

# THE RIGHT OF REVOLUTION: BLACK TRADE UNIONS, WORKPLACE FORUMS, AND THE STRUGGLE FOR DEMOCRACY IN SOUTH AFRICA

C. Matthew Smith\*

We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed.

Martin Luther King, Jr.<sup>1</sup>

## I. INTRODUCTION

In many ways, the story of labor relations in South Africa has run lockstep with the story of apartheid.<sup>2</sup> The earliest of its labor laws were enacted for the benefit of white laborers only—and worked to the detriment of black laborers.<sup>3</sup> The Mines and Works Act of 1911, for example, established quotas for black and white workers<sup>4</sup> and reserved certain better paying jobs in the mines for whites only.<sup>5</sup>

That would only be the beginning. The Industrial Conciliation Act of 1924 followed the bloody Rand Revolt,<sup>6</sup> a three-month strike to protest the lowering

---

\* J.D. 2000, University of Georgia.

<sup>1</sup> MARTIN LUTHER KING, JR., LETTER FROM THE BIRMINGHAM CITY JAIL 8 (Harper Collins 1994) (1963).

<sup>2</sup> See Stephen H. Jacobson, Comment, *Collective Bargaining in Undemocratic Regimes: Francoist Spain and Contemporary South Africa*, 12 COMP. LAB. L.J. 214, 225 (1991); Karon M. Coleman, Comment, *South Africa: The Unfair Labor Practice and the Industrial Court*, 12 COMP. LAB. L.J. 178, 178 (1991); Bob Hepple, *Trade Unions and Democracy in Transitional Societies: Reflections on Russia and South Africa*, in HUMAN RIGHTS AND LABOR LAW: ESSAYS FOR PAUL O'HIGGINS 56, 56 (K.D. Ewing et al. eds., 1994); Mark Mitchell & Dave Russell, *Black Unions and Political Change in South Africa*, in CAN SOUTH AFRICA SURVIVE?: FIVE MINUTES TO MIDNIGHT 231, 231 (John D. Brewer ed., 1989); William B. Gould, *Black Unions in South Africa: Labor Law Reform and Apartheid*, 17 STAN. J. INT'L L. 99, 99 (1981); Paul Lansing, *South African Changes in Industrial Relations Law: First Crack in Apartheid?*, 3 COMP. LAB. L. 291, 291 (1979).

<sup>3</sup> See Jacobson, *supra* note 2, at 225.

<sup>4</sup> See *id.* at 225-26.

<sup>5</sup> See Coleman, *supra* note 2, at 182; Lansing, *supra* note 2, at 294-95. Such job reservation tactics were implemented again in the Bantu Building Workers Act of 1951, which prohibited blacks from taking "skilled" construction jobs in white urban areas. See Lansing, *supra* note 2, at 295.

<sup>6</sup> See Lansing, *supra* note 2, at 292.

of wages and the granting of more semi-skilled jobs to Africans.<sup>7</sup> The national government was so threatened by the strike that it called in military planes and infantry. By the end, one report estimated that 153 people were dead and 534 injured.<sup>8</sup> Another scholar estimated that there were 247 dead and 591 injured.<sup>9</sup>

The act aimed to prevent any similar worker unrest by allowing employees to bargain collectively with their employers through registered trade unions. Such bargaining occurred in one of two forums: voluntarily formed industrial councils, consisting of equal numbers of union and employer representatives or temporary conciliation boards, constructed by the Ministry of Manpower when the disputing parties had not formed a council of their own.<sup>10</sup>

Nevertheless, the act excluded black workers from the term "employee," thereby protecting collective bargaining rights for whites only.<sup>11</sup> Thus, any black unions that might form could not avail themselves of the dispute resolution mechanisms provided for in the act.

Nor did the rewriting of the act in 1956 (later renamed the Labour Relations Act of 1956) provide any real relief from these strictures. Black unions still could not register independently with the government and thereby receive legal sanction for collective bargaining activities.<sup>12</sup> Moreover, while racially parallel unions (in which black and white branches existed side by side) were permitted, the white and black branches remained separate. Mixed meetings were prohibited, and the white branch bargained for the agreement that would set the rights for both groups of workers in the workplace.<sup>13</sup>

Even the Black Labour Relations Regulation Act of 1953 effectively did nothing to alter the prevailing apartheid-driven system. It established a separate bargaining arena for blacks in which liaison and worker committees brought issues to the attention of the employers.<sup>14</sup> Such committees, however, generally addressed minor issues and often suffered from the obvious ineffectiveness of the means permitted<sup>15</sup> as well as from disuse.<sup>16</sup>

---

<sup>7</sup> *See id.*

<sup>8</sup> *See id.* at 292 n.6.

<sup>9</sup> *See Coleman, supra* note 2, at 182 n.28.

<sup>10</sup> *See id.* at 182-83; Lansing, *supra* note 2, at 293.

<sup>11</sup> *See Jacobson, supra* note 2, at 226; Lansing, *supra* note 2, at 293.

<sup>12</sup> *See Jacobson, supra* note 2, at 226.

<sup>13</sup> This "parallel" system would persist well into the 1970s with certain fluctuations in the frequency of its implementation. *See id.*

<sup>14</sup> *See Coleman, supra* note 2, at 184.

<sup>15</sup> *See Lansing, supra* note 2, at 294 (noting that a later form of this act, the Bantu Labour Relations Regulations Amendment Act of 1973, explicitly stated that any agreements reached between a work committee and an employer would not be legally binding upon the employer).

<sup>16</sup> *See id.*

South African lawmakers, however, failed to take proper account of the sheer mass of disenfranchised black workers in South Africa. Once those workers recognized the collective political power they possessed, they began to oppose the prevailing system through large and very sophisticated trade unions. Under such conditions, it was inevitable that the laws would give way. But the trade unions' impact may not be limited simply to South Africa's labor laws. Indeed, these organized and highly democratic groups may have helped to make possible the tumbling of apartheid in South Africa altogether.

Part I of this Note will recount the historical role of black trade unions in the inner turmoil of the apartheid era and in that hegemony's eventual demise. Part II will examine the most significant innovation of South Africa's Labour Relations Act of 1995, the workplace forum, in the wake of the nation's reformation. Further, this paper will explore ways in which this innovation does or does not fulfill the promise of democracy, both within the workplace and the nation as a whole, for which so many fought during the apartheid struggle.

## II. THE FIRST STEPS

### A. Humble Beginnings

A number of scholars credit black trade unions with mobilizing the populace against the entire political system of apartheid.<sup>17</sup> This idea is not that surprising when one considers the role labor laws played in crippling the power and the will of black South Africans to oppose the state. Fighting against the economic stranglehold of the government on black workers inevitably meant fighting against the discriminatory political spirit behind those laws. Both practically and symbolically, the labor laws of South Africa embodied political inequality.<sup>18</sup>

---

<sup>17</sup> See, e.g., Darcy du Toit, *Corporatism and Collective Bargaining in a Democratic South Africa*, 16 INDUS. L.J. 785, 785-86 (1995); Hepple, *supra* note 2, at 56 ("In South Africa . . . the grassroots strength of the union movement provides a spear for the development of a participative democracy and a potential shield against political repression by a new elite."). For a more cautious critique of the strengths and weaknesses of the black unions as policy shapers, see generally Mitchell & Russell, *supra* note 2.

<sup>18</sup> See Mitchell & Russell, *supra* note 2, at 238 ("Of course, it was always totally unrealistic to imagine that the black unions would ever abstain from politics when the South African state itself interferes and intrudes into every aspect of the working lives of black workers.").

In the 1950s, South Africa experienced a new "wave of African militancy."<sup>19</sup> The momentum of this movement "was drawn partly from the shop floor," with the amount of labor disputes and striking workers doubling over the numbers of only a few years earlier.<sup>20</sup> At the same time, black unions also began involving themselves in the political process.<sup>21</sup> For example, rumors abounded that the South African Congress of Trade Unions (SACTU), a large multi-union cooperative, was somehow connected with the South African Communist Party.<sup>22</sup> One of the earliest confirmed alliances between labor and politics was that between SACTU and the African National Congress (ANC), the predominant political party of the black population of South Africa.<sup>23</sup> Similar coalitions continue to exist today, perhaps the most important being the alliance between the Congress of South African Trade Unions (COSATU) and the ANC.<sup>24</sup>

Scholars, however, point out that the black trade unions of the 1950s and 1960s, despite newfound militancy and political alliances, largely failed to affect national policies because of their "top-down" structure.<sup>25</sup> The unions' emphasis on enlistment of large numbers of workers for the purpose of amassing popular clout made them vulnerable to governmental opposition. By simply imprisoning a small number of key organizers and officials, the state could render a sizeable union an ineffective mass.<sup>26</sup>

---

<sup>19</sup> Deborah Posel, 'Providing for the Legitimate Labour Requirements of Employers': *Secondary Industry, Commerce and the State in South Africa During the 1950s and Early 1960s*, in ORGANISATION AND ECONOMIC CHANGE 199, 213 (Alan Mabin ed., 1989).

<sup>20</sup> *Id.*

<sup>21</sup> Two distinct philosophies emerged in black unions. The "workerist" unions refused to focus their attention outside of the workplace and workplace disputes. "Populist" unions, on the other hand, recognized their grassroots political power and sought both to utilize it through political strikes and to maximize it through coalitions with political parties. Moreover, some of the traditionally workerist unions have adopted more populist approaches over time. See Jacobson, *supra* note 2, at 231-32. In the remainder of this Note, unless otherwise indicated, references to black unions will include only those operating under a populist philosophy.

<sup>22</sup> See MERLE LIPTON, CAPITALISM AND APARTHEID: SOUTH AFRICA, 1910-1984 173 (1985).

<sup>23</sup> The African National Congress effectively took power over South Africa in recent years with the election of its president, Nelson Mandela. See *The Triumph of Moderation*, ECONOMIST, May 7, 1994, at 43.

<sup>24</sup> This coalition in recent years has received credit from many (and repudiation from many others) as the prime influence behind numerous ostensibly pro-labor laws, including the new Basic Conditions of Employment Act of 1996. See Sven Lunsche, *Job Figures Show Up ANC's Poor Track Record*, BUS. TIMES (South Africa), Nov. 9, 1997, available in LEXIS-NEXIS, World Library, TMLBLT file.

<sup>25</sup> See Mitchell & Russell, *supra* note 2, at 233.

<sup>26</sup> See *id.* at 233.

The government, recognizing this considerable chink in black labor's armor, took full advantage. The aftermath of the Sharpsville massacre of 1960 illustrates the point well. After a political demonstration in Sharpsville was violently ended when the South African police shot some sixty-seven African participants,<sup>27</sup> the government effectively shut down the black trade union movement through the arrests of key union leaders.<sup>28</sup> Indeed, the South African government was so successful that the "onslaught on African unionisation" in the 1950s and 1960s was one factor leading to "an abundant supply of cheap African labor."<sup>29</sup>

Similarly, strikes in Durban in 1973 and the Soweto uprising of 1976 resulted in arrests of and banning orders against key union players. This state retaliation threatened once again to put an end to black trade unionism.<sup>30</sup>

The government attempted to use parallel unions such as those discussed above to fill the voids that such crack-downs left.<sup>31</sup> Such measures apparently had a placebo effect in the 1960s. Indeed, in no year during that decade did the total number of striking black workers exceed two thousand.<sup>32</sup>

The dormancy ended, however, in 1973. Angered by the period of "excessive" privilege that whites enjoyed in the 1950s and 1960s, African laborers had had enough.<sup>33</sup> There was an "explosion of strike activity."<sup>34</sup> Moreover, an entirely new kind of union structure emerged that could not so easily be toppled, along with a "union militancy" that lent unprecedented momentum to the movement.<sup>35</sup>

South Africa felt the effects of this new era almost immediately. An estimated 100,000 black workers were striking in that first year alone.<sup>36</sup> Moreover, the white establishment's reactions in 1973 and 1976, while managing to bring about a suspension of activity,<sup>37</sup> fell far short of halting the

---

<sup>27</sup> See T. C. Moll, "Probably the Best Laager in the World": *The Record and Prospects of South African Economy*, in CAN SOUTH AFRICA SURVIVE?, *supra* note 2, at 136, 136.

<sup>28</sup> See Mitchell & Russell, *supra* note 2, at 232; Hepple, *supra* note 2, at 67.

<sup>29</sup> Posel, *supra* note 19, at 199.

<sup>30</sup> See Mitchell & Russell, *supra* note 2, at 233.

<sup>31</sup> See *id.* at 232.

<sup>32</sup> See *id.*

<sup>33</sup> See PATRICK BOND, *COMMANDING HEIGHTS & COMMUNITY CONTROL: NEW ECONOMICS FOR A NEW SOUTH AFRICA* 30 (1991).

<sup>34</sup> *Id.*

<sup>35</sup> See Mitchell & Russell, *supra* note 2, at 232.

<sup>36</sup> See *id.*

<sup>37</sup> In addition to the arrests of key union officials, the government attempted to erect a "committee system" for African workers as an alternative to trade unions. There were two kinds of committees implemented. In the first, members of the committee were wholly elected by

movement of black unionism altogether. Indeed, the 1980s would see black strikers in numbers never seen before.<sup>38</sup> What is more, the new strategy proved far more effective. Wage increases in the 1970s and 1980s resulted from the increasing clout of black trade unions.<sup>39</sup>

The endurance of these newer generation unions, according to some critics, came from their emphasis on involving the rank-and-file workers in making decisions.<sup>40</sup> This democratization had the practical effect of producing "deeper organisational roots," making these unions harder to topple than their top-heavy predecessors.<sup>41</sup> No longer could the arrest or banning of a few principals render a union helpless. The remainder of the union, which also was involved in every aspect of the union's decisions and direction, could carry on without them.

The more democratic union's political significance, however, was not limited simply to labor disputes. For the first time ever, large numbers of Africans found a mouthpiece for their grievances with not only their respective employment situations but also with apartheid as a whole.<sup>42</sup> Direct voice in the political process through involvement in political parties had been taken away from them by the Prohibition of Political Interference Act of 1968.<sup>43</sup> Thus, they naturally turned to the one mechanism that allowed them to air their anger.<sup>44</sup>

---

workers. In the other, the committee body was partly appointed by management and partly elected. Approximately half a million African workers were employed in workplaces featuring this system within a few years after the system was created. See LIPTON, *supra* note 22, at 67-68. In addition to the government's own efforts, large white trade unions also attempted to quell this black labor surge. TUSCA, a large and influential white trade union federation, began organizing black workers in the mid-1970s. However, vocal black unions accused TUSCA of targeting only shops where black workers had become "active" and then quelling this activity "by setting up 'tame' parallel unions." *Id.* at 204.

<sup>38</sup> See *id.*; Mitchell & Russell, *supra* note 2, at 232. In 1987, lost man-days due to strikes reached an astonishing nine million. See Marcia Klein, *Signs of Frustration in Strike Action*, BUS. TIMES (South Africa), Aug. 2, 1998, at Appointments 1, available in LEXIS-NEXIS, World Library, TMLBT File.

<sup>39</sup> See BOND, *supra* note 33, at 31.

<sup>40</sup> See Mitchell & Russell, *supra* note 2, at 233.

<sup>41</sup> See *id.* at 233, 244.

<sup>42</sup> See Hepple, *supra* note 2, at 69 (asserting that "the union movement was the only legitimate organization of the voteless majority of South Africans" until after de Klerk's pronouncement in February 1990 effectively ending apartheid).

<sup>43</sup> See Lansing, *supra* note 2, at 301.

<sup>44</sup> See LIPTON, *supra* note 22, at 173 (noting the widely-held contemporary belief that "until acceptable political institutions emerged, black frustration and anger were likely to spill over into the workplace").

The populist notion that unions should respond to all needs within the African communities took center stage as unions began making their presence felt in political as well as workplace disputes. When the government attempted to raise township rents and public transport fares, the unions protested by organizing rent strikes and bus boycotts within African communities.<sup>45</sup> Indeed, these concerted efforts may serve to best illustrate the intersection between labor and politics in South Africa. The laws implemented to further oppress the African population as a whole had a direct effect upon laborers and forced unions to operate outside the shop on their members' behalf.<sup>46</sup> Further, laws aimed at destroying the black union movement naturally would have a direct effect upon a large segment of the population.<sup>47</sup>

Moreover, when unions stepped outside the plant to battle more general apartheid laws, whatever victories they enjoyed benefitted not only their workers but also those, such as the growing mass of unemployed Africans, who for whatever reason had not managed to organize themselves. Populist unions knew that this division between the employed and unemployed could prove self-destructive to a comprehensive African movement. The workerist focus had the dangerous potential of splitting the voice of the African population. When advances were made in the workplace but in no other segment, socio-economic stratification would inevitably result.<sup>48</sup>

This broader function of populist unions, to act as the mouthpiece of the entire disenfranchised population, may also have found encouragement, ironically, in the South African legal system itself. For example, the laws requiring blacks to live in separate "homelands" and work camps placed both union organizers and employees in a shared "social setting."<sup>49</sup> This communal situation may have helped to establish the union in the social consciousness as not merely "representatives of labor interests" but also "political forces in the anti-apartheid movement."<sup>50</sup>

This greater role for black unions, moreover, would be summarized nearly a decade later by an Industrial Court justice in words that could as easily have been spoken in these earlier years of the movement. The justice wrote "Black

---

<sup>45</sup> See Mitchell & Russell, *supra* note 2, at 241-42.

<sup>46</sup> See *id.*

<sup>47</sup> As of 1980, 64.4 percent of the 8.7 million working South Africans were black. Further, 88.1 percent of the unskilled labor in the production sector were black. See Coleman, *supra* note 2, at 181 (citing Piron & Le Roux, *South Africa*, 9 INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR RELATIONS AND INDUSTRIAL RELATIONS 13 (R. Blanpain ed., 1986)).

<sup>48</sup> See Mitchell & Russell, *supra* note 2, at 239-41.

<sup>49</sup> See Coleman, *supra* note 2, at 206-07.

<sup>50</sup> *Id.*

workers . . . do not have the franchise and have no representation in parliament, consequently their opposition to any legislation which directly affects their lives has, of necessity, to find other means of expression."<sup>51</sup> The unions, with their democratic organizational structures and methods of applying great economic pressure, became those "other means."

*B. The Post-Weihahn Reforms and the Industrial Court*

The South African government, quick to recognize the burgeoning political threat of black trade unions, responded by establishing the Weihahn Commission in 1979. The purposes of the commission ostensibly included researching the underlying causes of the country's labor unrest and then reporting back to Parliament with recommendations on how to remedy those causes through updated laws.<sup>52</sup> Scholars have located in the amendments to the act made pursuant to the commission's recommendations a sinister underlying motive. While the reforms purported to grant numerous collective bargaining rights to black trade unions, the legislation in fact "attempt[ed] to coopt and incorporate the black trade unions into the established system of industrial conciliation."<sup>53</sup>

To understand this criticism, one first must examine the features of these reforms as enacted in the Industrial Conciliation Amendment Act of 1979 ("Amendment Act"). For the first time, black trade unions were given permission to register with the government. This was important because, under the act, statutory employees could legally join registered unions.<sup>54</sup> Registration brought the unions a recognition and legitimacy never before enjoyed.

In fact, the Amendment Act provided incentives for registering. In exchange for doing so, the union received the right to organize openly, to participate in industry-wide collective bargaining through Industrial Councils,

---

<sup>51</sup> *Gana & Others v. Building Materials Mfr. Ltd. t/a Doorcor*, (1990) 11 I.L.J. 565 (LAC).

<sup>52</sup> See Coleman, *supra* note 2, at 185.

<sup>53</sup> Mitchell & Russell, *supra* note 2, at 235; see also Hepple, *supra* note 2, at 68 (arguing that coopting the unions would make them more controllable). Compare, however, with the optimistic (albeit reservedly) approach taken shortly after the enactment of the post-Weihahn reforms in Lansing, *supra* note 2, at 301-02. The author, while admitting that the broad discretionary powers reserved for the government under these reforms ultimately could aid in the squelching of black unions, concluded that government "goodwill" in implementing the reforms could actually give the laws "a chance of success in bringing about the beginnings of industrial peace in South Africa." *Id.* While this policy shift would indeed yield the "first crack in apartheid," it would not be due to government goodwill but for altogether different reasons discussed *infra*.

<sup>54</sup> See LIPTON, *supra* note 22, at 68.



to engage in strike activity as a last resort, and to bring unfair labor practice charges before the newly established Industrial Court (IC).<sup>55</sup>

These reforms, however, in fact proved limited in their grant of rights and remarkably subversive to their facial purpose of promoting industrial peace through equal collective bargaining opportunity. For example, the law required each registering union to submit a constitution to the National Manpower Commission for approval. Moreover, before approval would be granted, the union would have to demonstrate that it was a non-political entity.<sup>56</sup> What is more, the amendments prohibited the unions from contributing financially to political parties.<sup>57</sup>

These prerequisites demonstrated a desire by the government not to allow black unions to flourish but to effectively remove their political sting.<sup>58</sup> By inviting them into the fold, the state could more closely monitor and regulate their activities.<sup>59</sup> And, to ensure that an approved union did not later develop an undesirable agenda, the Registrar retained the power to withdraw its registration.<sup>60</sup>

In addition, what progress the black unions could make was limited to bargaining for industry-wide standards rather than for improvements at any particular workplace.<sup>61</sup> Such restriction aimed to limit the unions' grassroots effectiveness by preventing the more democratic factory-based committees from dealing with employers directly.<sup>62</sup>

Here again the reforms aimed to eliminate union strength at its core—the localized rank-and-file structure.<sup>63</sup> Practically speaking, each union's shop-specific body of workers would have to join forces with other shops' workers, reach a consensus with regard to their desires, and take on the industry as a whole. Victories would be far more difficult to achieve this way than by exercising shop-specific bargaining power against an individual employer. By requiring industry-wide rather than localized bargaining, the reforms threatened to paralyze the mass of unionized voices that had been enabled by the new grass-roots union structure.

---

<sup>55</sup> See Mitchell & Russell, *supra* note 2, at 235.

<sup>56</sup> See *id.*

<sup>57</sup> See LIPTON, *supra* note 22, at 68.

<sup>58</sup> See Lansing, *supra* note 2, at 301 (describing the overarching governmental policy of "prohibiting black participation in the political process").

<sup>59</sup> See Hepple, *supra* note 2, at 68; Mitchell & Russell, *supra* note 2, at 235.

<sup>60</sup> See Lansing, *supra* note 2, at 301.

<sup>61</sup> See Mitchell & Russell, *supra* note 2, at 235.

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

Aside from assimilation and paralysis, the reforms embodied a second tactic for curbing black union strength. They sought to "divide and rule" the trade unions by conferring the amendments' benefits upon certain groups of black workers but excluding other significant portions of the African labor force.<sup>64</sup> Among the categories of excluded workers were agricultural laborers, domestic service employees, a great many of which were African women, and migrant workers.<sup>65</sup> Thus, only black males working in otherwise all-white urban areas were even marginally benefitted.<sup>66</sup> All others received no new rights.

Remarkably, the reforms failed to produce the desired effect. For one, the unions recognized the potentially divisive effects of these amendments. Angered by these attempts at cooption, a number of them simply refused to register.<sup>67</sup> Nevertheless, they continued to make their presence felt. As of 1982, 150 different employers had agreed to recognize unregistered unions.<sup>68</sup>

This concerted effort resulted in a parliamentary concession recognizing migrant workers to be within the reforms' ambit.<sup>69</sup> Even after this compromise, some unions continued to hold out and eventually won further concessions, such as the right to form racially mixed unions.<sup>70</sup>

This failure to disempower, therefore, resulted in an accumulation of momentum in quite the opposite direction. Black union membership, and indeed union membership overall, only increased in subsequent years. By 1983, unions enjoyed a total membership of 1.5 million workers. This represented an increase of 500,000 since 1979, nearly all of it coming from the African workforce.<sup>71</sup> In addition, as of 1985, total membership in unregistered unions had risen to 520,000.<sup>72</sup> This overall growth, along with "the massive consolidation of trade union organisation through the Federation of South African Trade Unions (Fosatu) and then Cosatu" produced victories, such as

---

<sup>64</sup> See *id.*

<sup>65</sup> See *id.* at 236. By "migrant workers," it is meant that a large segment of Africans who were not permitted to live within the mostly white industrial towns with their families but who instead carried a pass that permitted them to enter into the towns to work and, perhaps, to live in worker compounds. They were considered domiciled in one of the all-African homelands outside the townships. See STEPHEN R. LEWIS, JR., *THE ECONOMICS OF APARTHEID* 51-55 (1990).

<sup>66</sup> See Mitchell & Russell, *supra* note 2, at 236.

<sup>67</sup> See *id.* at 237; Hepple, *supra* note 2, at 68.

<sup>68</sup> See LIPTON, *supra* note 22, at 170.

<sup>69</sup> See *id.*

<sup>70</sup> See LIPTON, *supra* note 22, at 68.

<sup>71</sup> See Mitchell & Russell, *supra* note 2, at 238.

<sup>72</sup> See *id.*

a "second round of wage increases," much like the increases of a decade earlier.<sup>73</sup>

Thus the black unions, unlike almost every other vehicle of organized African empowerment, were surviving the government's attempts at emasculating them. Indeed, the overall effect of the post-Weihahn reforms was the granting of "a degree of political space where black South Africans could engage in legal forms of association and organization effectively denied them elsewhere."<sup>74</sup> Much as the IC had observed in the *Gana* case, the unions became the one effective forum for African discontent over the apartheid system as a whole. They became, in the words of one scholar, "'schools for democracy'—if not yet 'schools for revolution.'"<sup>75</sup>

The unions, however, did not operate alone in beginning the dismantling of apartheid. Indeed, two other provisions in the Amendment Act proved even more helpful to the movement despite having quite the opposite legislative intent. The Amendment Act provided for the bringing of unfair labor practice charges and for the IC to adjudicate the charges.<sup>76</sup>

The potential danger in these provisions came first from the remarkably ambiguous definition of "unfair labor practice." As originally enacted in October 1979, an unfair labor practice was defined as anything that struck the court as unfair.<sup>77</sup> Less than a year later, Parliament enacted an only slightly more detailed definition.<sup>78</sup> The new definition encompassed any labor practice or change in labor practice, except for strikes and lockouts, having the effect of unfairly prejudicing employees or employers, creating labor unrest, or detrimentally affecting employer-employee relationships.<sup>79</sup> This ambiguity, according to a number of critics, represented not poor legislative drafting, but a deliberate attempt to reserve considerable latitude in the government to thwart union activity by declaring it unfair and to grant unions virtually no notice of what would eventually constitute unfair labor practices.<sup>80</sup>

Moreover, the political and discretionary nature of the IC's powers, as established in the organic provision, sought to ensure that the tribunal would never operate free from state influence. Its members were to be selected by

---

<sup>73</sup> BOND, *supra* note 33, at 31.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (quoting A. Erwin, *On Unions and Politics*, paper presented to the ASSA Conference, University of Cape Town, July 1985).

<sup>76</sup> See Coleman, *supra* note 2, at 186.

<sup>77</sup> See *id.* at 189.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See, e.g., *id.* at 189; Lansing, *supra* note 2, at 301.

the Minister of Manpower based upon familiarity with the law and " 'competence to perform.' " <sup>81</sup> The latter criterion has been criticized as merely a tool for screening out candidates based on their political sentiments. <sup>82</sup> Moreover, the Minister of Manpower retained the power both to dismiss active members of the IC and to appoint an indefinite number of new members as the minister saw fit. <sup>83</sup> Finally, past adjudications would not bind the members of this quasi-judicial body in reaching their ad hoc conclusions in any given unfair labor practice case. <sup>84</sup> In so structuring this tribunal, Parliament apparently envisioned a body of politically like-minded adjudicators who could be appointed when need be and could be counted on to render decisions favorable to the established system of apartheid.

Inexplicably, however, the IC envisioned its role differently. Rather than serve as an enemy to the active role of black unions in the workplace and in the nation's political process as a whole, it became an "accomplice" in the movement toward democracy. <sup>85</sup> In making discretionary decisions regarding what did and did not constitute an unfair labor practice, the court began to develop "an equitable, nonracial system of labor law." <sup>86</sup>

In order to do so, the IC first had to conceive of its purpose as more than merely applying the letter of the statutory law. Indeed, it regarded its decisions concerning unfair labor practices as involving more than "pure law." <sup>87</sup> In justifying this approach, the court pointed to the ambiguity in the definition of "unfair labor practice" as evidence of an implicit power given by the legislature to develop this new body of law. <sup>88</sup> It also made clear that the concept of unfair labor practice still operated even outside of the collective bargaining relationship. <sup>89</sup> The court also found that actions lawful in other

---

<sup>81</sup> Coleman, *supra* note 2, at 187 (quoting from the Labour Relations Act, No. 28 of 1956 as amended, § 17(1)(b)).

<sup>82</sup> *See id.*

<sup>83</sup> *See id.*

<sup>84</sup> *See id.*

<sup>85</sup> *See id.* at 178. For a case study in the role of the South African judiciary in battling other aspects of the apartheid system, see Mark Andrew Green, *What Role Can South African Judges Play in Mitigating Apartheid?: A Study of the Urban African Legal Regime*, 1987 WIS. L. REV. 325 (1987).

<sup>86</sup> Coleman, *supra* note 2, at 189; *see also* LIPTON, *supra* note 22, at 68 (noting that "the new Industrial Court was making decisions favourable to black unions fighting for recognition and protection against victimization by some employers").

<sup>87</sup> *Metal & Allied Workers Union v. Natal Die Casting Co.*, (1986) 7 I.L.J. 520, 544 (LAC).

<sup>88</sup> *See SA Diamond Workers Union v. Master Diamond Cutters Assoc. of SA*, (1981) 3 I.L.J. 87, 101, 108-09 (LAC).

<sup>89</sup> *See id.* at 113.

portions of the act (e.g., dismissing strikers) could, nonetheless, under the particular circumstances of a case, constitute an unfair labor practice.<sup>90</sup>

By wielding its power in this way, the IC carved out of the statute a more equitable concept of the unfair labor practice than the statute allowed on its face. For example, despite the absence of an explicit duty to bargain in good faith, the court nonetheless felt free to determine that a party's bad faith bargaining, in light of all the facts in the case at hand, was an unfair labor practice.<sup>91</sup>

In issues of worker dismissals and discrimination, the statute again was relatively silent. And again, the IC stepped in to supplement the lack of protection afforded workers. For instance, while the act allowed for the dismissal of striking workers, the court held that an employer could not dismiss them for striking in response to the employer's unfair labor practice.<sup>92</sup> Moreover, while the act appeared not to outlaw specifically the dismissal of workers based on their union affiliation, the IC found unfair certain discriminatory activities such as granting benefits only to unaffiliated workers.<sup>93</sup>

Thus, the IC, through its statutorily granted powers and independent conception of its role in adjudicating unfair labor practice claims, proceeded to punch hole after hole in the act's restrictive provisions. The court appeared to have taken aim at those areas in which the statute allowed the employer, in subtle and even blatant ways, to corrode the union's effectiveness. Further, the court took upon itself the duty to ensure good faith in collective bargaining, to mitigate discriminatory activities, and even to ensure that a lockout, ostensibly excluded from the act's definition of an unfair labor practice, did not function as something other than simply an economic weapon used in vying for favorable collective bargaining terms.<sup>94</sup> Thus, the hoped-for cooption of registered black trade unions was impeded again and again by IC adjudications.

In 1988, Parliament responded by altering, once again, the definition of unfair labor practice. As before, the definition included greater detail. It set out a list of fourteen distinct unfair labor practices and incorporated the old

---

<sup>90</sup> See *Metal & Allied Workers Union*, (1986) 7 I.L.J. at 544.

<sup>91</sup> See *Coleman*, *supra* note 2, at 191-92.

<sup>92</sup> See *Natal Die Casting Co. Ltd. v. President of the Indus. Court*, (1987) 8 I.L.J. 245, 246 (LAC).

<sup>93</sup> See *National Union of Mineworkers v. Henry Gould Ltd.*, (1988) 9 I.L.J. 1145, 1159 (LAC).

<sup>94</sup> In *Sithole v. Federated Timbers Ltd.*, (1989) 10 I.L.J. 517, 521 (LAC), the IC found a lockout to be a *prima facie* unfair labor practice if the employees had already acceded to the employer's demands for which the lockout purportedly was brought.

definition as an additional catch-all category.<sup>95</sup> In so doing, Parliament attempted to shift the emphasis from considerations of fairness to strict statutory interpretation.<sup>96</sup>

The IC, however, continued to operate in the same manner as before when adjudicating unfair labor practice charges. Indeed, in twenty decisions made under the more recent 1991 definition, the IC made reference only four times to specifically codified unfair labor practices. Instead, the court chose to focus on the still present catch-all provision and its own self-proclaimed discretion to make rulings based upon the act's overarching policy of promoting collective bargaining.<sup>97</sup>

The IC further chose to continue its support for black unions and their role in addressing apartheid by making favorable rulings. It also, on occasion, made sweeping statements such as the one from the *Gana* case mentioned earlier, in which it recognized the unions as the sole organized voice for the mass of disenfranchised Africans. In that same opinion, the court went on to encourage the government to allow participation of black unions in the formulation of future labor legislation.<sup>98</sup> Thus, the IC granted these organizations not only assistance in shaping a favorable body of law but also a very real sense of institutional legitimacy in their function as a significant political force.

For these reasons, the labor relations laws of South Africa ultimately had exactly the opposite effect of that which was intended. Oppressive restrictions enraged their victims and encouraged them to discover the freeing power of speaking in collective voices. Measures intended to coopt the influence of the black trade unions, in fact, gave those organizations a legitimacy and a leverage in the labor community that they had never before enjoyed as legally marginalized groups. Moreover, later amendments introduced the unions to a remarkable ally, the Industrial Court, which wielded its discretion in an unexpected manner. That tribunal's sympathetic attitude toward the disenfranchised black workers and the workers' one true vehicle for change resulted in the creation of a favorable body of case law that firmly established the unions as a legitimate industrial and political force. The IC's favorable attitude toward black workers also led to the use of the concept of unfair labor practices to level a deliberately uneven playing field.

---

<sup>95</sup> See Coleman, *supra* note 2, at 196.

<sup>96</sup> See *id.* at 197.

<sup>97</sup> See *id.* at 200-01 (citing *Nasionale Suiwekkooperasie v. Food & Allied Workers*, (1989) 10 I.L.J. 712, 716 (LAC)).

<sup>98</sup> See *Gana Bldg. Materials*, (1990) 11 I.L.J. at 574.

The pivotal role played by the unions in altering one of the largest facets of life for so many black South Africans eventually encouraged the unions to involve themselves in other aspects of African life. Thus, unions became a champion of political as well as industrial causes (inasmuch as the two concepts may be kept separate). They banded together with political parties (as in the COSATU-ANC alliance mentioned earlier) to transform the realities that affected all Africans and not merely the employed. In addition, the volume with which the unions spoke shook the foundations of the apartheid government. As the movement grew, a change became more and more inevitable. What remained to be seen, however, was how this government, faced with its own mortality, would react to this critical mass of enraged South Africans.

### III. REVOLUTION?

The beginning of the end of apartheid came in February 1990 when Prime Minister F. W. de Klerk declared the lifting of all legal restrictions upon the African population in South Africa.<sup>99</sup> Five years would pass before a draft of the new Labour Relations Act ("New Act") was published in 1995.<sup>100</sup> Another year and a half would pass before the statute would in fact be enacted.

In the meantime, Act 200 of 1993, better known as the "interim constitution," came into effect. The preamble to the interim constitution ostensibly eradicated all forms of discrimination " 'between men and women and people of all races.' "<sup>101</sup> The very same act, however, sheltered the old act from any constitutional attack until such time as a new labor statute could be drafted and implemented.<sup>102</sup> Presumably, then, the IC also continued its work under the old act in carving out and maintaining a sort of rough equity between management on the one hand and workers and unions on the other. Nevertheless, there was a lingering sense that a significant reworking of labor relation laws in South Africa was needed instead of piecemeal judicial re-legislation.<sup>103</sup>

Also driving the need for reform was South Africa's membership in the Industrial Labour Organization (ILO), which the nation renewed as the New

---

<sup>99</sup> See Hepple, *supra* note 2, at 56.

<sup>100</sup> See du Toit, *supra* note 17, at 785.

<sup>101</sup> A. A. Landman, *Statutory Inroads into a Trade Union's Right of Disassociation*, 18 INDUS. L. J. 13, 15 (1997) (citing the preamble to the constitution of South Africa).

<sup>102</sup> See *id.*

<sup>103</sup> See generally Industrial Labour Office, *Prelude to Change: Industrial Relations Reform in South Africa*, 13 INDUS. L.J. 739 (1992) (reporting the labor concerns before reform in South Africa).

Act was being drafted. This rededication, as reflected in the New Act's final form, led one scholar to declare the statute "[a] synthesis between human rights and employment rights . . . given that the explicit objectives of the Act include the implementation of ILO conventions and the elimination of the legacy of apartheid in the workplace."<sup>104</sup> One such ILO convention, the Convention on Freedom of Association, for example, led drafters to include in the New Act a prohibition against gender or racial discrimination by either unions or employer organizations.<sup>105</sup>

The provisions of the New Act receiving perhaps the greatest attention, however, involve not prohibitions but the partial implementation of a new model of labor relations known as workplace forums.<sup>106</sup> These forums can alternatively represent the greatest emblem of how far the country has come since apartheid or the greatest threat to the progress that has been made. In the former view, their structure and method of operation are a fulfillment, even if flawed, of the dream of a democratic workplace. In the latter view, they threaten to neutralize the raw force of the collective worker voice by partially displacing the unions as worker representatives, by setting up potential conflicts between unions and workplace forums in representational matters, and by failing to empower enough workers to establish forums if they so choose. While it is true that the New Act's goal of increasing industrial cooperation and reducing confrontation may encourage the resolution of disputes in a less adversarial manner, to view these workplace forum provisions as a true threat to the power of collective opposition is to ignore completely the nature of such opposition in relation to the governing regime.

#### *A. Focus: Workplace Forums*

Perhaps the one true innovation of the New Act in the landscape of South African labor relations has been the enactment of provisions regarding workplace forums.<sup>107</sup> Such forums have existed in other countries for some

---

<sup>104</sup> Roger Welch, *Collectivism Versus Individualism in Employee Relations: For Human Rights at the Workplace*, 17 INDUS. L.J. 1041, 1052 (1996).

<sup>105</sup> See Landman, *supra* note 101, at 16 (discussing certain requirements that the union's constitution must meet).

<sup>106</sup> See §§ 78-94 of Labour Relations Act 66 of 1995 (S. Afr.) [hereinafter New Act].

<sup>107</sup> See Maurius Olivier, *Workplace Forums: Critical Questions from a Labour Law Perspective*, 17 INDUS. L.J. 803, 803-05 (1996); Paul Benjamin & Carole Cooper, *Innovation and Continuity: Responding to the Labour Relations Bill*, 16 INDUS. L.J. 258, 266 (1995).



time,<sup>108</sup> and the statute draws much of its inspiration from European models.<sup>109</sup> The avowed purpose behind encouraging workplace forums is "to facilitate a shift, at the workplace, from adversarial collective bargaining on all matters to joint problem-solving and participation on certain subjects."<sup>110</sup> Those "certain subjects" in which the legislature envisions cooperative efforts rather than adversarial postures generally fall into the category of "production" issues or "decisions that affect [workers] in their daily work activities."<sup>111</sup> Such issues include, for example, plant closures, product development, criteria for merit increases, and disciplinary codes and procedures.<sup>112</sup> "Distributive" decisions, such as the division of the enterprise's profits among workers, owners, shareholders, and others,<sup>113</sup> however, remain the domain of traditional collective bargaining.<sup>114</sup>

These new provisions and their cooperative model seek to provide two very distinct benefits. First, they seek to democratize the workplace. In fact, the legislature's Explanatory Memorandum rings with democratic sentiment when it asserts that "[w]orkplace forums expand worker representation beyond the limits of collective bargaining by providing workers with an institutionalized voice in managerial decisions."<sup>115</sup> Indeed, the New Act as a whole aims to promote a more egalitarian workplace, and a prominent vehicle of that envisioned goal necessarily is worker participation in decision making.<sup>116</sup>

The benefit that finds explicit and repeated mention in the Explanatory Memorandum, however, is greater efficiency and productivity.<sup>117</sup> By drawing upon the unique experiences and insights of workers and by opening a direct line of communication between employees and management, workplace

---

<sup>108</sup> Three such countries are Japan, Germany, and Sweden. See Clyde Summers, *Workplace Forums from a Comparative Perspective*, 16 INDUS. L.J. 806, 807 (1995). A fourth country, the United States, has experienced "marked failure" in encouraging and implementing workplace forums. See *id.*

<sup>109</sup> See Ministerial Legal Task Team, *Explanatory Memorandum*, January 1995, 16 INDUS. L.J. 278, 310-11 (1995) (hereinafter *Memorandum*) (naming countries where workplace restructuring has been successful).

<sup>110</sup> *Id.* at 310.

<sup>111</sup> Olivier, *supra* note 107, at 803-04.

<sup>112</sup> For a more comprehensive list, see *id.* at 804-05.

<sup>113</sup> See Summers, *supra* note 108, at 807.

<sup>114</sup> See Olivier, *supra* note 107, at 807.

<sup>115</sup> *Memorandum*, *supra* note 109, at 310; see also Olivier, *supra* note 107, at 805 (identifying in the workplace forum provisions an intent to promote democracy in the workplace).

<sup>116</sup> See New Act § 1(d)(iii); see also Olivier, *supra* note 107, at 807 (noting that promoting employee participation is a primary objective of the New Act).

<sup>117</sup> See, e.g., *Memorandum*, *supra* note 109, at 310-11.

forums in other countries have ensured more carefully contemplated and, ultimately, more productive decisions.<sup>118</sup>

The New Act allows for three variations on this cooperative theme. In the first of them, the New Act's provisions completely regulate the forum's operations.<sup>119</sup> In the second variation, the statute allows for a collective bargaining agreement that will set the structure, procedures, and subject matters covered by the forum. Finally, a collective bargaining agreement could regulate certain aspects of the forum while leaving the rest to the New Act's coverage.<sup>120</sup>

In the statutory variant, which applies only to enterprises employing at least 100 workers, excluding managerial staff,<sup>121</sup> the process of forming a workplace forum can only be initiated by a union representing a majority of all workers at the site and not simply from a union claiming majority support of a particular bargaining unit.<sup>122</sup> Members of the forum, however, may be elected from among all workers at the site, not simply that union's members.<sup>123</sup> The employer is completely excluded from involvement.<sup>124</sup>

Once in place, the statutory forum enjoys certain rights in relation to that site's management that are the linchpin of the workplace forum system. In regard to certain issues, the forum has the right to consultation. The employer may not simply ask the forum's opinion on a proposed decision; the employer must confer with the aim of reaching consensus.<sup>125</sup> Moreover, the forum may suggest alternatives, which the employer must give reasons for rejecting.<sup>126</sup> On other subjects, the employer has the duty to engage in joint decision making with the forum. Not only must they aim for a consensus, they must also achieve it.<sup>127</sup> Should they fail to do so, the dispute must go to third-party arbitration<sup>128</sup> or be referred to the Commission for Conciliation, Mediation, and Arbitration, an independent body established to resolve labor disputes.<sup>129</sup>

---

<sup>118</sup> See *id.* at 311; see also Summers, *supra* note 108, at 806 ("Workers . . . know things about the reality of production processes in the workplace, the causes of defective products, lost time and work injuries, and the potential for improvement which management never learns.").

<sup>119</sup> See New Act §§ 78(a), 80(1).

<sup>120</sup> See Olivier, *supra* note 107, at 804.

<sup>121</sup> See New Act § 80(1).

<sup>122</sup> See *id.* §§ 78(b), 80(2); Olivier, *supra* note 107, at 809.

<sup>123</sup> See New Act § 82(1)(h); Benjamin & Cooper, *supra* note 107, at 266.

<sup>124</sup> See Olivier, *supra* note 107, at 804.

<sup>125</sup> See New Act § 85(1).

<sup>126</sup> See *id.* § 85(2)-(3); Olivier, *supra* note 107, at 804.

<sup>127</sup> See New Act § 86(4)(a).

<sup>128</sup> See *id.* § 86(4)(a).

<sup>129</sup> See *id.* §§ 86(4)(b), 113, 115.

Moreover, in either mode of cooperative activity, the employer must provide the forum with all relevant information necessary to represent its members completely.<sup>130</sup>

At first blush, then, these forums appear to give employees a freer and stronger voice in the workplace than the voice (if any) enjoyed by any of their disenfranchised predecessors. Moreover, its greater strength may well come from the cooperative rather than adversarial methods of operation. One scholar, in reviewing the New Act in proposed form in 1995, argued that "[t]he worker's voice cannot be shouts of protests or demands, answered by the employer's assertion of management prerogatives."<sup>131</sup> Rather, a democratic workplace could only become a reality when management demonstrated "a willingness to share in problem solving and a willingness to consider employees not as suppliers of hours of labour but as partners in the enterprise."<sup>132</sup> As such, the New Act does, on the surface, seem poised to facilitate the beginning of a truly cooperative labor climate.

These provisions, however, might not in fact be the vehicle of true democracy in the workplace. Rather, some critics view them as flawed at best and sorely insufficient at worst. Indeed, one such critic has opined that

participation in decision making cannot realistically be seen as industrial democracy in the true sense of the word. At best it reflects inroads into management prerogative, but certainly not industrial democracy in the sense that the collective voice of the workers will constitute or even determine the eventual business decision to be implemented in the enterprise.<sup>133</sup>

The perceived weaknesses underlying such skepticism fall into a number of categories, the most prominent of which may be classified as structural and theoretical.

The structural problems begin with the requirement that the statute govern only workplaces comprised of at least 100 workers.<sup>134</sup> South African businesses tend to be organized into multiple worksites with smaller numbers of employees. This proves especially true in the retail and service sectors,

---

<sup>130</sup> See *id.* § 89(1).

<sup>131</sup> *Id.*

<sup>132</sup> Summers, *supra* note 108, at 806.

<sup>133</sup> Olivier, *supra* note 107, at 806.

<sup>134</sup> Workplaces of less than 100 workers can, of course, establish forums via collective bargaining agreement. See New Act § 81(1); Olivier, *supra* note 107, at 803. For the purposes of this discussion, however, analysis will be restricted to the statutory variant.

which employ thousands of workers but often see them organized in numerous separate sites. Many of these workplaces do not reach this statutory threshold of 100.<sup>135</sup> This minimum might also exclude up to 74 percent of the formal sector from the New Act's coverage.<sup>136</sup>

The legislature claims to have chosen the 100 employee minimum on the belief that larger workplaces generally possess the resources and skills necessary to operate such forums successfully.<sup>137</sup> Whether or not this will prove a correct belief remains to be determined. What is sure is that the South African system stands alone in this regard. European models set their thresholds significantly lower. For example, Germany set its threshold at five workers, and the Netherlands set the threshold at thirty-five.<sup>138</sup>

The second structural weakness in the workplace forum provisions is the prominent role given to a union representing the majority of workers at a workplace. As mentioned earlier, section 80(2) of the New Act allows only such majority unions to initiate the genesis of a statutory-variant forum at a worksite. Because a workplace in which a single union represents the majority of the employees (i.e., a particular bargaining unit encompasses a majority of the workers at the site) is the exception rather than the rule, such a requirement could have the same limiting effect that the 100-worker ceiling threatens.<sup>139</sup> What is more, this provision appears to be an attempt to secure the status of majority unions now in power.<sup>140</sup>

This protected position the union enjoys also could have the effect of weighting the forum's composition with union officers.<sup>141</sup> While the New Act itself calls for any worker to be eligible to be a candidate for a stewardship in the forum,<sup>142</sup> the influence that this central union could have on how the workers vote should not be discounted. Nor should the potential for union

---

<sup>135</sup> See Benjamin & Cooper, *supra* note 107, at 266.

<sup>136</sup> See *id.* But the authors posit that this fear may be based on "an overly literal interpretation of the definition of a 'workplace.'" See *id.* If somehow "workplace" were construed to mean all of the units comprising the enterprise of a single employer, the threshold may not exclude many workplaces at all. This may, however, raise even greater difficulties with the requirement that a majority union in the workplace initiate the forum's genesis.

<sup>137</sup> See *id.* at 267.

<sup>138</sup> See *id.*

<sup>139</sup> See Olivier, *supra* note 107, at 809.

<sup>140</sup> See *id.* at 810.

<sup>141</sup> See *id.* at 810-11; Summers, *supra* note 108, at 810.

<sup>142</sup> See Memorandum, *supra* note 109, at 314-15. But note that, while the union may simply nominate a candidate, an individual not backed by the union must obtain signatures from a fixed percentage of employees before he or she may campaign. See *id.*

cooption of the forum as simply another arm of its own influence<sup>143</sup> go unwatched. Such a result would be anathema to the forum's ostensibly democratic, cooperative nature.<sup>144</sup>

After a forum has been in existence, moreover, the majority union may trigger a ballot vote by which the forum may be dissolved.<sup>145</sup> It is unclear why the forum should not take on a life of its own once it has been created.<sup>146</sup> Indeed, the potential for partisanship in forum agenda appears far greater when it must act under the looming threat of dissolution by the largest faction of workers. Moreover, this in no way facilitates the separation of functions and jurisdictions, discussed below, that is crucial to preventing adversarial attitudes from infiltrating the forum's activities.

A third structural problem with the South African workplace forum provisions concerns the forums power to force employers to address the issues over which the statute grants the forums jurisdiction. Indeed, the forum lacks any power to demand that an employer engage in joint decision making with it on an issue the forum wishes to raise on its own. Rather, the forum only holds the right to be consulted on changes the employer has announced a desire to implement.<sup>147</sup> The only exception to this rule is the limited ability to demand consultation on the issues of merit criteria, discretionary bonuses, disciplinary procedures, and punishment for non-work related conduct.<sup>148</sup> Thus the forum's activities largely may be reactive but not proactive. This limitation threatens to ensure that these forums never truly enable a democratic workplace in its purest form—that is, a workplace in which employees' voices determine rather than simply modify the course of the enterprise.<sup>149</sup>

A fourth, more practical, difficulty involves the act's separations between productive and distributive issues (the former being the domain of the forum and the latter the domain of traditional collective bargaining) and between plant-level and more centralized activity (again the former belonging to the forum and the latter to collective bargaining). Both distinctions entail

---

<sup>143</sup> See Summers, *supra* note 108, at 810 ("There may be, in fact or substance, a single consultation or negotiation with the prospect of a strike to resolve the dispute."). In the German model, on the other hand, 75 percent of all forum stewards are also union members, but they are *not* officers in the union. See *id.* at 811.

<sup>144</sup> See *id.*

<sup>145</sup> See New Act § 93(1); Olivier, *supra* note 107, at 811-12.

<sup>146</sup> See Olivier, *supra* note 107, at 812.

<sup>147</sup> See New Act §§ 84(1), 86(1); Olivier, *supra* note 107, at 805.

<sup>148</sup> See New Act § 87; Olivier, *supra* note 107, at 805.

<sup>149</sup> See Olivier, *supra* note 107, at 806.

jurisdictional divisions that may prove both confusing and ultimately impracticable.

The production-distribution distinction is a potential source of dispute over who should serve as the workers' representative—the forum or the union—in any given matter.<sup>150</sup> While one may imagine issues that fall squarely within one category or another (e.g., product development and export promotion clearly are issues of production, while wages clearly are distributive), these two labels may well be two end points on a continuum rather than two concepts each with a unique character. Criteria for merit increases, for example, though statutorily considered a production issue,<sup>151</sup> could reasonably appear to involve a consideration of “a division of returns from the enterprise, how much goes to workers and how much goes to the owners or shareholders.”<sup>152</sup>

Clearly the New Act's actual language vitiates the possibility of confusion over who is the appropriate representative in merit increase criteria disputes. Nevertheless, the stage may be set for the appearance of an issue not yet enumerated in the New Act.<sup>153</sup> Who then may step in as the employees' mouthpiece will depend upon interpretation of the New Act. On the one hand, the New Act may be construed to require that any issue not explicitly given to the forum's jurisdiction fall to the traditional collective bargaining process.<sup>154</sup> This interpretation, however, could severely restrict the power of the more democratic vehicle to effect a cooperative solution to issues. Moreover, it might grant the unions power to bargain collectively over topics that empirically might be characterized as productive simply because the topics had not been spelled out in the statutory language.

This reading, however, ignores the legislative intent behind the implementation of the forum provisions. The Explanatory Memorandum speaks of the “focus” of the forums as “qualitative—that is, on non-wage matters.”<sup>155</sup> After observing the labor relations landscape in a number of other countries, the

---

<sup>150</sup> See *id.* at 807-08.

<sup>151</sup> As discussed earlier, the New Act requires the employer to consult the forum on this issue. New Act § 84.

<sup>152</sup> Summers, *supra* note 108, at 807.

<sup>153</sup> Cf. Benjamin & Cooper, *supra* note 107, at 267 (“For instance, will issues such as profit-sharing and production-linked bonuses be bargained collectively or co-determined?”).

<sup>154</sup> Cf. *id.* at 267 (“Ultimately, it will be for NEDLAC [the National Economic, Development and Labour Council, a coalition of labor, industry, and community leaders established for consultation during the drafting and enacting of the statute] to negotiate which issues will be bargained over collectively and which are for worker co-determination.”). This comment might suggest that only those issues explicitly granted to a party will be in its jurisdiction. See *id.*

<sup>155</sup> Memorandum, *supra* note 109, at 310.

legislature concluded that collective bargaining was "not well suited" to the task of arriving at consensual solutions to disputes involving these matters.<sup>156</sup> Presumably, then, adversarial collective bargaining is well-suited to the function of resolving wage-related issues. Indeed, some see these topics as "too often inescapably confrontational, reducing the parties to fighting over shares of the pie which are too small to satisfy either side."<sup>157</sup>

Thus it is the *nature* of the issue and of the institution that should decide who must take charge of a given dispute. Indeed, some critics concur in this assessment of the relative capacities of the two institutions and in the view that this is a necessary division of functions.<sup>158</sup> This separation is supported by European models.<sup>159</sup> Nevertheless, proponents of the conceptual distinction give little guidance as to how one maintains the practical distinction when the workplace encounters a dispute over an issue not yet enumerated in the provisions whose nature is not clearly distributive or productive.

As one might imagine, confusion over this preliminary issue could undercut the effectiveness of both vehicles because the workers may lack a clear idea of whom to look to as their champion. A fragmented shop-floor voice could result in both an internal worker dispute (augmented by the territoriality of the two institutions) and an employer's understandable unwillingness to converse with either representative for fear of talking to the wrong one or of receiving mixed signals from its employees.<sup>160</sup> The cooperative atmosphere necessary for a cooperative workplace would quickly disintegrate into directionless adversarialism.

The interrelated central-versus-local-activity distinction could further complicate this jurisdictional confusion. The New Act anticipates that workplace forums will operate at the plant level. For instance, each plant owned by any given employer may have its own forum. Collective bargaining, on the other hand, is to happen at the centralized (or "industry") level. For example, the employer will bargain once with a union or union coalition over

---

<sup>156</sup> *Id.* at 310-11.

<sup>157</sup> Summers, *supra* note 108, at 807.

<sup>158</sup> See *id.* at 807. But see du Toit, *supra* note 17, at 789 (arguing that the nature of the topics in these two categories are not so different at all and that what will determine ultimately whether cooperation or adversarialism will be employed in addressing any given issue is the attitudes of the parties involved).

<sup>159</sup> See Summers, *supra* note 108, at 807.

<sup>160</sup> Cf. Benjamin & Cooper, *supra* note 107, at 268 ("Demarcation disputes between forums, confusion among workers and managers, factionalism and divisions within unions between shop stewards and forum members, and the 'shunting of issues back and forth between the forums' are some of the potential difficulties that have been raised.").

distributive issues for all the employees it represents at all the plants the employer operates.<sup>161</sup> The separation attempts to avoid an infiltration of adversarialism in the local, cooperative efforts of the forums.<sup>162</sup>

A problem arises, however, out of the unique labor relations landscape already existing in South Africa. Historically, unions have mainly operated locally. In recent years, more centralized bargaining councils have developed per statutory provision, but plant-level supplementary bargaining by unions has continued.<sup>163</sup> Indeed, employers and unions alike appear to prefer such localized bargaining to the more unwieldy task of arriving at an industry-wide collective bargaining agreement.<sup>164</sup>

At present, therefore, workers have two very different representatives operating on the shop floor.<sup>165</sup> The potential for confusion similar to that discussed earlier clearly exists. To whom should the employees turn when a given dispute arises? Moreover, the prominent place of the majority union in the forum's existence and the potential for a workplace forum composed largely of officers in the majority union will only contribute to this confusion and even, perhaps, to cooptation of the forum's essential functions.<sup>166</sup>

Solutions to these potential difficulties have been suggested. The centralized bargaining councils must effectively limit the role of local unions in bargaining at the plant level.<sup>167</sup> This will hopefully eliminate the possibility of the spillover of adversarial sentiment into the forum as well as make the local union less visible and, therefore, reduce the temptation of workers to look to it for help on a distributive issue. Moreover, an amendment to the effect that union officers may not also hold positions in the workplace forum would perhaps "give some formal separation of identity between the two institutions."<sup>168</sup> Such an amendment would also ensure that the agenda of one does not filter into the agenda of the other. At the time of the writing of this Note, however, these proposals were given serious consideration only in scholarship.

---

<sup>161</sup> See Memorandum, *supra* note 109, at 312.

<sup>162</sup> See *id.* One scholar notes that, in the United States, plant-level bargaining to elaborate on centrally-negotiated collective bargaining agreements instills an adversarial tone in local worker coalition that in turn infects worker forum discussions with the employer and renders the forums a failure in their ultimate task of consensus-building and cooperation. See Summers, *supra* note 108, at 807.

<sup>163</sup> See Summers, *supra* note 108, at 807-09.

<sup>164</sup> See Olivier, *supra* note 107, at 812-13.

<sup>165</sup> See Summers, *supra* note 108, at 810.

<sup>166</sup> See *id.*

<sup>167</sup> See *id.* at 810.

<sup>168</sup> *Id.* at 811.



In addition, two theoretical considerations may serve only to perpetuate the practical difficulties of implementing this new system. These conceptual issues both entail an analysis of how the New Act conceives of the role of the workplace forum in South African labor relations. First, the statute clearly views the forum model as a "supplement" to traditional collective bargaining and not as a replacement for it.<sup>169</sup> This limited conception of the role of the forums might well lend them far less institutional legitimacy than they will need in order to operate as distinct, independent, and truly democratic representatives of all South African workers. How much this attitude will characterize the actual implementation and regulation of the statutory-variant forums remains to be seen. Potential may well exist, however, given the New Act's inherent vision to restrict the purpose of the forums to that of collective bargaining's butler.

The second conceptual difficulty involves not the role of the forum in relation to its adversarial counterpart but the ends sought to be achieved by the enactment of these provisions. As discussed at the beginning of this analysis, the twin aims of the workplace forum provisions appear to be greater efficiency and productivity as well as the democratization of the workplace. These two aims are complimentary only in the sense that drawing upon the unique shop-floor insights of workers will enable more informed, and ultimately more productive, decisions. On a broader level, however, the direct effects of these two goals serve different parties. Democratization would benefit disenfranchised workers while productivity most immediately benefits owners, shareholders, and other vested interests in the enterprise.<sup>170</sup> Should a conflict arise in which both aims cannot be served equally, the question then is, which aim should take precedence?<sup>171</sup>

How that question is answered could have a great impact upon the course of the forum's development or ultimate obsolescence. Indeed, how that question is answered may impact how the legislature will address the structural difficulties more than any other considerations. If lawmakers choose to exalt democracy over efficiency in addressing head-on conflicts, this preference could spill over into choices of, for example, whether the union or the forum should address any gray-area topic with the employer. Favoring democratization would render resolution of that issue in favor of the union, the less democratic institution, unless the nature of the topic clearly demands it.

---

<sup>169</sup> See Memorandum, *supra* note 109, at 310; see also Olivier, *supra* note 107, at 807 (discussing forums as "supplement" or "alternative").

<sup>170</sup> See Memorandum, *supra* note 109, at 310.

<sup>171</sup> Cf. Olivier, *supra* note 107, at 807 (noting this tension between the aims).

Ultimately, the difficulties inherent in the New Act's workplace forum experiment leave South African workers in a sort of limbo. On the one hand, unions are partially displaced by these new cooperative vehicles. It is a strike against adversarial action. On the other hand, the forum provisions are plagued by a number of difficulties, including tremendous holes in coverage, limitations on the forum's power to initiate or participate in industrial dispute resolution, potential conflicts between forum and union, and a confusion over the ultimate aims of this new labor innovation (efficiency or democracy). Thus, even if the time is right for South African industry to jettison more confrontational means of dispute resolution (the topic of the following section), the cooperative model set in its place is ill-equipped for the task at hand. The South African legislature, therefore, must in the near future make a choice. It must seek to resolve the difficulties inherent in the forum as constructed and therefore empower more fully this democratic industrial vehicle, or it must abandon the idea and recognize once again collective bargaining as the desired method of resolving all disputes. As it stands now, too much potential for confusion and frustration exists.

### *B. One Further Step Back*

In a broader sense, whether workplace forums succeed, and why, may tell us more than anything else about the future of South Africa as a nation. Indeed, while workplace forums have been described as perhaps the more "democratic" organized labor institution (assuming the faults in their implementation discussed above can be corrected), it is not clear at all that ultimately they will work to complete or to preserve the hard-fought prize of democracy in South Africa as a whole. We must take one further step back, then, to examine these provisions in relation to other changes brought about by the New Act—and, indeed, by a new South African government.

The first step in this analysis must be a determination of how far exactly South Africa has progressed down the road toward democracy. One critic has suggested that a nation passes through three stages during such a transition. The first stage, which he calls "liberalization," entails a new "definition of rights," not simply for an elite but for all citizens.<sup>172</sup> The second stage, "democratization," is characterized by a "popular mobilization"<sup>173</sup>—that is, a recognition of and an empowerment by these new rights, which those previously disenfranchised segments of the population enjoy for the first time.

---

<sup>172</sup> Hepple, *supra* note 2, at 56.

<sup>173</sup> *Id.*

A "redistributing of wealth and resources" marks the final stage, "socialization."<sup>174</sup>

Where, then, is South Africa? The nation entered the first stage when de Klerk announced in February 1990 that all political restrictions upon blacks were lifted.<sup>175</sup> As of 1994, South Africa had entered the popular mobilization phase.<sup>176</sup> But how much progress, if any, has occurred since then?

The New Act had its birth in a time of significant legislative action on many social fronts. A draft of it was published in February 1995, along with "corresponding statutes applicable to the public, education, and agricultural sectors."<sup>177</sup> These statutes all attempt to bring national laws into conformity with the new constitution, a major tenet of which is the furtherance of democracy and the end of discrimination. Thus power, rights, and the resources necessary to vindicate them find new life in legislation that makes them applicable to all members of South African society.

Moreover, the "proposition" that national "priorities have shifted from the struggle for democratic rights to the struggle for economic and social upliftment of the black majority"<sup>178</sup> further suggests the notion (on the part of the government of South Africa, if no one else) that the old regime has been completely dismantled and that the populace has mobilized itself for the job of rebuilding and restructuring itself as a democracy. Now comes the task of redistributing social, political, and monetary resources to those who have lacked it before—the "social upliftment" phase.

This notion in turn has underpinned the legislature's belief that "[a] corresponding shift from adversarial towards more participative industrial relations [is] imperative," not only in improving South Africa's role in the world market but also in achieving the socio-political aims of the aptly-named "Reconstruction and Development Programme."<sup>179</sup> While earlier stages in the transition may have admitted, and even called for, combative postures against the prevailing hegemony, such a confrontational atmosphere cannot sustain the process of socialization in the workplace or, presumably, in the nation as a whole. Socialization is by its very nature a cooperative effort, allocating equal power and responsibility to all.

Conversely stated, the adversarial nature of traditional collective bargaining in the workplace and political/industrial actions such as strikes proved

---

<sup>174</sup> *Id.*

<sup>175</sup> *See id.*

<sup>176</sup> *See id.*

<sup>177</sup> du Toit, *supra* note 17, at 785.

<sup>178</sup> *Id.* at 787.

<sup>179</sup> *Id.*

uniquely appropriate to the task of opposing a repressive government with no interest in equality or cooperation with the African majority. Only by rising up in these collective, agitated groups could the disenfranchised populace seize the power that was theirs purely by virtue of their size and will. Only by greater force could barriers erected and maintained by force be toppled. Once the walls have toppled, however, adversarial actions presumably lose their usefulness. More precisely, more constructive tools become necessary for erecting the egalitarian political structure after the previous structure is dismantled.

But the question still remains: is that where South Africa is? The government has begun proceeding as if engaged in the process of socialization. But how can we be sure just yet that it has not overestimated the progress made? Hepple's three-stage theory presupposes a nation will progress in all sectors, in all regions, at the same pace. Could not unforeseen resistance in the educational sector, for example, cause it to lag behind others? In such a case, adversarialism and not cooperation perhaps would stand the better chance of quelling the resistance and bringing educational reform up to speed.

With this in mind, one scholar has suggested that an alternative—and more sinister—purpose lurks behind the decision to enable and encourage the kinder, gentler institution of workplace forums. By implementation of these forums, trade unions and the potential for adversarial collectivism will be defused.<sup>180</sup> As Darcy du Toit writes,

A system of “cooperation” imposed from above might be perceived as a device for disarming the union movement, not necessarily by creating an organizational alternative in the shape of workplace forums . . . but, more insidiously, by downplaying the importance of independent (“adversarial”) mobilization in the eyes of workers.<sup>181</sup>

Such an impression has its roots in the limitations on industrial action imposed by the New Act. Whereas previously disputes could be pressed and strikes called over all issues, including issues of basic “rights,” the New Act draws a distinction between industrial action over “rights” issues and industrial action over “interest” issues. The latter is allowed, while the former is not.<sup>182</sup> Moreover, the new Labour Court is given the “intrusive role” of interfering

---

<sup>180</sup> See du Toit, *supra* note 17, at 790.

<sup>181</sup> *Id.*

<sup>182</sup> See *id.*

with strikes it considers wrongful and awarding damages against participants.<sup>183</sup>

Further restrictions on industrial action arise from the granting of jurisdiction to workplace forums over issues previously addressed by trade unions. While the New Act does not necessarily prohibit striking over "consultation" issues when no consensus may be reached, it does proscribe industrial action over "joint decision making" issues.<sup>184</sup> Proponents of cooperative labor models have criticized the statute for allowing strikes in the former situation. It does not go far enough, they complain, in working to prevent the spillover of adversarial attitudes into the forums.<sup>185</sup>

This criticism, however, again presupposes the undesirability of more confrontational models in the present-day socio-political landscape. As suggested, that preference may not be so clear-cut. Indeed, at least the threat of potential collective populist opposition may be desirable even in an atmosphere of complete cooperation. Thus, one could complain that the New Act encroaches too much upon a historically effective safeguard of the hard-fought prize of an effective, democratic voice.

It may be a question, in other words, of who is watching the watchers. While no one has questioned the dedication of the present national government to the ideals of equality and democracy, even it can give no guarantees about the faithfulness of future regimes to those same ideals. Would it perhaps not be better to retain the one weapon that has proven its worth in enforcing such tenets even in the face of so insidious, so virulent, and so stubborn an opposition as the apartheid system?

Moreover, as du Toit has hinted, limiting the situations in which industrial action may legally take place might have the effect of altering worker perception of the role it could play in vindicating rights that have been encroached upon.<sup>186</sup> In this manner, the New Act may reduce the potential for collectivism, not only by establishing certain prohibitions against it but also by enabling a sort of atrophy. Given enough time, the sword of opposition could rust unburnished until no longer fit for service as a guard against creeping marginalization or stratification.

This has not happened yet, and it is important to note that the New Act does not necessarily eliminate "the right of workers to participate in socio-economic

---

<sup>183</sup> See *id.* at 790 n.19; see also New Act § 68(1)(a)-(b).

<sup>184</sup> Olivier, *supra* note 107, at 813. For "joint decision making" issues, the act prescribes mandatory arbitration. See New Act § 86(4)(a)-(b).

<sup>185</sup> See *id.*

<sup>186</sup> See du Toit, *supra* note 17, at 792 (discussing the importance of worker participation in protecting rights).

protest action."<sup>187</sup> A 1997 ruling by the Labour Appeals Court appears to hold that such action may proceed so long as the participants first comply with certain alternative dispute resolution procedures.<sup>188</sup> It may take several more years, therefore, before it becomes clear exactly how deeply the workplace provisions cut into the availability of such adversarial recourse. Du Toit and others may find their worries never coming to fruition.

#### IV. CONCLUSION

One final point considers the true nature of collective opposition in relation to the controlling laws of South Africa. Du Toit's characterization of such movement as *independent* mobilization emphasizes the extent to which it necessarily exists outside of the prevailing discourse. Indeed, it sets itself *against* these controlling forces so that it might, by its opposition, end them. It is, in Thoreau's words, a recognition of "the right of revolution; that is, the right to refuse allegiance to, and to resist, the government, when its tyranny or its inefficiency are great and unendurable."<sup>189</sup>

Throughout the history of labor relations in South Africa, the government has attempted to impose restrictions on the ability of discontented workers to express corporately their dissatisfaction. As demonstrated in Part I, however, such efforts ultimately failed. One may attribute such failure in part to the Industrial Court, whose sympathy toward disenfranchised Africans took the government completely by surprise. That tribunal used nebulous labor legislation to chip away at the very power disparity it was enacted to maintain.

But that cannot fully explain the apartheid government's failure. Nor does it help us to predict what effect, if any, the present workplace forum provisions may have on either the labor relations landscape or the larger social one. It may well be, as discussed in Part II, that these forums will present all South African workers with a truly democratic workplace (subject to the correction of certain flaws in the statutory scheme). Whether these same provisions will help or harm the democratic project under way in South Africa as a whole remains to be seen.

Certainly these provisions comprise the first potentially effective inroads into the power of trade unions. The trade unions historically have enabled the

---

<sup>187</sup> Carol Paton, *COSATU Protest Action Divides Labour Court: Workplace Conflict*, BUS. TIMES (South Africa), May 11, 1997, available in LEXIS-NEXIS, World Library, TMLBT file.

<sup>188</sup> See *id.*

<sup>189</sup> Henry David Thoreau, *Civil Disobedience*, in THE VARIORUM CIVIL DISOBEDIENCE 31, 34 (Walter Harding ed., 1967).

voices of the marginalized. But to stop there in the analysis is to ignore the lawless, "independent" nature of collective opposition. It exists as a check on the movement of prevailing forces against the will of those "subjects" the forces are intended to protect. Where the laws proscribe collective opposition but the populace seeks a corporate voice, the laws eventually will give way, in effect if not in substance.

Thoreau issued the challenge as follows: "Unjust laws exist: shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once?"<sup>190</sup> Thoreau preferred the last of these options. Historically, so too have the disenfranchised people of South Africa.

Thus, it may be that the worker forum provisions ultimately will *not* hamper the ability of workers, either as workers or as citizens, to make known their complaints and to seize the power that is theirs to force changes. Where the law seeks to contain rather than reflect the will of society, laws will be broken and eventually changed.

This South Africa knows from experience.

---

<sup>190</sup> *Id.* at 39.

