

Be careful what you wish for...

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Some points to ponder

The history of all hitherto existing societies is the history of class struggle.

– Marx and Engels *Communist Manifesto* (1848)

The Brazilian worker is a worker surrounded by laws on all sides but dead from hunger. So many laws! But we lack one to keep him from dying of hunger.

– Brazilian trade union leader in the 1950s

One of the biggest problems for any person trying to understand the South African economy is the question: through whose eyes do we study it? We can look at the economy through the eyes of the capitalists or we can look at it through the eyes of workers. Depending on which set of eyes we use, we'll see a very different picture.

– *Political Economy: South Africa in Crisis* COSATU Education Publication, 1987

1 INTRODUCTION

In considering and analysing the experiences of workers and the organised working class over the ten years since the LRA was promulgated, I wish to raise some issues which I think are important in drawing the correct conclusions from our experiences and planning a progressive way forward experiences which for me indicate that, while we may be winning a few skirmishes, we are definitely losing the war.

It is important that we not only share our experiences but that we are able to analyse and interpret them. That, in turn, raises the question of the means by which this happens. Comrade Tony Ehrenreich, in his input on Friday evening, spoke of applying the appropriate tools of analysis. Given the theme of this Seminar I would like to assume that he meant drawing on a Marxist approach for this purpose.

The issues I therefore wish to touch on are:

- Trade unions as organisations dealing with more than simply wages and employment conditions,
- The advent and growing entrenchment of trade union legalism and
- Global capitalism, GEAR and the South African labour movement.

2 TRADE UNIONS AS ORGANISATIONS OF THE WORKING CLASS

Jan Theron, in his paper on who constitutes an 'employee' in terms of the LRA,¹ refers to the relationship between trade unionism and politics by quoting from a 1967 paper by Perry Anderson on the limitations of trade union political action.

Anderson's paper also said the following:

'The demands of neo-capitalism – the need to control inflation, to plan long-term capital investments, to increase export markets – have led to a political attack on trade union autonomy in a number of Western nations.'²

This could very easily have been written 30 years later in relation to the South African trade union movement and GEAR.

Let us therefore turn to the political limitations of trade unions.

Marxist theory sets out two main reasons for the establishment of unions: first, to build unity amongst workers to defend their interests and, secondly, to stop competition amongst workers.

As clearly recognised by Perry Anderson, trade unions are not revolutionary organisations. In the main they seek to create a better life for workers within capitalism. In other words, they are defensive organisations. They seek to afford some protection to workers who would otherwise be even more vulnerable as employers continuously look at ways of extracting more from workers in pursuit of profits.

But Marx went further. In *Trades unions – Their past present and future*³ he stated that 'unconsciously to themselves, the Trades' Unions were forming centres of organisation of the working class'. In other words, through organisation and action on a class basis, workers' struggles are politicised. A growing class consciousness emerges from this organisation and struggle, pointing the way towards the necessity of a revolutionary political party to take forward the battle for socialism.

As Marx said:

'If trade unions have become indispensable for the guerrilla fight between capital and labour they are even more important as organised bodies to promote the abolition of the very system of wage labour'.⁴

In other words, great political significance is attached to trade unions. They are clearly not regarded as neutral, non-political organisations.

Trade unions, therefore, in general

- offer resistance to the ongoing drive by capitalists to drive down the cost of labour;

1 Theron J 'Who's in and who's out' (2007) *Law Democracy & Development/ Ditsela special edition* page 25

2 Anderson P 'The limits and possibilities of trade union action' in Clarke T and Clements L (eds) in *Trade unions under capitalism* (1977) at 342–343

3 In 'Instructions for the delegates of the Provisional General Council – The different questions, The International Workingmen's Association' (1866); available at <http://www.marxists.org/history/international/iwma/documents/1866/instructions.htm>

4 *Ibid.*

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- defend and seek to advance the broader economic interests of workers;
- through the organisation of workers, develop a class consciousness; and
- serve as a training school in broader working-class struggle, (Marx called them 'schools of socialism').

Progressive trade unionism, as propagated by Marx and others⁵, is best described by the following five features:

- *A militant, class struggle approach* as opposed to a class collaborationist approach. This means defending the interests of workers regardless of the interests of the capitalists or the government. Any concessions are only made out of consideration for the interests of the working class. A class collaborationist approach, on the other hand, seeks to develop a harmony between the interests of capital and labour.
- *Building the union on a non-sectarian basis*. Whilst recognising the unevenness in political development amongst different sections of the working class, this approach seeks always to build maximum unity amongst workers.
- *Organising the unorganised*, especially the unemployed.
- *Trade union democracy*. This means an organisation is controlled by its members, having regard to the pressures brought to bear on unions by the state and the capitalists who seek to undermine trade union democracy – for example, through bribery and co-option.
- *Becoming involved in broader political activity*.

Progressive trade unionism is therefore not restricted solely to wages and other employment conditions issues. It concerns itself with broader social, democratic and economic issues. The history of the progressive South African labour movement bears testimony to this.

But because trade unions do spend a lot of their time seeking to improve the immediate economic conditions of their members, mostly by way of centralised collective bargaining, the threat to trade union democracy is ever-present. This threat comes from a number of sources. These include attempts by capital to control unions through 'rewards and blandishments from above, whether these are direct or indirect bribes or merely the enticements of social cooptation.'⁶ The tendency towards bureaucratic forms of organisation and becoming sites of corruption, self-seeking and petty squabbling are often the result.⁷

In the process they can come to reflect the interests of their class adversaries rather than their members. Perry Anderson sums it up well when he says that 'it becomes the natural objective of capitalism to appropriate it (the trade unions) for the stabilisation of the system. It can then become turned against the very purposes for which it was created. It is this ambiguity – power for

5 See Draper H *Karl Marx's theory of revolution* Vol 2: The politics of social classes (New York, Monthly Review Press (1978) at 115–125 for an expansion on what constitutes progressive trade unionism.

6 *Ibid* at 122

7 Marxist Internet Archive *Encyclopedia of Marxism*: available at <http://www.marxist.org/glossary/terms/u/n.htm>



as power over – which makes working class institutions the best of all anti-working class weapons.’⁸

Trade unions, therefore, remain sites of struggle between progressive and bureaucratic pressures. What kind of union movement do we have in South Africa today?

In addition, it must also be accepted that the power of trade unions in capitalist society can never match the power and increasing mobility of capital. At the end of the day, workers and the organised working class remain dependent on employers for their jobs and wages. This means that trade unions are always faced with an ideological struggle, in which the activities of the business community are declared to be ‘rational’, ‘sensible’ and, ultimately, in the national interest as well as the interests of workers whose employment depends on continued business confidence and investment.

The legal and the judicial system are also weighted heavily in favour of capital. As a consequence, the majority of court cases arising from legal disputes between business and trade unions, employees and employers are resolved in favour of business and employers. This is clearly reflected in the experiences we shared over the last few days.

I believe that we need to bear all these factors in mind when assessing our gains and losses flowing from the 1995 LRA. But we should not look only at the law in the post-1995 period. I am strongly of the view that we must also understand how we came to be in a situation where more and more reliance is placed on the law. This reliance on the law, in my opinion, has contributed to the setbacks and defeats (and limited victories) that have been shared over the past few days.

This then brings me to the issue of trade union legalism.

3 TRADE UNION LEGALISM

The term ‘trade union legalism’ is used here to describe the legal regulation of trade unions. The shift away from the voluntarism that characterised trade union/employer relationships in its early years towards ever-increasing legal regulation has and continues to have a profound effect on the trade union movement.

The various collective agreements negotiated over time, as well as laws and regulations introduced by government – some in response to union demands, others as measures to bring about greater levels of control over organised workers – constitute the legal framework within which unions now operate. The role of government in this process raises the whole debate of the class nature of the state.

Laws generally reflect the balance of power in class struggle. The myth of their neutrality and even handedness – even if specific laws and regulations may appear so at face value – must be challenged. As they say, the proof of the pudding is the eating, and the devil is in the detail. Our experiences with

⁸ Anderson (fn 2 above) 346



what we have come to call 'our LRA' bears testimony to this. I will return to that point later.

The ongoing build-up of these laws and regulations, which we would like to see as means of protecting workers, often gets us tied up in red tape and leads to growing union bureaucracy – a dislocation between members and their organisation, and ever-growing reliance on internal and external legal professionals to take up the cudgels on behalf of workers rather than on the action of workers themselves. In other words, we have seen a turn away from the militancy and initiative of workers to dependence on paid officials and legal protection. In a big way, therefore, trade unions are the victims of their own success.

Besides the problems alluded to above, legalism has many other implications for the trade union movement. These range from a strain on union resources, spiralling legal costs and potential negligence claims by members who feel they have not been properly represented, to a major decline in the organising model of trade unionism brought about by the easy access to stop-order facilities. As a matter of interest my own union – one of the larger ones in COSATU – spends in excess of R250 000 per month on legal fees.

Jan Theron, in his paper on the definition of 'employee', touches briefly on the debates of the early 1980s regarding changes to labour legislation. It is indeed that period which best captures the debates and developments which have led us to the current state of trade union legalism.

The proposed amendments to labour legislation immediately after the publication of the Wiehahn Commission report⁹ were viewed by many as signalling a clear intention by the state to gain control over the newly-formed independent trade unions. We must keep in mind that this was at the height of the struggle against apartheid, in which the re-emergence of a militant, predominantly black trade union movement was a hugely important factor. The state's intention, it was argued, was to restrict trade union autonomy, extend control to unregistered unions, limit union assistance to strikers and increase the restrictions on political activity. As part of the regulatory requirements, for example, unions were required to submit to the Registrar of Labour Relations:

- the union constitution;
- the names of all office-bearers within 30 days of election;
- audited financial statements; and
- membership particulars.

Voting had to be by ballot and forms had to be kept for three years. The Registrar had to be notified of the establishment of new branches and the names and addresses of chairmen (*sic*) and secretaries.¹⁰

⁹ The Wiehahn Commission, headed by Prof. Nic Wiehahn, was set up in 1977 following student and worker uprisings in the early 70s. Its main brief was to investigate training and labour legislation. It produced six reports, the first in 1979, leading to legislation enabling the registration of black trade unions.

¹⁰ See s 11, Labour Relations Act 28 of 1956 as amended by Act 57 of 1981. These requirements may be compared with those in s 100 of the present LRA.

Greater levels of state intervention were therefore being proposed in aspects of union organisation which up until then – at least for the emerging progressive labour movement – had been left to the union members to decide on and control.

Many of the unions and federations that were to form COSATU in 1985 resolved at Langa in August 1981 that, while not objecting to providing information regarding their constitutions, finances and levels of representation, '[we] refuse to subject ourselves to control by anybody other than our own members'. They went on to say that '[we] therefore resist and reject the present system of registration insofar as it is designed to control and interfere in the internal affairs of the Union'. The same resolution rejected the 'present Industrial Council system as an acceptable means of collective bargaining'.¹¹

These developments led to many arguments for and against registration. Some argued that registration could 'lead to a bridgehead from which the structure of apartheid/capitalism could be undermined' while others warned that participation in the proposed system 'would inevitably lead to co-option in terms of which the burgeoning trade union movement would be neutralised and labour struggles defeated'.¹²

Those arguing for registration were of the view that, amongst other things, registration would ease the struggle for trade union recognition by employers and provide certain legal rights to trade unions which were not provided to unregistered unions. The registration of predominantly African trade unions, it was said, was a concession to African workers that would make it difficult for the state to repress those unions.

Opponents of registration, on the other hand, were firmly of the view that registration would tend to bureaucratise trade unions and remove them from the control of their members. Employer recognition of a union, they argued, depended on the strength of the union and many companies had been forced to recognise unregistered unions for this very reason. These arguments against registration were motivated by a view that the prevailing industrial relations system was embedded, in the words of Martin Nicol, 'in the tradition of legalism and the anti-organisation which it has nurtured'¹³ – a view informed in the main by the experiences of the unions under the existing labour legislation.

Nicol went on to argue that the entry into legalism meant a danger that major decisions would be taken by the leadership as opposed to the workers, and that the use of the law would be encouraged, rather than organisation, as the unions' first weapon.¹⁴ Today, our isolation as workers from much of what happens in institutions like NEDLAC is an illustration of what this meant.

11 'Union responses to March Bill' *South African Labour Bulletin* September (1981) Vol 7 No.'s 1 & 2 at 3. It should be noted that big business and employers fully supported the registration provisions of the new Act.

12 Davis D 'The legal struggles for a Democratic South Africa in the 1980s', paper delivered at conference on *A South African conversation on Israel and Palestine* September (2002) Institute for African Studies, Columbia University, 20–21.

13 Nicol M 'Legislation, registration, emasculation' in *South African Labour Bulletin* March (1980) Vol 5 Nos. 6 and 7 at 56.

14 *Ibid* at 51



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From a legal perspective the debate was, on the one side, about the law as an 'instrument of capitalist power' and, on the other, about the 'contradictory and dialectical quality of law which would allow for space in terms of which trade unions could advance the gains for workers'.¹⁵

The general consensus was that the latter proposition won the day. For me the jury is still out as to what this victory has meant in real terms for workers and the working class. How you answer the question will depend on which world view you take and the strategies and tactics you favour to build an alternative world system, if that is indeed your goal.

In similar fashion, I think our experiences of the 1995 LRA should be subjected to the same scrutiny, with the added complication that this Act was passed by the first majority government in South Africa. This does not, however, mean that all its provisions have their genesis in the post-1994 period. In fact, many of the provisions are to be found in the old LRA, while others are a reflection of rights won by workers in struggle in the period leading up to 1994.

The shift to legalism is therefore rooted as much in attempts by the state to control the trade union movement, through concessions made in response to trade union struggles, as it is an outcome of the trade unions themselves seeking to enshrine in law some of the victories gained over time. However, what the trade unions never gave enough consideration to, at least in my opinion, were the negative consequences of these developments.

4 THE 1995 LRA, A GLOBALISING WORLD AND THE ENTRENCHMENT OF CAPITALISM IN SOUTH AFRICA

Globalisation sums up the capitalist response to the structural crisis gripping the system. As Perry recognised as long ago as 1967, and others after him, this response has wreaked havoc on the living and working conditions of the majority of the world's population while transferring obscene levels of profits into the hands of a few.

The democratic transition in South Africa encompassed its integration into this world order. This included a constitutional guarantee of the sanctity of private property. We can argue about whether or not this was an inevitable outcome in the light of local and international conditions. In this context, however, the LRA was one of a plethora of new laws flowing from what has been hailed as one of the most democratic constitutions in the world.

The LRA, aiming to promote what the government called 'regulated flexibility', was hailed as a victory by organised workers. It enshrined many of the rights that unions had been campaigning for and, at face value, seemed to provide protection and certainty in a number of areas.

At face value, a law with strong social-democratic intentions. A law, however, that was emerging within the neo-liberal macro-economic framework of

¹⁵ Davis D 'The legal struggles for a Democratic South Africa in the 1980s', paper delivered at conference on *A South African conversation on Israel and Palestine* September (2002) Institute for African Studies, Columbia University, 20-21.



GEAR and South Africa's entry into the global economy. This contradiction has continued to haunt the drafters and legislators who in many instances have asserted a different intention from that which the courts have read into the Act. At the same time it has served great doses of disillusionment to those in the labour movement who had hailed its progressive nature.

But, as some have argued, the key intention of the new LRA was very clear. Its content was undoubtedly influenced by 'the continuing economic crisis and the new government's conviction that the prevailing system of industrial relations constituted an impediment to economic recovery'.¹⁶

Therefore, I would contend, the interpretation of the Act by the courts was never going to be based simply on what was 'fair' but, rather, on what made good capitalist economic sense. This was in part dictated by certain provisions which – while creating the appearance of treating workers and employers equally in terms of rights and obligations – clearly favoured and protected the interests of big business. This approach by the courts is most evident in judgments in the area of operational requirement dismissals.¹⁷

But there are other provisions in the Act which further illustrate the bias in favour of employers – provisions that we often gloss over as we sing the praises of the Act. These include:

- The myriad of restrictions on the right to strike: essential service provisions, notice periods, qualifications on solidarity strikes, possible dismissal based on operational requirements, etc. It is completely hypocritical to deny workers who work in so-called essential services the right to strike when these same services can be cut off for non-payment.
- The separation of interest and rights disputes. This clearly restricting solidarity action in the case of dismissals, and hands over to the courts the sole right to adjudicate on matters where we had previously enjoyed the right to use our collective strength.
- The commitment to codetermination, from NEDLAC at the one end to workplace forums at the other. It is a principle which seeks to elevate the economic interests of capital to the status of a national interest and create a shared responsibility for maintaining and defending this system.

As I have already mentioned, the LRA also places a far greater burden on unions to receive sound legal advice and deal with matters in the courts. Our experiences of underresourced and overstretched tribunals and courts are similar to those of workers in developed economies. As a matter of routine, it can take up to three years for a dispute to work its way through the courts. The ability of employers use the system to their advantage has been clearly illustrated by their manipulation of the machinery for the enforcement of collective agreements and arbitration awards.¹⁸

16 Du Toit D; Bosch D; Woolfrey D; Godfrey S; Cooper C; Giles GS; Bosch C & Rossouw J *Labour Relations law: A comprehensive guide* 5 ed (2006) at 18

17 See Gandidze T 'Dismissals for operational requirements' (2007) *Law Democracy & Development/ Ditsela special edition* page 83

18 See Brown J 'Enforcement difficulties in the public and private Sectors' (2007) *Law Democracy & Development/ Ditsela special edition* page 97



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I fear that the unions' growing reliance on purely legal forms of action can blunt – and, I submit, has blunted – the edge of their members' fighting capacity and fostered illusions that political and industrial action are outdated forms of struggle, that our salvation now lies in seeking a worker-friendly interpretation and application of the law.

In my view this simply provides opportunities for the legal fraternity on the one hand to make loads of money – when acting for unions, the hard-earned wages of workers – and, on the other, to raise complex arguments in favour of one or other interpretation which are, in most instances, way over the heads of rank and file members. And then at the end of the day we are at the mercy of the arbitrators and judges.

But, as suggested earlier, the unions have also contributed to this situation. This is borne out by the number of union persons taking a greater interest in labour law seminars and training than in workshops on recruitment and servicing members. Little or no attention is given to building strong shop floor structures while general shop steward education, including political education, is seriously neglected.

Interest in the law *per se* is not the problem (and I will return to why I say this) but, rather, the underlying reason for this interest. The reason, in my view, is a shift towards a more class collaborationist approach to advancing worker interests than the militant class struggle approach that informed trade union work in earlier times.

The history of the progressive labour movement in South Africa is, in the main, a history of working class activism, of solidarity action and growing class consciousness as spoken about by Marx and others. It is a history that spoke of a desire for a system transcending capitalism, a history littered with struggles waged outside the narrow confines of the law. But much of this has changed in recent times.

Whether one calls it class collaborationist politics or respect for legalism and parliamentary democracy, this approach and the very limited gains made on this basis have generally not served the organised workers very well.

A 'social partnership' based on modern global economic and political realities can never be just. Let us return to 1967 when Perry Anderson wrote the following:

'there is no parity of power between "Management" and "Labour" in a capitalist society, because labour is an untransformable element which can only be withdrawn (or at best used for the occupation of factories), whereas capital is money – a universally transformable medium of power which can be cashed in any number of different forms. Thus capital can be switched into control of information media, resources for a lockout, support for a propaganda campaign, finance for private education, funds for a political party, budgets for weaponry in a social crisis(the use of goon squads was common in the USA in the thirties etc.'¹⁹

This is even truer today. Trade unions' limited resources come nowhere near what the state and the employers have to keep labour in its place.

¹⁹ Anderson (fn 2 above) 337



5 CONCLUSION

I am a strong proponent of the Marxist model of a progressive trade union. Amongst other things, this means that there are forms of trade union struggle which, even if they do not immediately result in the 'destruction of the system', are important for the working class and must be taken up seriously.

The working class remains an exploited class and therefore the struggle for immediate economic demands and the revolutionary struggle against capitalism are two sides of the same coin. In other words, the destruction of capitalism is nothing other than the defensive struggle against the attacks of capital taken to its final conclusions.

At the same time, there are those who see the working class only as an exploited class and the struggle as being limited to immediate demands. This, I submit, is a very ahistorical approach to working class struggle and has contributed in part to the slide into legalism.

So, while I strongly favour a move away from legalism, we have to continue representing members in accordance with the existing framework, including in the various tribunals established under this regime. This does require that we equip ourselves with the tools to do this work. Seminars such as this none contribute in this regard.

At the same time we should continue to fight for legislation which unambiguously guarantees the rights won in struggle but steers clear of the kinds of rules and regulations which restrict and straitjacket our struggles.

We should be fighting for laws which guarantee our right to strike without restrictions and diminishes or eradicates the role of the courts in settling differences between employers and employees. In this regard we must draw up a clear set of demands and build a broad-based campaign in support thereof. This means that some will have to disabuse their minds of the thought that to fight for changes to the LRA is a betrayal of their legacy.

Unions, irrespective of affiliation, should pool resources, share experiences and, where possible, wage common battles.

We should not hold on blindly to formulations of the past but start exploring new forms of organisation and organising. By this I mean that we need to ask ourselves whether the old 'one industry one union' approach remains relevant today or whether we should not revisit the notion of general unions.

We need to look again at how unions are organised in the workplace and critically ask ourselves whether centralised collective bargaining, in its current form, advances working class interests.

The organisation of the unemployed and underemployed sections of the working class must be vigorously taken up. Jan Theron calls for the establishment of effective organisations of those currently excluded from protection and what he calls 'a change of mindset amongst the unions'.²⁰ Hand in glove

²⁰ See (fn 1 above).

with this must be the development of links with other working-class formations in a much more structured way than up to now. Experiments of this nature in countries like Argentina must be studied and engaged with.

But most important for me is the realisation that we are involved in a class struggle and that our strategies and tactics must be based on this reality. Use of the law cannot be the be-all and end-all of our struggle.

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