TRANSFORMATIVE EQUALITY: THE ROLE OF DEMOCRATIC PARTICIPATION

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ABSTRACT

There is a paradox in affirmative action and other schemes to achieve the redistributive goals of labour law. This is that while one of the main aims of such schemes is to increase the participation of disadvantaged groups in institutions, the introduction and implementation of the schemes only rarely involve the active participation of those groups. Instead, most schemes are designed by the holders of power (government, employers etc) and rely on top-down command-and-control mechanisms for their enforcement. The result is that many schemes end up being 'paper tigers, fierce in appearance, but missing in tooth and claw.' The scheme may alter the colour or gender of those in power but deep structural inequalities remain.

The first part of this paper discusses some theoretical arguments and propose a model of 'reflexive regulation' as a basis for participation. The second part looks critically at why command-and-control models have largely failed. The final part examines the nature and extent of participation and of accountability.

INTRODUCTION

There is a paradox in transformative equality schemes. This is that while one of the main aims of such schemes is to increase the participation of disadvantaged groups in institutions, the introduction and implementation of the schemes only rarely involve the

active participation of those groups. Instead, most schemes are designed by the holders of power (government, employers etc.) and rely on top-down, command-and-control mechanisms for their enforcement. The result is that many schemes end up being 'paper tigers, fierce in appearance but missing in tooth and claw.'[1] The scheme may alter the colour or gender composition of those in power but deep structural inequalities remain – for example, the inequality between middle class white men and black women may diminish, but the gap between poor black women and rich black women may increase.[2]

Democratic participation in the making and implementation of affirmative action schemes is central to the idea of *transformative equality*, that is the dismantling of systemic inequalities and the eradication of poverty and disadvantage .[3] This involves ensuring what Amaryta Sen has called an 'equality of capabilities',[4] enabling people to have the skills they need to participate in society, to engage in productive activities and to participate in decision-making. The measures needed to achieve this include a positive role for institutions in removing barriers, and in ensuring that those who need more resources than others get them. In other words, it involves an element of redistribution.[5] However, Sen has emphasised that 'equality of capabilities' does not mean uniformity. For example, there may be a need to reward individual efforts and productivity, and equality has to be weighed with other aspects of justice such the equity of procedures.[6]

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[1] Bob Hepple (ed), *Social and Labour Rights in a Global Perspective* (2002) at 238.
[2] Sandra Fredman, *Discrimination Law* (2nd edn, 2011) at 232.
[3] S.Albertyn, 'Substantive Equality and Transformation in South Africa' (2007) *SAJHR* 257.
[4] Amaryta Sen, *Development as Freedom* (1999).
[5] Sandra Fredman, *Human Rights Transformed* (2008) 226-40.
[6] Amaryta Sen, *The Idea of Justice* (2009) 296.

The aim of 'inducing large-scale social change through non-violent political processes grounded in law'[7] can be successful only if those who are directly affected have an effective voice in the making and implementation of transformative measures. There are two principal arguments for the *presence* of representatives of women, racial groups that have suffered discrimination in the past, disabled people and other disadvantaged groups in the *processes* of change. First, these representatives are likely to articulate the needs of their particular group, and so help ensure that there is a 'fit', that is 'proportionality' between the aims of an affirmative action scheme and the means used to enforce it. This reduces the risks of over- or under-inclusiveness and increases the likelihood that the appropriate groups are identified and targeted for affirmative action. There is, of course, no guarantee that representatives will effectively voice the needs and interests of the affected groups; indeed there may be differing interests and conflicts within particular groups. This makes it essential that there should be mechanisms of *accountability* of the representatives to their constituencies.

A second argument for democratic participation in the making and implementation of affirmative action schemes is that this makes *restorative justice* possible. This is 'a process where all the stakeholders in an alleged injustice have an opportunity to discuss its consequences and what may be done to right the wrong.'[8] In other words, 'meaningful engagement' between interested parties, going beyond 'consultation' but possibly different from 'negotiation' should be a feature of affirmative action schemes.

[7] Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 at 150.
[8] J.Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Better* (2008) at 76

The first part of this chapter considers some theoretical arguments and proposes a model of 'reflexive regulation' as a basis for participation. The second part looks critically at why 'command-and-control' models have largely failed, using examples from the United Kingdom and South Africa. The third part examines the nature and extent of participation, and of accountability.

REFLEXIVE REGULATION[9]

There are least two reasons in theory why transformative equality schemes fail. The first is that these schemes often involve an interference with rights of private property. By its nature the free exercise of these property rights in a market system generates inequality, cyclical unemployment, and poverty, the very evils that transformative equality seeks to remedy. After the crisis of the First World War, a new generation of social democratic lawyers, notably the Austro-Marxist Karl Renner, detected a functional transformation in the institution of private property. Using the example of state regulation of a privately-owned railway company, he observed that private property had in effect become a public utility, though it had not become public property. 'The sovereign owner of private property has suddenly, by one stroke of the pen, been converted into a subject who has public duties.'[10] He believed that the development of public law institutions and

[9] This part draws extensively on the author's article, 'Negotiating Social Change in the Shadow of the Law' (2012) 129 *South African Law Journal* 248.

[10] Karl Renner, *The Institutions of Private Law and their Social Functions,* ed O.Kahn-Freund (1949)118-122 at 120; for a critique see Richard Kinsey, 'Despotism and legality' in Bob Fine et al (eds), *Capitalism and the Rule of Law* (1979) 46-64.

procedures regulating labour, housing, education etc. represented the 'first unavoidable step to nationalisation.'[11]

By the end of the Second World War, however, the experience of the great depression of the 1930s and its outcome in fascism and war, made theorists of the post-1945 welfare state take a more pessimistic view about the possibility of restricting private property rights through social legislation in a democratic capitalist state. For example, Polanyi argued that this would undermine the functioning of the market system, and said it was implausible that there could be a lasting solution to the problem of poverty and unemployment in a market-based economy. [12] This conclusion is shared by those neo-liberal economists who see social and labour regulation as contributing to rising labour and social costs, increasing unemployment, and putting a country which has such rights at a competitive disadvantage in the global economic system.[13] In the present period of almost unrestrained financial capitalism in which large sums of capital can be moved around the globe at the touch of a computer, the weakness of nation states in protecting the poor and vulnerable against the growing power of corporate private property is self-evident.

The tension between the enforcement of rights to substantive equality, on the one hand, and the right to property, on the other hand is widely recognised. For example, the South African Constitutional Court has arrived at the conclusion that the best way of balancing these rights in order to achieve just and fair outcomes is through dialogue. In the words of

[11] Ibid , at 121.
[12] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (1944) at 234.
[13] For a critique of these conclusions see Bob Hepple, *Labour Laws and Global Trade* (2005) chap 10.

Justice Albie Sachs, one has to 'balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant to each particular case.'[14] After pointing out that there are some contradictory values that are so intrinsic to the way our society operates that neither the legislature nor the courts can solve them with 'correct' answers, Justice Sachs continued:

> 'In seeking to resolve [these] contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.'[15]

Although these remarks were made in relation to housing rights, ownership rights also have to be counterposed to other fundamental rights, such as, the right to a basic education.[16] Courts may seek to 'balance' these rights, depending on the specific context, but would generally prefer to encourage the parties to reach a negotiated agreement. The critical issue, to be discussed later, is whether a just 'balance' can be achieved in negotiations between unequal parties and what role the court or administrative authority has in ensuring such a balance.

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[14] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), para 23.
[15] Ibid, para 39..
[16] E.g. *Governing Body of Juma Musjid Primary school and others v Ahmed Asruff Essay N.O. et al* [2011] ZACC 13.

A second theoretical reason for the failure of transformative equality schemes lies at the heart of the use of law as an instrument of social change. This was expressed by Eugen Ehrlich (1862-1922), a founder of the sociology of law.[17] He distinguished the 'living law' from abstracted judicial understandings of law. 'Living law' is the outcome of social processes, the way in which people act within and outside legal institutions. Abstracted law, unlike living law, demands specificity and relatively clear obligations; it operates by individualising conflict between specific parties in a bipolar way. Disputes about transformative equality schemes aimed at reducing social disadvantage and exclusion, on the other hand, are polycentric, involving many different causes and interests. Every time a court is asked to enforce a positive obligation to advance a socio-economic right or a right to equality of opportunity it is confronted by the complexity and multidimensional nature of social disadvantage. There are many causes of disadvantage, including social class, lack of opportunities to work or to acquire education and skills, childhood deprivation, inadequate housing, illness and lack of access to health services. There is also discrimination on grounds of age, gender, disability and ethnicity. To focus on only one dimension may neglect and aggravate other causes of disadvantage. Attempts to reduce the cycle of disadvantage to a single set of positive obligations determined through an adversarial process cannot in themselves deliver substantial social justice. For Ehrlich law can never control the factual order itself –'only a better form of legal decision-making could –and should- do justice to the facts of the living law.'[18] The

[17] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, with an introduction by Roscoe Pound (1936), a translation of *Grundlegung des Soziologie des Rechts* (1913) A new translation, with an introduction by Klaus Ziegert, was published in 2002. See generally Marc Hertogh (ed), *Living Law: Reconsidering Eugen Ehrlich* (2009).
[18] Nelken in Hertogh (ed) op cit note 17 at 262.

critical question which this suggests is whether legal methods such as 'meaningful engagement' and 'consultation' provide an appropriate bridge with the 'living law'.

In recent decades, Ehrlich has been seen as a forerunner of the Continental school of sociology of law associated with Niklas Luhmann's systems analysis.[19] This attributes failures of social regulation to deliver desired outcomes to the limited role that law can play in changing other social sub-systems. By analogy with the biological theory of autopoiesis,[20] it is argued that society is not structured hierarchically with law at the top. One should not expect law to change behaviour by simple 'command and control'. There are multiple sub-systems including the market, the workplace and the administration. Each sub-system operates autonomously to a greater or lesser degree, each has its own 'language' and operates according to its own internal logic. There is no 'shared' language: each sub-system is operationally 'closed' in the sense that it is capable of self-reproduction without direct reference to the outside environment. At the same time it is cognitively open to indirect influence. It can adapt to external stimuli 'reflexively', that is by acts of communication with other sub-systems and by adjusting to the common environment in which they operate. So when the sub-system of the workplace receives a communication from the legal system, this filters through its own internal norms and culture. The outcomes may be significantly different from what is desired by those initiating legal intervention. Teubner describes this as a 'regulatory trilemma': either the targeted sub-system ignores the intervention, or the intervention damages the sub-

[19] Niklas.Luhmann trans. Karl A Ziegert et al, *Law as a Social System* (2004).The following paras of this and the next section draw on Bob Hepple, 'Enforcing Equality Law; Two Steps Forward, Two Steps Backwards for Reflexive Regulation' (2011) 40 *Industrial Law Journal [UK]*315-335.
[20] G.Teubner, *Law as an Autopoietic System,* trans. by Anne Bankowska and Ruth Adler, ed by Zenon Bankowski (1993) at 64-99.

system's ability to reproduce itself (for example, the juridification of autonomous collective bargaining by legal intervention), or the legal system loses its legitimacy because it is ineffective. Teubner's solution is to create a new model of 'reflexive law' which does not seek to impose substantive rules on sub-systems but instead works with the internal dynamics of those systems and co-ordinates them through 'proceduralisation'. [21]

A conclusion that has been drawn from this theory is that if legal intervention is to be successful it must concentrate on improved communication that enables the targeted sub-system to adjust and re-configure itself. Braithwaite, one of the leading advocates of what he calls responsive regulation, explains:

> [T]he core idea of responsive regulation (whether by government or other actors who regulate) should be responsive to the motivational postures of the regulated, to their customs, their actual conduct and to structured facts…[R]esponsive regulation makes the explanatory claim that legally pluralist deliberative institutions that engage multiple stakeholders are most likely to secure the regulatory purposes of such institutions..[It] values flexibility, citizen participation in crafting contextually attuned solutions to problems and parsimony in recourse to coercion. Yet deterrence and incapacitation have vital roles in responsive regulation.[22]

This kind of regulation involves three interlocking mechanisms. The first is internal scrutiny by the organisation itself to ensure effective self-regulation. The second is the involvement of interest groups (such as managers, employees and service users) who

[21] G.Teubner, 'Juridification: concepts, aspects, limits, solutions' in G.Teubner (ed) *Juridification of Social Spheres: a comparative analysis in the areas of labour, corporate, antitrust and social welfare law* (1987) 3-48.
[22] J.Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Better* (2008) at 163.

must be informed, consulted and engaged in the process of change. The third is an enforcement agency which should provide the back-up role of assistance, building capabilities, and ultimately sanctions where voluntary methods fail. These interlocking mechanisms create a triangular relationship among those regulated (e.g employers), others whose interests are affected (e.g. workers and consumers). and the enforcement agency as the guardian of the public interest.

The 'most distinctive part of responsive regulation is the regulatory pyramid. It is an attempt to solve the puzzle of when to punish and when to persuade.' [23] At the base of the pyramid is what Braithwaite has called 'restorative dialogue'.[24] This involves information, persuasion, and voluntary agreement. A crucial element in the design of the enforcement pyramid is to identify and involve the potential participants in the regulatory process. As one moves up the regulatory pyramid, increasingly demanding interventions are involved. When persuasion and dialogue fail progressively more deterrent sanctions are required until there is compliance.[25]

An objection which is sometimes raised against the theory of reflexive regulation is that it either ignores or underestimates the importance of power in securing or avoiding compliance. How can one mitigate the undoubted imbalance between the institutional power of mega-corporations and public bodies and the individuals, work groups, and communities affected by their activities? One way is to strengthen the political and legal

[23] J.Braithwaite, *Restorative Justice and Responsive Regulation* (2002) at 30.
[24] Ibid.
[25] Bob Hepple, Mary Coussey, Tufyal Choudhury, *Equality: a New Legal Framework? Report of the Independent Review of UK Anti-Discrimination Legislation* (2000) at 59.

power of independent regulatory agencies, but that has often failed to work in the past when done on its own, because of judicial hostility, lack of resources, and the absence of transformative positive duties to bring about change. Another, more promising strategy to oppose corporate and institutional power is to strengthen the countervailing power of individuals, work groups and communities. This may be achieved by legally imposed procedures for engagement. The nature of that engagement will depend on the context. It includes information, consultation and other forms of participation, and, in the labour relations context, collective bargaining.

One may conclude that the disadvantage of the reflexive regulation model is that it may simply serve to legitimate or rubber-stamp the exercise of corporate and institutional power unless individuals and groups affected by their actions have the legal power to compel engagement, and the courts or an enforcement agency have the power to ensure that agreements uphold the values of the legislation and, where necessary, to impose deterrent sanctions.

THE FAILURE OF COMMAND AND CONTROL[26]

In the context of affirmative action 'command-and-control' means that the state or an agency sets the aims and outcomes that an organization is required to meet, and enforces this through investigations and legal proceedings. This is distinguished from 'reflexive' or 'responsive' regulation ,as discussed above, which is based on the idea that the

[26] This part draws on the author's chapter, 'Agency Enforcement of Workplace Equality' in L Dickens (ed) *Making Employment Rights Effective* (2012).

regulators need to be responsive to the motivations, customs and structures of those who are being regulated. This involves providing incentives to organizations to undertake internal scrutiny and to engage with interest groups. The role of the state or agency is that of providing information and advice and negotiating change, with deterrent sanctions available as a last resort when voluntary methods fail.

The model of administrative enforcement of anti-discrimination law had its origins in United States' Fair Employment agencies and Canadian Human Rights commissions. These were adapted in Great Britain in the forms of the Race Relations Board (RRB) (1965-76), Commission for Racial Equality (CRE)((1976-2007), Equal Opportunities Commission (EOC) (1975-2007) and Disability Rights Commission (DRC) (1999-2007). The Commissions were given powers to investigate specific organisations on their own initiative, and to stop directly and indirectly discriminatory practices, backed by deterrent sanctions. This was classic command and control regulation, supplemented by a right for individuals to make complaints of unlawful discrimination. Research indicates that the positive effect of individual cases is generally short-lived and can lead to defensive and negative attitudes to change.[27]

The early UK anti-discrimination legislation made specific but limited provision for forms of positive or affirmative action (such as special training) to help protected groups overcome barriers to employment. Prior to the introduction of public sector equality duties (below), a limiting feature of the race and sex discrimination legislation was that it relied exclusively on negative duties prohibiting discrimination rather than positive duties

[27] Hepple, Coussey, Choudhury (above note 25) ,Appendix 1.

to eliminate discrimination and advance equality. The limiting feature of the disability discrimination legislation, before the public sector duty was introduced, was that the duty to make reasonable adjustments applied only to a specific disabled person such as one who applied for a job or was already an employee requesting an adjustment because of their disability. The concept of indirect discrimination was not applied to disability, and there was no general duty to ensure a workplace friendly to disabled people.

More generally, by the turn of the century, after 35 years of agency enforcement, there was still little sense that the majority of organisations had a sustained and co-ordinated strategy to improve diversity and equal opportunities in the workforce.[28] Such a strategy requires a commitment by managers and workers' representatives to participate in bringing about changes, and a system for measuring progress. The early agencies were devised on the basis of a model of organisations that were hierarchical, vertically integrated and centralised. The top-down rule-making command and control approach depends on individual fault-finding and retrospective investigation of an act alleged to be motivated by an unlawful ground of discrimination. This tends to breed negative, defensive and adversarial responses. However, the reality is that organisations cannot survive in the new globalised economy unless they are flexible and adaptable to market changes and technological innovation. Organisations are flattening their hierarchies, giving more authority to lower-level managers and demanding a high quality workforce, with the active participation of managers, workers and customers or service-users. Equality of opportunity at work increasingly depends, not simply on avoiding negative discrimination, but on training and improving skills, developing wider social networks,

[28] Ibid, at 19-20.

and encouraging adaptability. In that new environment, the traditional command and control approach places too much emphasis on state regulation, and too little on the responsibility of organisations and individuals to generate change.

The weaknesses of command and control regulation and individual enforcement led the Cambridge *Independent Review of the Enforcement of UK Anti-Discrimination Legislation* ,[29] using the insights of modern regulatory theory to design an 'optimal' form of regulation which could help to reduce, if not eliminate, under-representation, exclusion and institutional barriers to equal opportunities. This was described as 'enforced self-regulation', involving the three interlocking mechanisms described earlier.[30] The Cambridge Review argued that this broad strategy needed to be developed in several specific ways: (1) a single commission covering all protected characteristics; (2) a positive duty on public authorities to advance equality; (3) positive duties on private sector employers to achieve employment equity or fair participation; (4) positive duties on employers to introduce pay equity schemes; and (5) the improvement of deterrent sanctions including the use of contract and subsidy compliance.

Only the first two parts of this strategy were embraced in the Equality Acts 2006 and 2010.[31]. First, a single Equality and Human Rights Commission (EHRC) was created with more extensive powers than the earlier commissions. The EHRC has two powers, largely modelled on those of the DRC, one to conduct an inquiry, and the other to

[29] Hepple, Coussey, Choudhury (above note 25).
[30] Above, p…
[31] Northern Ireland has separate legislation, which has pioneered affirmative action in the UK, enforced since 1999 by a single Equality Commission (see note 36 below).

conduct a formal investigation.[32] An inquiry can relate to any of the Commission's duties, but leads only to a report and recommendations. These are not legally binding, but a court or tribunal may have regard to a finding, and the Commission may use information or evidence acquired in the course of an inquiry for the purpose of a formal investigation. The Commission has heavily circumscribed powers to obtain information, documents and oral evidence, under judicial control. One of the virtues of a single commission is that the inquiry can cut across strands, for example to investigate possible multiple discrimination. The inquiry may relate to a particular sector. For example, the EHRC has held inquiries into gender equality in the financial services sector, race equality in the construction industry, and employment of migrant and agency labour in meat and poultry processing. Alternatively, the inquiry may be thematic, for example the EHRC has held one into harassment. The Commission may not use an inquiry to find whether a named person has committed an unlawful act; it needs to commence a formal investigation (below) for that purpose.

The second power of the EHRC is to conduct a formal investigation. The Commission may do so only if it 'suspects' that the person concerned may have committed an unlawful act. This follows the DRC model and sets a 'threshold test' of 'reasonable belief'. It has been argued that only if the Commission's decision to investigate is irrational or strongly disproportionate should a court interfere.[33] A single complaint of unlawful conduct is unlikely to suffice as the basis for initiating an investigation, but a series of complaints over time might be sufficient. The suspicion may (but need not) be

[32] For details see Bob Hepple, *Equality: the New Legal Framework* (2011) 151-4.
[33] C O'Cinneide, 'The Commission for Equality and Human Rights: a New Institution for New and Uncertain Times' (2007) 36 *Industrial Law Journal* 141.

based on the matters arising in the course of an inquiry (above). There are stringent procedural requirements. Named person investigations may lead to an unlawful act notice against which there is a right of appeal to an appropriate court or tribunal. The notice may require the person to prepare an action plan for the purpose of avoiding a repetition or continuation of the unlawful act, and may recommend action to be taken by the person for that purpose. The action plan has to be approved by the Commission, which has power to apply to a county court (in England and Wales) or sheriff (in Scotland) for an order requiring a person to give the Commission a draft or revised action plan. During the period of five years beginning with the date on which the plan comes into force, an order may be sought and granted requiring the person to act in accordance with the action plan or to take specified action for a similar purpose. Failure to comply with an order without reasonable excuse may lead to a fine. The EHRC also has powers to assess compliance with the public sector equality duty (below) and, where it thinks that a public authority has failed to comply with a duty, the power to issue a non-compliance notice.

The Equality Act 2011 has harmonised and extended the circumstances in which positive action may be taken.[34] It allows a person to take any action which is a proportionate means of achieving any one of three aims: enabling a person to overcome disadvantage connected with a protected characteristic (e.g. race, gender, disability), meeting special needs of persons with a protected characteristic, and enabling or encouraging participation in an activity where participation by persons with a protected characteristic is disproportionately low. Although positive action remains voluntary in the private

[34] See Hepple (above note 32) 128-30 for details.

sector, there has been a radical reconstruction of equality law in the public sector by the imposition of a positive legal *duty* on public bodies to eliminate discrimination, advance equality of opportunity, and foster good relations between different groups.[35] This duty provides an incentive for organisations to examine their employment practices, to remove barriers to the employment of black minority ethnic groups, women and disabled persons, and to take positive action. It can be seen that the EHRC remains largely within the enforcement models of its predecessors. In particular, In particular, it cannot launch a formal investigation in the absence of evidence of unlawful acts. The EHRC was not given the power to conduct equality audits in the public and private sectors, like the Irish Equality Authority can do, even in the absence of specific evidence of discrimination. In Northern Ireland, the Equality Commission is able to use the results of triennial reviews that employers are required to submit relating to representation of Catholic and Protestant communities, as well as their investigatory powers, in order to negotiate agreements designed to remedy under-representation of either community. These are affirmative action agreements which usually require undertakings to change the way they recruit, advertise, promote, and dismiss, often setting numerical goals and timetables. Most of the agreements reached have been voluntary but a number are legally enforceable. The voluntary ones usually follow a triennial review, while the legally-binding ones tend to follow a formal investigation. Research[36] shows that agreements focussing on institutional changes have been more effective in securing progress towards fair employment than lawsuits. Voluntary agreements have been more effective than the

[35] Ibid, at 134-7.
[36] A.Heath, P Clifford H Hamill, C McCrudden and R Mubarak, *The Enforcement of Fair Emploiyment Law in Northern Ireland: the Effect of Commission Agreements, McBride Agreements and Fair Employment Tribunal Cases' (*unpublished paper, 2009*).*For a summary see C McCrudden (2009) 4 *Equal Rights Review* 7.

legally enforceable ones. The researchers suggest that one explanation for this may be that legally-binding agreements have had to be negotiated where the employers are resistant to change. 'Voluntary agreements where senior staff (with whom agreements are typically negotiated) have been persuaded of the legitimacy of the exercise may thus be more wholeheartedly implemented than are legally enforceable agreements where the leadership of the concern had to be compelled to accept their intervention' .[37] The research suggests that leadership and commitment from the top of the organisation is crucial for the implementation of reforms.

The failure of the Labour and Coalition Governments to introduce employment equity and pay audits means that there is little incentive in Britain for employers to enter into voluntary agreements with the EHRC. [38] A step in the direction of legally binding agreements has, however, been made. The Equality Act 2006 gives the EHRC, like the former DRC, the power to make legally binding agreements in lieu of enforcement. It may do so only if it thinks that the person has committed an unlawful act. The inducements for a person to make such an agreement are that the Commission must undertake not to proceed with a formal investigation or unlawful act notice, and the person is not taken to be admitting to the commission of an unlawful act by reason only of entering into the agreement. If the Commission thinks that a party to an agreement has failed to comply, or is not likely to comply with an undertaking in the agreement, it may

[37] Ibid.
[38] However, the Conservative-Liberal Democrat Coalition Government has now given the power to employment tribunals to require a pay audit by an employer who is found to have broken the provisions for equal pay between women and men: Enterprise and Regulatory Reform Act 2013, s..

apply to a county court (in England and Wales) or sheriff (in Scotland) for an order requiring the person to comply or take such other action as the court may specify.

Although the Equality Acts 2006 and 2010 took important steps towards a model of reflexive regulation of equality, the Coalition Government, elected in 2010, has taken two backward steps. First it has cut the EHRC's budget by almost two-thirds, and proposes to limit the EHRC's powers to so-called 'core' functions. Secondly, the duties on public bodies to have due regard to the need to advance equality have been amended so as to remove any specific duty of engagement with those whose interests are affected. The prospects for reflexive regulation have suffered a serious setback.[39]

A second example of command-and-control' regulation is the South African Employment Equity Act 1998 (EEA) which aims to achieve equity in the workplace by negative obligations prohibiting unfair discrimination and also by positive obligations on designated employers[40] to take 'affirmative action' measures to ensure the equitable representation of black persons, women and disabled persons (the 'designated groups') in all occupations and levels in the workplace. [41]The enforcement of the positive obligations provides an example of 'command and control' administrative regulation. The enforcement of the affirmative action duties is the responsibility of the Department of Labour. The details of the legislation are discussed by Ockert Dupper in chapter…,

[39] See Bob Hepple,'Enforcing Equality Law; Two Steps Forward Two Steps Backwards for Reflexive Regulation' (2011) 40 *Industrial Law Journal [U.K.]*315, for details.
[40] 'Designated employers' are those with 50 or more employees or with an annual turnover above a certain limit. Municipalities, organs of state and employers are bound by a collective agreement that appoints it as a designated employer: EEA s 1.
[41] This part draws on the author's article,' Negotiating Social Change in the Shadow of the Law' (2012) .. *SALJ* …

above. Here it is intended only to suggest some reasons why the Act has apparently had only a limited impact.

First, participation is limited to an obligation on designated employers to 'consult and reach agreement' on specified matters with a trade union representing members at the workplace, or if there is no such union with its employees or representatives of them. South African trade unions have historically been hostile to forms of workplace consultation that they believe may result in co-option by management and the blunting of class struggle.[42] Moreover, there are many workplaces in which there is no representative trade union or the union represents only one section of workers. In that event, the employer must consult with its employees as a whole (across all occupational groups and both designated and non-designated categories of employees), or their nominated representatives. This raises the question of how employment equity consultation relates to other forms of workplace consultation. The Labour Relations Act 1995 (LRA) sought to encourage non-adversarial consultation on issues such as productivity and workplace grievances by establishing workplace forums, but in practice trade unions have prevented them being set up by exercising their veto powers. The EEA makes it clear that the obligation to consult on employment equity does not affect the obligation to consult and reach 'consensus' with a workplace forum where one exists. However, unlike the LRA, the EEA does not define the content of the duty to consult. Consultation under the LRA means: (a) putting proposals rather than completed decisions to employee representatives; (b) disclosing all relevant information; (c) allowing representatives to respond to these

[42] For a recent overview see Sakhela Buhlungu, Mick Brookes and Geoffrey Wood, 'Trade Unions and Democracy in South Africa: Union Organisational Challenges and Solidarities in a Time of Transformation' (2008) 46 *British Journal of Industrial Relations* 439-468.

proposals; and (d) responding to alternative proposals, and, if not acceptable to the employer, explaining the reasons for the rejection. There is a Code of Good Practice under the EEA, issued by the Department, which recommends a much more informal approach including an opportunity to meet and report back, a reasonable opportunity to meet employers, and to request, receive and consider information. The Code suggests that either an existing workplace forum should be utilised or a consultative forum representing both designated and non-designated employees should be established. There is no reliable data on the extent to which employment equity issues are discussed by the few workplace forums that exist or how many special employment equity forums are in operation.

A review of trade union consultation by employers under the EEA, conducted in 2005 by Harish Jain, Loyiso Mbabane and Frank Horwitz of the Graduate School of Business UCT, ('the UCT study'),[43] found that there was consensus among trade unions that they are not properly consulted by employers on equity planning and implementation, and that equity planning has been kept separate from other aspects of human resources development, such as skills. According to this Report, EE planning appears to be at the 'information giving' or 'basic consultation' level. They also found that trade unions themselves do not place EE planning and implementation high on their employment relations agenda, and there are not enough people, especially shop stewards, capacitated to monitor EE compliance. They rely on government to deal with the issue and expect a more aggressive role by labour inspectors.

[43] Trade Union Consultation by Employers under Employment Equity Legislation' Paper delivered at the 4th Regional Congress of the International Industrial Relations Association (IIRA) Mauritius 28-30 November 2005

The UCT study found that a common complaint was that too few inspectors had been appointed. For example, in Gauteng there were 120 inspectors not all of whom could carry out employment equity inspections. According to the inspectors their training was inadequate, and a directive was believed to have been issued to them by their head office 'not to prosecute' but to focus on advocacy. A study in 2008 by Andries Bezuidenhout and others at the Sociology of Work Unit, Wits University, commissioned by the Department of Labour ('the Wits study'),[44]found that the most common issue identified by inspectors is that the company employment equity plan is not reflected at the workplace and in the makeup of the stakeholders in the employment equity forum. One informant from the Department of Labour's Head Office told the researchers that the Department had not seriously enforced the EEA since its inception, but had concentrated on cases of procedural compliance (213 from 1998-2008). This was in part due to internal problems in the Department. An informant said that it could take an inspector the whole day to analyse a company's employment equity reports in order to assess whether stakeholders were adequately represented. Employment equity questions did not have priority in inspections. The Wits study found that many workplaces had never been visited by an inspector. The researchers were handicapped by the absence of accurate and complete records in the Department's Employment Equity Register. The number of reports submitted every second year varied greatly and they contained many errors. The general levels of non-compliance were high with a clear lack of monitoring by the

[44] Andries Bezuidenhout, Christine Bisschoff, Sakehela Buhlungu and Kezia Lewins,'Tracking Progress on the Implementation and Impact of the Employment Equity Act since its inception' March 2008, Research commissioned by Department of Labour South Africa, www.labour.gov.za/downloads/documents/research documents/Employment%Equity_DoL_Report%20SWOP%20Final%2031.102008.pdf

Department. The failure of the EEA to bring about significant progress towards equitable representation is revealed by the statistical profile in the Commission for Employment Equity (CEE) Report for 2010/11.[45] For example, white males still dominate the top echelons of business, despite the fact that the majority of professionals are now Black and the output of black graduates has tripled over 10 years.

Although research on the effects of the EEA is limited, several reasons for the failure of the legislation can be identified. First, the EEA relies mainly on 'command and control' by an under-resourced, under-trained, and bureaucratic administration for enforcement. This would be reinforced by the amendments to the EEA proposed in 2010 and later withdrawn, which remove opportunities for dialogue with the employer through the process of negotiating written undertakings. Second, enforcement by an inspectorate also charged with enforcing basic conditions of employment dilutes the enforcement of the very different obligation of affirmative action, and increases the risks of 'agency capture', such as where inspectors decide as a general rule 'not to prosecute'. The role of the CEE is largely limited to producing statistical profiles based on reports by employers.[46] Third, the obligation to undertake affirmative action is placed solely on the employer who has a wide and ill-defined discretion, easily capable of manipulation. The achievement of equitable representation is not seen as the joint obligation of the employer and its workforce as a whole, that is as a matter for partnership and co-determination. Fourth, the duty is process-based rather than focusing on outcomes. This leads to a rigid bureaucratic or 'tick-box' approach to compliance rather than a concentration on objectives the

[45] Department of Labour, 11th CEE Annual Report 2010/11
[46] The number of such reports received by the CEE has progressively increased from 6876 in 2006 to 18,534 in 2010: 11th Annual CEE Reprt 2010/11.

achievement of which can be objectively measured. Fifth, only a very weak form of 'consultation' is prescribed, and this may be with parties who are disinterested or do not see themselves as having a direct stake in achieving change, or who have adversarial attitudes and do not see affirmative action as a matter for mutual co-operation. Finally, while sanctions should be available where negotiations fail, this should be only at the end of the line of a negotiating process. If sanctions are disproportionate, employers will be pushed into increasingly defensive or obstructive positions, or will simply ignore the law, in order to protect their businesses from the external threat to their survival.

THE NATURE AND EXTENT OF PARTICIPATION AND ACCOUNTABILITY

Active responsibility of all the stakeholders, and engagement between them is the foundation of reflexive regulation of affirmative action. Engagement is not an avoidance technique nor a truce between adversaries. It is a means to achieve the 'progressive realisation' of the goal of equality of opportunity and to develop substantive norms within organisations that promote equality.

Imbalance of power is often seen as an objection to effective participation. In a bipolar adversarial system, the substantive outcome of negotiations rests in the hands of the parties. This will depend on the skills and resources available to each party, and their respective strategies. The classic example is collective bargaining between employers and trade unions where the ability of each side to deploy actual or threatened lock-outs and strikes is an essential element in the process. This leads to the characterisation of labour

negotiations as power struggles in which the stronger party can dominate the weaker. In an attempt to strike a balance in favour of the weaker party, the law may intervene, for example by courts granting interdicts (injunctions). In some jurisdictions, labour courts or similar bodies may seek to ensure the fairness of the bargaining process by interpreting the duty as being to bargain in 'good faith'. If the duty to engage is treated as a form of bargaining, the logic of this would be to examine the relative power of each party and to determine whether they are each making the appropriate contribution towards achieving a just and equitable outcome. These pitfalls can be avoided by treating 'engagement' in disputes about affirmative action not as bargaining but primarily as a process of exchange of information and learning about the parties' respective positions, leading to a better understanding of the issues, followed by persuasion based on reasoned argument, with a view to reaching agreement. This goes beyond 'consultation' which, as usually interpreted, gives only a passive role to those consulted to respond to proposals made by the holder of power. What is required is a process which involves an active participatory role for all the parties. This approach recognises that there is no single source of power (government, employer etc) but that power comes from many sources and at different levels, and that the factors which influence the exercise of power are usually not straightforward: they may include respect for dignity, the need for political legitimacy, and business interests as well as material resources. It is essential that this participation does not take place in a normative vacuum. The parties must come to the table ready and willing to be persuaded as to how the principle of substantive equality is to be implemented. The role of the court or administrative authority is to ensure that the parties deliberate in a way that gives effect to the substantive rights.

This approach to participation is consistent with a modern understanding of deliberative democratic decision-making. Fredman defines this as 'a situation in which citizens share a commitment to a resolution of problems of collective choice through public reasoning…Moving from a bargaining model to a deliberative model therefore requires a substitution of interest-governed action by value-oriented action.'[47] Fredman explains that deliberative democracy does not mean that there has to be consensus on all questions of principle or their application. But there must be reciprocity, harmony and respect which allows consensus to develop over time.

A persistent problem with deliberative democracy is that of representativity and accountability. Who represents the poor, the disadvantaged and the excluded? The role of non-governmental organisations and of community groups is often stressed. But these bodies are nearly always under-resourced and may filter community interests through a particular lens.[48] There is a danger that some interests will be neglected and that the communities may not be fully aware of the issues. In real life, engagement is usually not with a single monolithic entity, but involves heterogeneous groups with different interests. There is likely to be argument and internal negotiation between these groups, some will be well-organised and experienced, others may be ad hoc coalitions.

The EEA in South Africa confers the exclusive right to be consulted on trade unions deemed to be 'representative' under the LRA, but we have seen that trade unions have

[47] Fredman (above note 5) at 33-8.
[48] Martin Minogue and Ledivina Carino (eds), *Regulatory Governance in Developing Countries* (2006) at 10.

not utilised this right effectively. The legitimacy of engagement will depend on the way in which the courts review and supervise the process. Where there is constitutional litigation, the court can retain supervisory jurisdiction to ensure that the agreement is fair to minority groups and is properly implemented. 'Consultation' requirements need to be r to provide for the involvement of elected employee representatives.

The success of reflexive regulation depends on the independence of the regulatory agency, so as to ensure relative insulation from political and business pressures. The independence of the enforcement agency, like the independence of the judiciary, helps to ensure a pluralistic democracy in which no one power can dominate the others. The UN Paris Principles set out the desirable status and functions of human rights agencies.[49] These include accountability to the directly elected legislature rather than the executive.. A government inspectorate may be vulnerable to 'capture' by interest groups. In principle, an independent agency has more autonomy than inspectors attached to a government department. Another lesson is that the primary role of the agency should be to develop the capabilities of those who are regulated – the goal is enforced self-regulation not command and control. This means providing the parties with the space and capabilities for balanced deliberation.

In the case of both models of participatory democracy, deterrent sanctions remain important. Voluntary negotiation and deterrent sanctions are not alternatives. Although courts and administrative regulators should start with attempts to persuade parties to co-operate, they need to be able to rely on progressively more deterrent sanctions until there

[49] *Principles Relating to the Status of National Institutions*, UN General Assembly, December 1993.

is compliance. There must be a gradual escalation of sanctions and, at the top of the enforcement pyramid, sufficiently strong sanctions to deter even the most persistent offender. It is a mistake to rely solely on harsh punitive fines to bring about compliance without incentives to negotiate change. This may lead to avoidance of the law or, worse still, bring the law into disrepute. Participation needs to be under the shadow of legal sanctions rather than in their full glare.

CONCLUSION

This chapter has put forward two principal arguments for democratic participation in the making and enforcement of transformative equality schemes: to ensure a 'fit' or 'proportionality' between the aims of the scheme and the means used to achieve those aims, and to recognise that restorative justice is a *process* in which conflicting interests have to be reconciled. It has been suggested that most schemes fail because of the conflicts in a market-based economy between the right to private property and the right to equality, and also because of the inherent limits of law as an instrument of social change. The response to this must be through dialogue and participation of those whose interests are affected in the process of change, and there need to be mechanisms to ensure the accountability of those who represent these interests.

This approach is supported by the theory of reflexive or responsive regulation. For legal intervention to be successful it must concentrate on improved communication and engagement between the legal system and other social sub-systems, and enable institutions targeted for change to adjust and reconfigure themselves. There is, however, a

danger that the imbalance of power between institutions, trade unions and other social groups may make engagement a one-way process that brings about only cosmetic changes. Strategies to avoid this include the activities of well-resourced and powerful independent regulatory agencies and the strengthening of the countervailing power of trade unions and other social groups.

Such strategies will not succeed if the regulatory agency or government is locked into a command-and-control approach to enforcement. The examples of Britain and South Africa show that such an approach is incompatible with the modern shift from hierarchical institutions to flatter, more flexible structures in which training and flexibility are paramount. Successful models, like that in Northern Ireland, depend essentially on leadership and commitment within organisations, with incentives to make voluntary agreements, backed by deterrent sanctions.