some of these items like employment equity – if used correctly – could fundamentally alter the internal labour market of the particular enterprise. Rules relating to social benefit schemes could allow workers to influence the investment priorities of worker and pension funds, for example, to ensure that these are used to advance reconstruction and development.

The policy implications of jointly managing work rules cannot be underestimated. For instance, the reduction of working hours would not just change the pace and rhythm of work but would also contribute to employment creation, productivity enhancement and improved quality of life for workers. Strengthening this would be the fact that the veil of secrecy surrounding managerial prerogative is also pierced through information disclosure provisions. These provisions require all relevant information that would facilitate effective engagement on consultation and joint decision-making to be disclosed to the work-place forum. In addition, documented information would have to be provided on request to the members of the work-place forum.

Now, if a work-place forum were to be initiated or triggered by a "representative trade union", certain practical steps would have to be followed. Firstly, an application would have to be made to the CCMA in the prescribed form. For the purposes of Chapter 5, a "representative trade union" is defined as a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a work-place.

The second step defines a role for the CCMA to consider such application in relation to the following criteria: (i) the employer employs 100 or more employees; (ii) the applicant is a representative trade union; and (iii) there is no functioning work-place forum established in terms of this chapter. Finally, the Commission must appoint a commissioner to assist the parties to establish a work-place forum by collective agreement or, failing that, to establish a work-place forum in terms of Chapter 5, with due regard to Schedule 2.

In the context of the public service, the establishment of work-place forums will be regulated in terms of a Schedule promulgated by the Minister for the Public Service and Administration in terms of section 207(4).[1] This would nonetheless not preclude "voluntarist" agreements outside of the statutory framework for sectors within the public service.

1 S 80(12) Labour Relations Act.

What emerges starkly is that although Chapter 5 tries to find a balance between legal regulation – or juridification – and voluntarism, with the ultimate thrust to give statutory backing to work-place forums, it nonetheless does not exclude the possibility of collective agreements outside of the statutory framework to establish work-place forums. In the main, "voluntary" or non-statutory work-place forums open up the possibility fundamentally to redefine every aspect of the work-place forum, including its powers (which could go beyond joint decision-making), agenda items, composition, level of operation, dispute resolution procedures and so on. This, however, would require consensus and voluntary agreement by the parties, and could happen in a process overseen by the CCMA and finally be embodied in a collective agreement. Sometimes this option is referred to as the "contracting out" option and essentially throws up a challenge to the union movement to develop a "model" collective agreement on the type of work-place forum that would be suitable for a given work-place. This would be similar to the recognition agreements that were developed to secure shop steward structures.

On the other hand, if there were no agreement between the parties, then the CCMA should prescribe the statutory models in terms of the LRA . One variation of this statutory model would be in accordance with the features specified in Chapter 5, read with the "Guidelines for Establishing Work-place Forums" contained in Schedule 2.[2] Alternatively, the competencies of work-place forums could be conferred on shop steward structures. This is also a statutory model, referred to as a trade union-based work-place forum.[3]

Even if workers in a particular work-place – whether in a factory, primary health care unit or retail outlet for instance – wanted to establish a work-place forum it would still be essential to determine whether they fall within the scope of the LRA. A cursory glance at the LRA suggests it has universal or global reach into the private and public sector. However, in a strict legal sense this would depend on the definition of "work-place" in the private and public sector.

Within the LRA the definition of work-place applicable to the private sector and public sector (which includes parastatals and quasi-governmental institutions) will be defined by the physical location of where the employees of an employer work. Regarding the public service, the definition of work-place will hinge firstly on consultation between the responsible Minister and the bargaining council for a particular sector in the public service. In the second instance, where there is no sectoral bargaining council, the Minister for the Public Service and Administration will determine this issue after consultation with the Public Service Co-ordinating Bargaining Council.

Another dimension to the scope of Chapter 5 is whether a work-place forum can be constituted to include several operational units. Put differently,

2 S 80(10).
3 S 81.

will the definition of "work-place", as well as the statutory framework of Chapter 5, allow work-place forums to be established within different branches or plants of a company? In terms of the definition of "work-place" this problem is resolved by the following test: in a particular place where employees work, is the operation independent by size, function or organisation? If answered in the affirmative, then separate work-place forums with full competencies could be constituted for the different operational units. In addition, within the statutory framework of Chapter 5, read with Schedule 2, it would be possible to establish a co-ordinating structure for these work-place forums. Finally, regarding scope, work-places with fewer than 100 employees cannot establish a statutory work-place forum. This reflects an attempt by the legislature to promote work-place forums in large enterprises.

Chapter 5 excludes senior managerial employees from the work-place forum. For the purpose of Chapter 5,[4] a senior managerial employee is defined as an employee whose contract of employment or status confers the authority to do any of the following in the work-place: (i) represent the employer in dealings with the work-place forum; or (ii) determine policy and take decisions on behalf of the employer that may be in conflict with the representation of employees in the work-place. Basically, the work-place forum concept envisages an institution that is exclusively composed of workers and which meets with management.

On closer scrutiny, the "worker composition" of work-place forums holds out several possibilities. Within the legislative scheme the composition could be determined by agreement and hence anything is possible. In the second instance an "all comer" model could also prevail, which could be constituted of union and non-union members reflecting the occupational structure and physical location of the enterprise. Also in numerical terms a work-place forum of this type could be composed of five up to a maximum of 20 members. In procedural terms, nominations for candidates for election could be provided by any registered trade union with members employed in the work-place or a petition signed by not less than 20 per cent of the employees in the work-place or 100 employees, whichever number of employees is the smaller.[5] In terms of a trade union based work-place forum it would be in practice composed of shop stewards.[6] Ultimately, the challenge to worker representation on a work-place forum is to ensure that the interests of all workers are represented.

The operations of both statutory and non-statutory work-place forums would be governed by a constitution which, amongst other consensual features, must specify: the procedures and substantive basis for recalling a member of a work-place forum, the procedures for filling vacancies, time off with pay for training and to perform functions, provisions for full time members where there are more than 1000 employees in the work-place

4 S 78(a).
5 S 82(1)(h).
6 S 81(2).

and provision for experts and trade union representatives to attend meetings of the work-place forum.

The training provisions referred to are necessary to contribute to the viability of work-place forums. Although, it can be argued, that workers have experience and knowledge within the division of labour and hence training is not necessary. However, given the structural deprivation under apartheid, which has affected the literacy and numeracy capacity of most people, and the increasing use of new technology (like computers) and automation in production, it does become necessary for training and capacity building to be institutionalised within the work-place forums.

In addition, a work-place forum must have regular meetings with the employer regarding the financial and employment situation of the enterprise. Such a report must also be given annually by the employer to one of the meetings with all employees. The work-place forum must also meet with employees regularly to report on its activities.

Finally, if the constitution of a work-place forum does not contain procedures to conciliate and arbitrate disagreements, then disputes pertaining to consultation may be resolved by industrial action. In terms of joint decision-making disputes are to be resolved through arbitration. Information disclosure disputes must first be conciliated by the CCMA and thereafter resolved through arbitration. If there is a breach of confidentiality the commissioner may order the right to disclosure of information in that work-place to be withdrawn for a period specified in the arbitration award. Any disputes related to the interpretation and application of Chapter 5 would have to be conciliated and arbitrated by the CCMA.

3 SEARCHING FOR ORIGINS – THE POLITICS OF CO-DETERMINIST INDUSTRIAL RELATIONS

During the eighties – the "Wiehahn decade" – although racial dualism within the industrial relations system was abolished in a legal sense, the case law developed by the Industrial Court produced a power disequilibrium by encouraging managerial unilateralism at bargaining impasse,[7] as well as curtailing and weakening the strike weapon.[8] In addition, the bargaining agenda[9] was narrowed, thus limiting the convergence of common interests. In the last instance, through legal regulation[10] – particularly to give legal efficacy to collective agreements – the state abandoned the "outer ring" and became less of a neutral entity. The ideological prism of the Industrial Court – essentially pluralist industrial relations theory – failed to contribute to a labour law project that achieved industrial democracy.

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7 *NUM v East Rand Gold and Uranium Co Ltd* (1991) 12 *ILJ* (A) 1239 A–D.

8 *CSFWU v Aircondi Refrigeration (1990)* 11 *ILJ* 532 (IC) at 547 C where retrenchment, even if informed by an anti-union intent, was allowed by the Industrial Court. Secondly, the LRA of 1956 did not outlaw scab labour and even the countervailing strategem for labour – picketing – was criminalised. In the third instance, employers had recourse to an interdict in terms of s 17(11)(Aa) of the LRA of 1956, when a strike

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Following the election of the first democratic government in April 1994, Tito Mboweni's Ministry of Labour produced a five-year plan which in the main proposed to far-reaching labour law reform. A key element of this plan was the overhaul of the LRA of 1956, the statutory framework that governed collective and individual employment relations during the eighties. To give effect to this policy objective the Cabinet, in July 1994, approved the appointment of a Ministerial Legal Task Team, with the overarching brief to prepare a negotiating document in draft Bill form to initiate a process of public discussion and negotiation by organised labour and business and other interested parties (Department of Labour, 1995b: 1).

After consultation with employer and trade union representatives from the National Manpower Commission (NMC), the Minister of Labour on 8 August 1994 appointed the Ministerial Legal Task Team, under the convenorship of Professor Halton Cheadle, a lawyer long associated with the labour movement.[11] Despite the trappings of political legitimacy enjoyed by the Legal Task Team, oppositional voices were also heard in the mainstream press against the drafting process. Both Brand and Brassey (also an assistant to the Legal Task Team) argued that what the Minister required:

> "was not a drafting committee of lawyers, but a commission of interested parties and expert assessors. In entertaining representations, gathering facts (not least about questions of feasibility) and drawing conclusions, the commissioners would do more than just educate themselves: they would stimulate a debate that would educate others and win for their ultimate proposals a broader measure of acceptance" (Satgar, 1995: 19).

What comes through from the intervention by Brassey and Brand is the assertion that the reform of the LRA was a top-down initiative. The state, notwithstanding its policy intentions and agenda, developed a Bill which set the parameters for debate, negotiation and public comment. In essence, all participatory responses to the Bill were incorporated into a legal framework and agenda set by the state.

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did not conform to section 65 or was prohibited. Finally, the patchwork jurisprudence developed around collective or strike dismissals provided employers with an opportunity to dismiss workers and ultimately weaken the strike weapon.

9 See *SASBO v Standard Bank* 1993 14 *ILJ* 706 (IC), in which a distinction was made between mandatory and permissive bargaining topics.

10 Statutory agreements concluded at industrial council or conciliation board level had to be promulgated by the Minister of Manpower in terms of s 48 of the previous LRA.

11 Comprising the following members: Professor H. Cheadle (Convenor); Mr R Zondo; Ms A Armstrong; Ms D Pillay; Mr A van Niekerk; Professor W le Roux; Professor A Landman (President of the Industrial Court); Mr D van Zyl (State Law Advisor seconded to the team). Assisting the team were advocates M Wallis, SCJ Gauntlett, SC Professor SM Brassey and S Ngcobo, Attorney Ms H Seady, and a researcher, Ms C Cooper. The task team was also assisted by the ILO which provided resources for a 10 day stay at the ILO in Geneva and also provided the Task Team with an opportunity to consult internationally renowned experts within the ILO itself. The task team was also assisted by three experts: Professor B Hepple, Master of Clare College, Cambridge; Professor A Adiogun, University of Lagos, Nigeria; and Professor Manfred Weiss, JW Goethe, University, Frankfurt, Germany.

For Chapter 5 this has serious implications given that, ostensibly, the co-operative thrust of statutory work-place forums could integrate the labour movement into the formalism of a legislated industrial relations system. This is so, because, unlike other countries (Germany, Sweden and Italy) where the co-determination channel is separated from collective bargaining, the LRA failed to provide legislated centralised bargaining across all sectors, while at the same time, it has provided an inherent duty to bargain over co-determination issues which is likely to blur the dividing lines between bargaining and co-determination.[12]

In addition, according to Munck, schemes promoting worker participation in other parts of the Third World, in particular Benin, Madagascar, Congo, Algeria and Tanzania, have been undergirded by a co-optive intent on the part of capital and the state. More explicitly, Munck concludes:

> "in the post-colonial situation the state became the main agent of economic development and the organiser of "human resources". It is in this context that the state promoted a particular variant of workers' participation ... within quite specified limits while retaining full political power in its own hands (Munck, 1988:150)".

This prompts the obvious question: is the co-determinist thrust of work-place forums an imposition by the emergent national democratic state, in South Africa, to stabilise industrial relations and co-opt the labour movement? To answer this question there is a need to probe the drafting and negotiations process related to Chapter 5.

3.1 The drafting process

The mystery surrounding the origins and motivations for Chapter 5 begins with the mandating brief, or letter of appointment, of the legal drafting team. On close scrutiny of this document, it is apparent work-place forums and co-determination are not explicitly mentioned. Except, the brief does make mention of the Reconstruction and Development Programme (RDP). It states that the draft negotiating Bill would "have to give effect to government policy as reflected in the RDP". Unpacking this reveals that the RDP chapter on labour and worker rights does propose worker empowerment. It even goes so far as to assert that legislation must facilitate "worker participation and decision-making in the world of work".

Thus, it would seem the origin of Chapter 5 is indisputable and given that it originates from the RDP, it can be argued, COSATU's input into the development of the RDP as a tripartite alliance programme refutes any claim that Chapter 5 of the LRA was imposed by the government or the Minister of Labour,[13] on the labour movement. However, it is essential to

12 In the end though, watching for this danger is not new to the labour and shopfloor tradition in South Africa and was apparent in the opposition displayed by unions to works and liaison committees.

13 According to Cheadle, it was Minister Mboweni who stressed the imperative of crafting a worker participation institution into the LRA. Interview, February 1997.

recognise that the main thrust of the RDP was and is the promotion of work-place democratisation and stemming from this is the possibility of negotiating work-place and industrial restructuring. This is very apparent in the RDP White Paper which asserts that:

> "Industrial democracy will facilitate greater worker participation and decision-making in the work-place. 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".[14]

On the other hand, Chapter 5 was essentially drafted to promote South Africa's re-entry into international markets and the realisation of a more open economy (Department of Labour, 1995c: 35). In the Explanatory Memorandum which accompanied the original draft bill this is stated most explicitly as follows:

> "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 (Ministry of Labour," 1995b: 135)".

Put differently, the main policy rationale underlying the drafting of Chapter 5 was the provision of a labour market institution that would promote industrial restructuring and, ultimately a new global competitiveness drive towards export-led industrialisation. Thus the drafters' research – the study of South African best practice, overseas visits by the drafting team, and advice obtained from international experts – was informed by this policy thrust.[15] In the words of Amanda Armstrong, a member of the team, "when we looked at other countries the more successful way of restructuring entailed co-determination rather than adversarial relations and hence the main model for us was Germany".[16]

Although the drafting of Chapter 5 in the negotiating Bill was constrained by the possible impact of the negotiations and largely informed by comparative experience, the drafting team developed a conception of co-determination that was uniquely South African. Thus in methodological terms, although the German[17] model of works councils, was used effectively to bring about industrial restructuring, the drafters did not transplant it into the South African context. At the same time there was no firm and clear intention to develop work-place forums as institutions that could fundamentally democratise the division of labour in South Africa and ultimately ensure that worker empowerment translates into worker control. In this sense, statutory co-determination (even with a union trigger)

14 Para 3 11 4.

15 Amanda Armstrong and Helen Seady, interview, September 1996. Also see Andre Van Niekerk, interview, October 1996.

16 Armstrong and Seady, interview.

17 See Wolfgang Streeck "Successful Adjustment to Turbulent Markets: the German Automobile Industry in the 1970s and 1980s" in *Social Institutions and Economic Performance – Studies of Industrial Relations in Advanced Capitalist Economies* 1992 169–196.

within the draft Bill represented an attempt by the government to allow unions and workers to participate in managerial decision-making to ensure stability and "industrial peace" in the course of allowing the state to engineer the restructuring of the South African economy through "free market" reforms and liberalisation.[18]

Hence, it can be argued that the legal drafting team blindly and uncritically imbibed the discourse of globalisation and its "free market" policy prescriptions. However, the shift in public policy, in particular towards "free market" export led industrial development, has its origins in the retreat (Zita, 1997) of left intellectuals, particularly of the 1973 generation, who were associated with the labour movement and the Industrial Strategy Project.[19]

Significantly, this policy thrust and agenda does not provide a basis for establishing work-place forums in the public service, and hence could partially explain why this area of the draft negotiating Bill was not developed. The most that could have been read into the Bill was that its scope permitted work-place forums to be established in the public service. Cheadle explains this as follows:

> "A task team was established to look at industrial relations issues in the public service, unfortunately when the drafting was completed the public service task team had not completed its work (interview, Cheadle: February 1997)".

3.2 Negotiations in NEDLAC

On 2 February 1995, the negotiating document in draft Bill form was presented at NEDLAC's Labour Market Chamber for consideration by government, labour and business. Negotiations commenced on 4 May 1995 and continued intermittently over three months. At the outset, main areas and issues of contention were isolated and prioritised for negotiations. One of these was Chapter 5.

Government in its opening comments on Chapter 5 stressed its commitment to redesigning labour relations in South Africa to meet the challenges of this society. Alternatively expressed, the government stressed, "economic growth can only be attained through a major restructuring process". In this regard it explicitly stated it remained "committed to the overall approach contained in the Bill, namely a statutory framework for the introduction of co-determination in the work-place". In addition government highlighted four areas it believed required more consideration. These included:

- the proposal that a work-place forum can only, in terms of the Bill, be "triggered" by a representative trade union;

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18 This is apparent from the policy thrust emanating from the government's macro-economic policy framework, known as GEAR. As a macro-economic policy GEAR has all the hallmarks of a homegrown Stabilisation and Structural Adjustment Programme.

19 Avril Joffe, David Kaplan, Raphael Kaplinsky and David Lewis *Improving Manufacturing Performance in South Africa - The Report of the Industrial Strategy Project* International Development Centre (1995).

- the provision that neither management nor the trade union may disband a work-place forum once it is established;
- the proposal that the model is employee-based, as opposed to being trade union based;
- those issues which are appropriate for consultation, and those issues which are appropriate for joint decision-making (Department of Labour, 1995c: 6-8).

According to Wendy Dobson, the NEDLAC Labour Market Chamber convenor, the initial response from both labour and business was laced with caution (interview, Wendy Dobson). Labour initially asserted its demand for a union-based work-place forum. Underlying this was an argument that work-place forums, as conceived in the draft Bill, could undermine unions and established shop steward structures. In addition labour argued for a provision that would enable the dissolution of work-place forums (the draft Bill provided, that once established, work-place forums could not be disbanded: the so-called "Catholic marriage"). In the main, business initially argued against the union trigger and for the law to also allow employer-initiated work-place forums to be established.

Subsequently, the negotiations deadlocked with regard to work-place forums. The main issues of contention were the union trigger, the agenda items for consultation and joint decision-making, the information disclosure provisions and the relationship between work-place forums and collective bargaining (*ibid*). At this point business proposed dropping Chapter 5 from the LRA. Dobson's perspective on this impasse suggests it was government that kept work-place forums on the negotiating agenda and introduced redrafts of Chapter 5 to facilitate the search for a middle ground and further negotiation. In her words, "it was their baby and they did not want it to die".

Nevertheless, with all the controversy around detail and the mechanics of Chapter 5, neither labour nor business engaged the policy reasons for establishing work-place forums. No questions were posed nor was debate initiated on democratisation of the work-place or even the "globalisation challenge" of industrial restructuring. In addition it seems unclear to what extent the multi-volume report on public submissions on the draft Bill was used by the negotiating parties. Furthermore, provisions for work-place forums in the public service were not seriously considered. Although there was recognition of the different setting within the public service, there was not much debate on the topic and the most that emerged form the negotiations were procedural provisions that could guide the initiation and establishment of work-place forums in the public service at a later date.[20]

After negotiating the Labour Relations Bill, Chapter 5 in particular, had a slightly different architecture and approach to work-place forums. From promoting statutory co-determination and in a sense having a tilt toward juridification[21] or state regulation in the draft Bill, the negotiations

20 S 80(12) and s 82(4).

21 This is notwithstanding the provision for a union trigger.

produced a regulatory framework that went beyond a state-driven model of work-place forum. Essentially the balance between voluntarism and legal regulation that was developed not only accommodates labour's trade union-centred model within the statutory framework, but allows for "contracting out" whereby the parties themselves can define the type of work-place forum they want.

In short, statutory co-determination is just one thrust and impulse within Chapter 5 and, ultimately, work-place forums in terms of the LRA of 1995 cannot be construed as a state-imposed institution merely intended to co-opt labour.

4 BEYOND CO-DETERMINATION – CHALLENGES FOR WORKER CONTROL TO ADVANCE TRANSFORMATION FROM BELOW

With the collapse of authoritarian and centrally planned Soviet socialism in 1989, most labour movements, in particular those on the periphery of the new "global village" and aspiring to radically transform their societies, are now on the retreat. Western ideologues like Francis Fukuyama have proclaimed the triumph of capitalism and ultimately, the market. This articulation has attempted to reclaim history within a new hegemonic teleology which recasts and conflates democracy to the market (Amin, 1995: 38-42). It has also gone further to assert multi-party competition within a liberal pluralist order as a dominant ideological construct, masquerading as a "common sense" view of democracy and the climax of Western political thought.

However, for industrial relations theory (particularly pluralist theory) and labour law in South Africa, the political analogy of liberal democracy to industrial democracy has been established for a long time (Rycroft & Jordaan 1992: 119-125 and Satgar, 1996). As mentioned above, the work-place, seen through the lens of liberal pluralist political theory and legal ideology, not only masked "hierarchy and domination", but portrayed the work-place as a micro-level democratic order with contending interests of workers and employers mediated by the reach of legal rules encapsulated in the employment contract and subsequently, also by collective labour law (Du Toit, 1994: 167). The state, through the juridifying edifice of labour law and pluralist legal ideology, was also endowed with a neutrality and pre-eminence to maintain a power equilibrium in the adverserial struggle between workers and employers.

In South Africa today, the new LRA, and mainly Chapter 5 on work-place forums, departs from the pluralist collective bargaining power equilibrium model by also attempting to institutionalise a power equilibrium – but within a co-determinatist framework that allows hierarchy to be maintained through the inclusion of workers directly within the managerial realm. Therefore neo-pluralism, if one were to describe the statutory co-determination paradigm of the new LRA in these terms, is a power-sharing industrial relations framework. It does not confront the rationality of hierarchy in transformative terms and hence does not allow for an expansion of the frontiers of worker control.

Now, although worker control is a self explanatory industrial relations term, it is important to clarify it's wider political meaning, at this point, to fully grasp the "politics of labour law" For Munck:

> "workers control is thus essentially a slogan in a political strategy which advocates a gradual role by workers in contesting management's "right to manage". Some of its forms may seem similar to co-management but it aims ultimately at workers self management and thus seeks to avoid integration within the industrial relations machinery" (Munck, 1988:151).

Simply, worker control is a policy means, from below, to dislodge and supplant managerial prerogative in such a way that workers are collectively responsible for running and managing their work-places. The transformative implications of this conception of worker control, for industrial relations theory and labour law reform, are profound and posit at least two challenges *vis-à-vis* the statutory co-detemination thrust that are deeply embedded in Chapter 5. In the first instance, the ideological and political boundaries that surround the statutory conception of co-determination have to be dismantled through critical engagement. This is not an exercise in "verbal militancy" nor an attempt to dismiss co-determination. Instead, it is a realisation that co-determination is not the same as democratisation but is rather a determined form of hegemonic struggle.

Unpacking the notion of democratisation, will further clarify this point. As part of transformative discourse, whether having a resonance in the Reconstruction and Development Program as "people-driven delivery " or "democratisation of the state", the word "democratisation" is imbued with an essentialist notion of ongoing societal change, laden with a host of transformative possibilities. In terms of the "politics of labour law" it allows for a political subject, like trade unions, to transform power and ownership relations within the work-place in such a way that industrial relations theory and labour law reform is substantively radicalised. In other words, the "employer" and "employee" relationship is transcended while at the same time ensuring that work-place and community relations and work-place and state relations are transformed. This means co-determination, in the context of democratisation, is one of many institutional expressions of worker power over management that ensures the substance of the employment relationship is no longer unilaterally determined by employers.

The second challenge posed to statutory co-determination by a policy of worker control, is locating it within a spectrum of transformative possibilities that exist in the course of work-place democratisation. At one end of the spectrum are "soft options" including green areas and quality circles, as part of World Class Management; control over grievance procedures and hours of work and other basic shopfloor issues and processes. Alongside this, and moving into the opposite end of the spectrum where the power of employers is increasingly curtailed, are consultation, negotiations and co-determination (either through worker directors or joint decision-making through statutory work-place forums) which are all likely tranformative possibilities (Anstey, 1990: 6). But worker control also contemplates a horizon for democratisation beyond co-determination to include the

possibility of autonomous worker self management being realised, simultaneously wherever possible.

In the main, though, numerous challenges stand in the way of realising autonomous worker self management,[22] the ultimate goal of worker control.

> Increasingly the intervention capacity, reach and developmental role of the state is coming under attack within neo-liberal globalisation discourse. The neo-liberal prescriptions and proclamations of globalisation envisage a limited or minimalist state, which merely facilitates the trans-nationalisation and global mobility of capital. But, when the "death of the state" proposition is questioned or the notion of rolling back the state, it is apparent that it is only a change in regulatory regime that is proposed (Patnaik, 1995: 199-200).

Thus, to ensure that the new democratic state in South Africa is not trapped within a neo-liberal ideological conception, workers have to recognise the state as a site of contestation. Essentially, workers have to engage the state to ensure that in its response to globalisation, it provides the necessary regulations, policy support and institutions to sustain and promote autonomous worker self management. For instance, training institutions like Ditsela would have to be re-oriented to ensure that they empower workers beyond the ABC's of the LRA but also provide them with the relevant skills to manage enterprises. Also, the financial system would have to be regulated to ensure the necessary financial support and viability of worker run and owned enterprises is achieved.[23]

Achieving autonomous self management in a factory or public sector unit could amount to an island of work-place democratisation unless the trade union movement, when embracing a transformative strategy of unionism, advances in concert. In other words, a policy for worker control and ultimately autonomous worker self management has to be part of an ongoing process, driven by a united labour movement. The recent COSATU Congress took a first step in this direction when it rejected co-determination as the sole thrust towards advancing worker control. Instead COSATU opted for a transformative resolution which sets as a challenge the realisation of "new socialist forms of work organisation and management which advance worker control." At the same time , advancing autonomous self management as a united labour movement enables international experience to be drawn on most effectively. For instance, the Corporate Plan developed by British shop stewards at Lucas Aero Space (Wainwright, 1994: 162-163) to ensure worker management and control or the take over and renewal of Kamani Tubes (Srinivas, 1993) in India by workers or the experiment by a women's movement in Sweden[24] which self-managed a school, can be closely studied and experimented with as part of the worker control movement to achieve a democratised economy.

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22 The challenges confronting autonomous worker self management also pertain to the realisation of co-determination, in some respects.

23 Relevant in this regard is the policy framework governing worker pension and provident funds. It might be necessary for the Finance Ministry to play a more active role in structuring worker buy outs with this money.

24 Wainwright H *op cit* at 115–143.

Clearly, democratisation envisages work-place change that ultimately transforms the division of labour. This recognises capitalist forms of work-place organisation and methods of production, whether Taylorist or Fordist in terms of the detailed division of labour for mass production or for "flexible specialisation," are not consistent with worker control and the de-alienation of work. In fact, most of the technological innovation within these methods of production have undermined worker control and have enhanced the dominance of capital. Within the context of Third World industrialisation this is complicated by the uneven diffusion of technology and methods of production (Bayat, 1991: 184-186, 202-207).

Hence, the challenge for worker control and, in the main, for autonomous self management is to define a new concept of work. This should not reject technology but should rather recognise technological development and innovation are neither neutral nor a natural development intrinsic to economies. Actually, employers and states have played a conscious role in developing technologies. However, if technology is to be democratised and transformed through worker control, then workers have to take the planning and design of technology seriously, with a view to meeting social needs. At the same time, fundamentally changing decision-making so that the intellectual and manual divide between workers is overcome is essential. Ultimately, labour power has to be liberated from the law of value so it is no longer merely a factor or input into production for profit maximisation but is instead an outcome of socialised production.

However, what does this mean for Chapter 5 and work-place forums? Alternatively expressed, can work-place forums become organs of worker control that advance autonomous worker self management ? Essentially, these questions enable a departure from theory into the realm of the practical in an attempt to define work-place forums as a worker control model.

5 WORK-PLACE FORUMS AS A WORKER CONTROL MODEL: CO-DETERMINATION AND AUTONOMOUS SELF MANAGEMENT

The emergence of a new democratisation institution in the work-place is bound to be embroiled in struggle. Employers are definitely going to resist inroads into managerial prerogative. Besides trying to thwart these initiatives, concerted attempts would be made to institutionalise work-place forums within a co-optive framework. Without a clear perspective on what should be achieved by the union movement this could end in disaster, with flawed institutions that are controlled by employers.

With Chapter 5 of the LRA trying to strike a balance between legal regulation and voluntarism, several models could emerge. The first is a statutory model with two variations, developed as follows:

- through prescription, if the parties fail to reach a "voluntarist" agreement which requires the CCMA to establish and define a work-place forum in terms of Chapter 5 read together with the Guidelines For Establishing Work-place Forums contained in Schedule 2; or

- through the statutory provisions for trade union-based work-place forums, which would allow the competencies of work-place forums to be conferred on shop steward structures.

According to Halton Cheadle, "first prize should be a thousand voluntary work-place forums rather than statutory forums" (interview, Cheadle). This is the second model that is permitted by the LRA which allows for collective agreements outside the statutory framework. It is this model that holds out the prospect of going beyond legislated co-determination and ultimately subverting the rationality of hierarchical management in both the private and public sector. Essentially, it would allow parties to define a work-place forum that is trade union-centred, but which allows for autonomous self-management.

In practice autonomous worker self management can broadly have two voluntarist variations. The first is a completely autonomous self-management work-place forum, which would allow skilled and unskilled workers to run an enterprise, public service unit or co-operative.

For example, in the public service an autonomously self-managed work-place forum can be established in a school. This would bring together skilled and unskilled workers into the managerial realm of the school. Besides this collective forum deciding on work schedules and education policy issues relevant to the school, it could also work out accountable, transparent and participatory ways of managing the administration of the school. Similarly, in a primary health care unit or even a police station, workers can self-manage their work.

Basically, the devolution of managerial power in the public sector holds out the prospect to transcend individual centred and authoritarian forms of management. To achieve this an "Autonomous Self Management Work-place Agreement", for instance, can be negotiated in the public service co-ordinating bargaining council, which would not only delineate and separate collective bargaining from autonomous self-management, but would also contribute to identifying those base institutions – like schools and primary health care units – of the public service that can establish autonomous self management work-place forums.

Another variation of an autonomous self management work-place forum is one which not only allows for co-determination over certain issues but at the same time also has an autonomous self management competency and agenda for workers. For example, in a parastatal or large conglomerate, like Anglo American Corporation, an autonomous self management work-place forum can be agreed to which could exist alongside the board and have the following competencies as information disclosure, consultation, joint decision-making and autonomous self management. In terms of the agenda there could be – at least in the short term – co-determination on investment decisions, production planning, work reorganisation and technology use but autonomous self-management on affirmative action policy, training and health and safety issues. The challenge of this variation of autonomous self-management is to struggle to achieve a full and complete self-management agenda that eventually transcends the co-determination competency. This would become likely if workers also address the ownership dimension of the enterprise.

6 CONCLUSION

It would seem that the future of work-place forums, within the industrial relations and labour law system in South Africa, has still to be decided by debate, policy reflection and serious strategic decision-making. Although spawned through policy provided for in the Reconstruction and Development Program, a point often missed in labour movement ranks, the regulatory framework and institutional make up of work-place forums has been fundamentally shaped by the negotiations on the LRA of 1995, in the National Economic Development and Labour Council (NEDLAC). Although the outcome of these negotiations does not provide a comprehensive legal framework for work-place forums in the public sector, the statutory provisions do allow for private sector forums that could be trade union centred (that is, accommodating shop steward structures) or composed in terms of Schedule 2 of the LRA.

However, if the labour movement in South Africa were to engage purposively with the opportunities that work-place forums hold out for democratisation of the employment relationship, worker control is bound to extend its frontiers into a radical zone. In this regard "contracting out" of the LRA could enable unions to transcend the limits of statutory co-determination and, ultimately, attempt autonomous worker self management.

There are no guarantees of success either with co-determination or autonomous worker self management. Nonetheless, experiments, initiative and creative innovation by workers is required now and over time. It is the knowledge and experience gained from this that would allow workers to deal with neo-liberal restructuring and most importantly, contribute to redefining legal ideology and industrial relations theory through transformative practice.

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