Bargaining Indicators 2014

Twenty Years - A Labour Perspective

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Twenty Something Years of Tripartism:

A Note of Realism about the LRA, After Twenty Years of Democracy

by Jan Theron

South Africa commemorated twenty years of democracy in 2014. Democracy was supposed to usher in a new dispensation for labour, that is, for those who labour for others in an employment relationship. It did so, to the extent that a new labour relations regime was introduced and new institutions were established. It also did so, to the extent that a section of those in employment, most of whom were formerly disenfranchised, are in various ways materially better off than they were in 1994. For those who are not in an employment relationship, there are also services and a social safety net of a kind that did not previously exist.

Even so, one encounters, with increasing regularity nowadays, the sentiment that "we were better off under apartheid". In today's (1 October 2014) newspaper, juxtaposed with an article headed "Still poor? You deserve it", a sentiment attributed to Jack Ma, China's internet billionaire, there is an article about what the residents of Imbali village in Kwazulu-Natal had to say about a proposed visit by President Zuma: "We do odd jobs but we spend most of our time sitting here", a 27 year old resident is quoted as saying. "People talk about twenty years of democracy. Well, nothing has changed for us and our community."[1]

The cornerstone of the new labour relations regime was the Labour Relations Act of 1995 (the "LRA"). It is not yet twenty years since the LRA was adopted, and it only came into force a year later. However, the process leading to its adoption can be traced back to the Laboria Accord in 1990. This was when the parties most directly affected by the new law, namely organised labour, business and government, committed themselves to a form of tripartism, or social partnership, in which labour market policy and amendments to existing labour legislation would be negotiated between them.[2] The Reconstruction and Development Programme was intended to cement this partnership, and the establishment of the National Economic, Development and Labour Council (NEDLAC) Act to give it institutional form.[3]

It is perhaps understandable that organised labour tends to view the LRA as its crowning achievement. It was, literally, negotiated. No other legislation before or since has been through a comparable process, with the exception of the Constitution itself, and the LRA was adopted prior to the final Constitution. This underscores how important the role of organised labour was in bringing about the transition to democracy. At the same time, the purposes of the LRA underscore the kind of expectations its adoption generated: these are to "advance economic development, social justice, labour peace and the democratisation of the workplace..."[4]

There is another reason why organised labour tends to view the LRA as its crowning achievement. The Laboria Accord marked the juncture at which an emergent trade union movement representing workers of all races, but predominantly African workers in the primary and secondary sectors of the economy, came in from the cold. In so doing, it displaced

1 "JZ lives in Nkandla, we live in hell". N. Nair, The Times, 1 October 2014.
2 This was in terms of the Laboria Accord. For an account of the process leading to the conclusion of Accord and subsequently, see S. Godfrey, in Du Toit et al. 2003. Labour Relations Law, Fourth Edition, 14-34.
3 NEDLAC was established in terms of the NEDLAC Act, No 35 of 1994.
4 Section 1, LRA of 1995.

an established trade union movement that had been around much longer, but had failed to shed its racial profile. Accordingly, the approach organised labour adopted in the negotiation of the LRA was heavily influenced by an experience acquired over a very short period, in historical terms: little more than a decade.[5]

WHAT PROGRESS, THEN, HAS THERE BEEN TOWARDS ACHIEVING ITS PURPOSES IN THE PERIOD SINCE THE LRA WAS ADOPTED?

The LRA and economic development

The relationship between law and economic development is complex, and the proposition that labour law, specifically, can advance economic development is controversial. The orthodox view about the relation of law to economic development, however that is defined, is that it is "a secondary force in human affairs, and especially in labour relations".[6] To the extent that there has been a debate on the question of the relation of law to economic development, it has been in response to a contrary view, that labour legislation is an impediment to economic development. Indeed, there is a widely held view that labour legislation is the primary impediment to economic development, which is in turn how jobs are created.

In most cases this view is ideologically motivated, based on the assumption that markets are self-regulating, and best left to their own devices. Clearly the LRA represents an intervention in the labour market. For those who subscribe to this assumption, it is objectionable for this reason. However it is important in this regard to differentiate between two positions, although these are often conflated: for libertarians who believe in a minimalist state, the objections are fundamental. Neoliberals, on the other hand, want a strong state.[7] Their ideal is an invisible rather than a minimalist state.

The LRA's intervention in the labour market was calculated to end a situation in which "all employment was primarily regulated by the contract of employment".[8] Put differently, its objective was to insulate the labour relationship from common law influences. It went to considerable lengths to do so: amongst other things it established a new dispute resolution body, the Commission for Conciliation, Mediation and Arbitration (CCMA), with exclusive jurisdiction to arbitrate unfair dismissals disputes (but with very few other powers). This was in turn made accountable to a specialised Labour Court, with the same status as the High Court.[9] For a surprisingly long time labour lawyers seemed to believe that the LRA had in fact ended the regulation of employment by contract.

This was not, of course, an objective with which the neoliberal project had any sympathy. It was dedicated to promoting the common law, and in particular notions of the sanctity of contract. No matter. What counted was what was happening on the ground, in the workplace. At a time when the neoliberal project was increasingly ascendant both globally and locally, employers drastically curtailed the numbers of workers in jobs to which the LRA's rules applied. One way they did so was to "convert" workers who had hitherto been regarded as employees and to whom labour legislation applied to "independent contractors", to whom the legislation did not apply.

5 In 1980 there were less than a handful of recognition agreements entered into with emergent trade unions
6 O. Kahn Freund, 1977. Labour and the Law. Second Edition, Stevens and Sons, London: 2.
7 See P.Mirowski, 2013. Never let a serious crisis go to waste. Verso, London and New York: 39-41. Mirowski and others argue that it is the commitment to a strong state that differentiates neoliberalism from classical liberalism. What he refers to as "mature neoliberalism" understands this.
8 C. O'Regan. 1997. 1979-1997: Reflecting on 18 years of Labour Law in South Africa. Industrial Law Journal, Vol 18, Part 5: 889.
9 The exception to the exclusive jurisdiction of the CCMA is dismissal disputes that are for operational reasons.

In cases where this conversion was patently a scam, the incapacity of the state to enforce its own legislation was exposed. This was partly a result of a new approach to enforcement, adopted in both the LRA and the Basic Conditions of Employment Act. This was intended to be educative rather than punitive. The incapacity of the state was also a consequence of the way the CCMA was constituted. Inspired by a model of private dispute resolution developed in the 1980s to cater for the emergent trade unions, it was constituted as an independent agency, governed by its own board. This was to render the state invisible, consistent with the neoliberal ideal. The abundant resources with which the CCMA was provided, courtesy of the public fiscus, contrasted starkly with the inadequate resources provided to a hopelessly understaffed and demoralised labour inspectorate.

It would be simplistic to categorise all instances in which employees were converted to independent contractors as a scam, or what the International Labour Organisation (ILO) now terms "disguised employment". Often this conversion was effected by way of schemes to "empower" or "incentivise" individuals, consistent with a broader neoliberal scheme to restructure employment. This scheme dovetailed nicely with government's black economic empowerment policies, making it difficult to criticise.

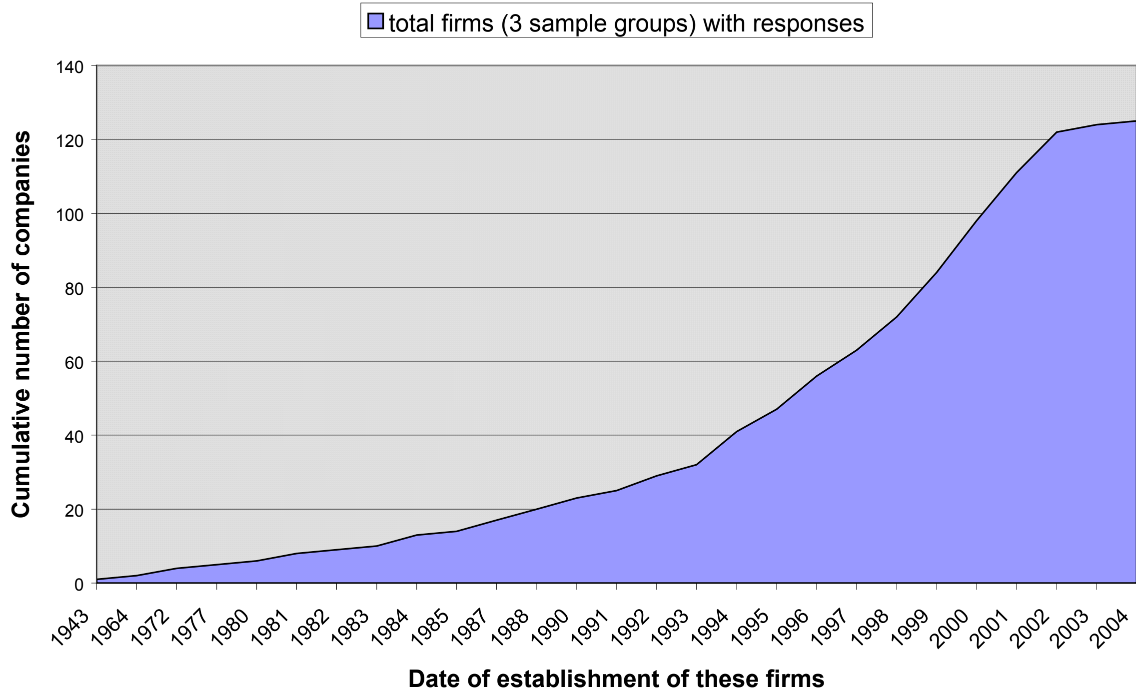
Amendments to the LRA adopted in 2002 to create a presumption as to who was an employee proved to be an ineffective response to such schemes. Many of the workers converted in the 1990s and subsequently are independent contractors to this day. Owner-drivers are an example. Moreover new recruits are engaged as "independent contractors" rather than employees. As a consequence, they are subject to a contractual regime, rather than the LRA, even though they are in a dependent relationship akin to employment.

The conversion of workers to "independent contractors" was in any event only one of several ways in which the owners of the means of production were externalising accountability for the conditions of workers who labour for them. The 2002 amendments to the LRA also represented a missed opportunity to respond to the broader scheme to restructure employment then underway, which I describe as externalisation. The more important form of externalisation at the time was the utilisation of temporary employment services (TESs), otherwise known as labour brokers. The irony here was that the LRA itself permitted labour broking, in blithe disregard of the consequences of designating a labour broker as the employer of workers who it provided to a client.[10]

A 2005 study on labour broking shows an exponential growth in the number of new TESs being established in the period from 1994 until 2002, as reflected in the table below.[11] This can be ascribed as a response to the perceived impact that labour legislation would have on employers and, particularly since the LRA was adopted, the business opportunity that it opened up, given that it did not circumscribe in any way what was "temporary" about the service a TES supposedly provided.

The number of new firms established, of course, does not tell us how many workers they employed. All indications are that it was significant. The fact that the number of new firms reflected in the table below tails off after 2002 also has no bearing in the numbers employed. It can probably be ascribed to a process of consolidation that was already underway, in terms of which fewer, larger TESs were increasingly ascendant.

10 Section 198, LRA of 1995. The designation of the labour broker as the employer was initially introduced in a 1983 amendment to the LRA of 1956. Section 198 does state that the client utilizing a TES may be "jointly and severally liable" in certain a limited circumstances.
11 J.Theron, 2005. The rise of labour broking and its policy implications.



The rise of labour broking should not be viewed in isolation from other ways in which employment was being externalised. In fact there is nothing in the definition of a TES to differentiate it from any other service where a person "for reward, procures for or provides to a client other persons, who render services to, or perform work for, the client" and which persons are remunerated by the client.[12] Accordingly, it could be contended the definition extends to these other services. The CCMA, for example, has held that an employer which styled itself a contract cleaner was in fact a labour broker in terms of the LRA. Conversely, if the definition is not regarded as extending to such other services, it becomes easy for a labour broker to style itself as a service to which the LRA does not apply.

This year amendments to the LRA were adopted restricting the period for which a labour broker may be placed with a client.[13] The fact that these amendments are still not in force, after several years of deliberation between the social partners, calls into question the value of this partnership, and NEDLAC. At the same time the amendments do not acknowledge that labour broking is simply a species of externalisation, except obliquely, or attempt to regulate other forms of regulation. As a result, the most likely outcome of this particular amendment will be that the larger labour broking firms will reinvent themselves as other kinds of service providers (as some have already done). The more marginal operations, in the meantime, will likely be absorbed into the informal economy.

In summary, there is no basis for the argument that labour legislation, and specifically the LRA, is an obstacle to either job creation or economic development because there are so many ways around it. In the absence of effective enforcement, and more particularly in the absence of an effective labour movement, it is at worst an irritation factor to employers. The converse of this proposition is that without a state capable of enforcing its own legislation, the role of labour organisation becomes critical. At critical junctures since the adoption of the LRA, this analysis suggests that organised labour was not alive to present threats. The question that arises is to what extent this can be ascribed to an undue reliance on the legislation and the institutions it has created, rather than the efficacy of its own organisation.

12 Section 198(1), LRA of 1995.
13 Section 198 A, LRA of 1995.

The LRA and social justice

Social justice is not only a purpose of the LRA. It features in the Declaration of Philadelphia, which was incorporated into the constitution of the ILO. However social justice is defined, it concerns how outcomes are distributed, and is a neoliberal bugbear for this reason. The market, in terms of neoliberal doctrine, cannot give rise to a just or unjust distribution of outcomes. If you are poor, in other words, you deserve it. Invoking social justice is simply an attempt to justify further interventions by the state.[14]

One way to explain the ILO's shift in focus to decent work is as a defensive response to the neoliberal assault on the validity of social justice as a concept. However that shift took place before the global financial crisis exposed just how threadbare the notion of self-regulating markets was. Today, the outcome of two or more decades of neoliberal ascendancy could not be clearer. There is rampant inequality. In the labour market, this translates first of all into inequality of outcomes between those who have jobs and those who do not. Secondly, amongst those who have jobs, it concerns the inequality of outcomes between those who have decent jobs and those who do not.

The concept of a "decent job" is borrowed from the ILO's concept of decent work, where work is understood to encompass all forms of work, and not simply in an employment relationship. "Job" therefore should have a corresponding meaning. While the gold standard for a decent job is standard employment i.e. a job that is for an indefinite period, full-time and performed on the workplace of the employer (as distinct from those who are employed by service providers, and work for a client) it seems glaringly obvious that the gold standard will not be attainable for all. The great weakness of decent work as a concept is that it provides no guidance as to how to bridge the divide between those in standard jobs and the rest.

It can be argued that the 2014 amendments go some way towards bridging this divide, by providing for certain categories of non-standard employment. These are workers employed by labour brokers, as already noted, part-time workers and temporary workers in direct employment (as distinct from those who are work for a client, and can be regarded as "indirectly employed", or in a triangular employment relationship).

However, it is unclear what the policy objectives of these amendments are. As I have argued elsewhere, it appears the parties to the legislative process were not able to make up their minds between two conflicting policy objectives. The one views all forms of non-standard employment as inherently undesirable. Its objective is therefore to make it as difficult as possible for employers to resort to non-standard employment, thereby compelling them to comply with the gold standard. The other is to craft labour rights for non-standard workers which take account of the nature of their employment, with a view to making certain forms of non-standard employment fairer.[15]

If, however, the objective was to craft labour rights that take account of the nature of non-standard employment, one would have expected a much stronger set of rights for part-time workers. This is because part-time work is (or should be) indefinite employment, at the workplace of an employer. Accordingly, the part-time worker is protected against unfair dismissal (whereas the temporary worker is not). The part-time worker is also able to exercise organisational rights at the workplace of his or her employer (whereas the worker employed by a service provider or labour broker is not).

14 J.Tomlinson, 1990. Hayek and the Market. Pluto, London: 39-40.
15 J.Theron, 2014. A Strategy for Nonstandard Employment. Institute of Development and Labour Law, University of Cape Town. See www.idll.uct.ac.za

The question that arises from the above analysis is whether labour, understood to include those who labour for others but who are not necessarily employed by them, has been well served by the attempt to insulate the labour relationship, legally speaking. The only workers who have arguably been insulated from the common law are those in standard jobs. In respect of other categories of workers, the effect has been to create a mind-set that insulates them from the Constitution. It is indicative in this regard that the first constitutional challenge to the Labour Relations Act has been brought by an organisation which subscribes to the neoliberal project, rather than by workers who labour for others without any or adequate protection.[16]

With regard to the CCMA, it has undoubtedly been successful in its own terms in processing its very large case roll. This is overwhelmingly made up of cases of unfair dismissal. The outcome is that workers in standard jobs are probably more secure than they were prior to the introduction of the LRA. However, it is doubtful whether any other categories of worker benefit from the same outcome. It is likely that the high proportion of cases that the CCMA dismisses for jurisdictional reasons includes many such workers. Processing of unfair dismissal cases can only be said to advance social justice if it contributed to creating greater job security for all workers.

The Imbali residents who do odd jobs and spend the rest of their time sitting around clearly have no job security. This is obviously not the CCMA's doing, but it is also likely that the CCMA is a victim of its own success, in that jobs have been externalised to avoid the risk of CCMA proceedings. The irony about this is that, as befits an institution constituted along neoliberal lines, employment in the CCMA conforms to a neoliberal model. It employs a comparatively small core staff, and a large number of so-called "part-time commissioners", employed on a contractual basis, who are in a dependent relationship to the CCMA akin to employment.

Labour Peace

At the end of 2012 the wheels of the social partnership that the Laboria Accord established started coming off. Police acting for one of the social partners massacred the disaffected members of another partner, labouring for Lonmin, a British multi-national. To compound this atrocity, it transpired that a Director serving on the Board of this company was the erstwhile General Secretary of the National Union of Mineworkers (NUM) and current Deputy President of the country.

The sequel to the Marikana massacre was an unprecedented series of strikes and protests on farms and in rural towns in the Western Cape. There was a further resurgence of strikes and protests in 2013, resulting in an unprecedented increase in the minimum wage prescribed by the Farmworker Sectoral Determination. If the objective was to secure support for the ruling party, it seems to have back-fired. De Doorns voted for the Democratic Alliance.

The increase in the minimum wage exposed another flaw in the scheme the LRA introduced. In a bid to claw back or contain the cost of a 52% increase, many farmers unilaterally changed the conditions of work of their workers. The remedy the LRA provides in such a situation is to go on strike. However a strike is not a weapon weakly organised or vulnerable workers can use. It is also not an option in a seasonal industry, during the off-season. Consequently, many workers believe they are worse off now than they were before the increase.

16 A prominent proponent of this view is the Free Market Foundation, which has brought a constitutional challenge to the validity of section 32 of the LRA.

Undoubtedly this "resolution" will come back to bite employers and the state, at some future point, as the Marikana massacre did, by first of all spurring a mass exodus from NUM, and then the longest ever strike in the mining sector, in 2014. In the same year there has also been a protracted strike in the metal and engineering industry. It does not appear that the LRA has been able to achieve even the most concrete and attainable of the purposes enumerated above, namely, labour peace.

Democratisation of the workplace

The workplace, as defined in terms of the LRA, means the place where the employees of the employer work. When the LRA was adopted, and the base of the emergent trade union was in the primary sector, on the mines, and in the secondary sector, in manufacturing, it might have seemed obvious what the workplace was. It was a factory or mine whose workforce the trade union had organised. Democracy in the workplace meant recognising the trade union the workers had elected to represent them, and recognising the right of workers to elect their own representatives in the workplace.

At the time of the adoption of the LRA, however, it appears organised labour was not satisfied with a common sense definition of the workplace. Instead, it opted for a definition that defied common sense. In terms of this definition, where an employer has several operations the workplace encompasses all of them, except where these "operations….are independent of each other by reason of size, function or organisation".[17] The idea that an operation can ever be independent of the entity that owns it by virtue of its "size, function or organisation" is of course nonsensical.

The effect of this definition is to make it extremely difficult if not practically impossible, at a point at which externalisation was fuelling a growth of employment in services, for any trade union to secure majority representation in national firms operating in the services sector, including the retail sector. However what is equally relevant in the present context is the mind-set on the part of organised labour that it evidenced.

Clearly the objective of this definition was to safeguard trade unions that had already secured recognition from employers having a multiplicity of operations against newcomer trade unions. There should be no objection, of course, to protecting trade unions against unfair competition. To do so by way of a legislative definition, however, smacks of a sleight of hand. It is also to frustrate the democratic wishes of a majority, when thousands of mineworkers at one mine no longer want the recognised trade union to represent them, but their employer justifies its unwillingness to respect their wishes on the basis that they do not constitute a majority at three mines. This apparently was the situation at Marikana, in the events leading up to the massacre.

In any event, in the period since the LRA was adopted the workplace has been transformed. A little known fact relating to the situation at Marikana, and on the platinum mines, is the high proportion of workers employed by contractors or intermediaries. In the case of Lonmin, this represented 26% of the entire workforce. In the case of Implats, it represented 30%.[18] In the case of some manufacturing plants, this figure approaches 50%.

17 Definition of a workplace, section 213, LRA of 1995.
18 2013 data on the Lonmin and Implats websites (accessed on 6 March 2014).

The workplace today, as it exists in these and other sectors, is a place where the workforces of different employers work. The only way in which democratisation could be achieved in such a workplace is if the different workforces were organised, and could be represented in a single forum. This could not be a workplace forum as defined in the LRA, however, since that structure is premised on the LRA's definition of a workplace.

CONCLUSION

It is of course not true that we were better off as a society under apartheid. By the same token, we would certainly not be better off without the LRA and the institutions it established than with it. Yet there is no room for complacency. Organised workers need to stop pretending to themselves and others that by advancing their own interests, they are necessarily advancing the interests of others. Economic development, social justice and democratisation are worthy purposes. So is labour peace, but not at the expense of worker rights.

The rights that need to be advanced in the present conjuncture are the rights of workers who do not benefit from the labour relations system that the LRA introduced. The amendments to the LRA adopted in 2014 are a step in the right direction, in that they acknowledge a problem that exists. However, they do not go far enough. Also, no amount of amendments will remedy the problem if workers are not organised. Trade unions need to do what trade unions are supposed to do: organise the unorganised.

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