Trade unions and the law: Victimisation and self-help remedies

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1 INTRODUCTION

Five workers are called in by the general manager: two men, three women. The only obvious things they have in common is that they are so-called Coloureds in a factory where the majority of workers are African. Also they are all known members of a trade union, the Food and Canning Workers Union (FCWU).

The timing is significant. After initially being willing to meet with the union, the company is refusing to have anything more to do with it. The union in turn has just applied for the appointment of a conciliation board, in an attempt to utilise the official system to compel the company to negotiate wages with it.

The general manager tells the workers they are dismissed. There is no form of enquiry, and no reasons are given. What should the workers do? What should the union advise?

2 VICTIMISATION DISMISSAL

To lose your job for no good reason is one thing. But it is the reason itself that characterises dismissals as victimisation.

This was generally not stated at the time of the events alluded to above. It did not have to be. It was enough for workers to suspect the motive for the dismissals was their involvement in the union.

In a country with minimal social security, dismissal will always be the workers' greatest fear. Especially so when their jobs are considered unskilled. Yet this fear is also a spur to organisation. Organisation holds out the potential to constrain the employer's power.

The power to dismiss is what constitutes the employer's power over the workers employed by him.[1] Victimisation, it follows, concerns far more than the right of individual workers not to be treated unfairly. It is what I would describe as an act of power.

The object is to prevent a particular kind of organisation; organisation that represents an alternative locus of power in the workplace. This is

1 I refer to "the employer" as male because employers generally were in the period covered by this analysis.

what a union signifies to capital; especially when the union is in the process of being established, and capital has not yet devised strategies to contain it.

It can achieve this object in two ways. Firstly and most obviously it engineers a particular outcome: removing from the workplace persons who constitute a threat, in this case. Secondly and more importantly it operates at a symbolic level, by sending out a message to the workers at large, or anyone with the idea of organisation as a countervailing power.

If the five had been victimised, as the workers believed, they had a remedy in law. Victimisation was illegal in terms of the 1937 amendments to both the Labour Relations Act (as it is now known) and the Wage Act. [2] Moreover victimisation was one of the few offences in which the legislature had shifted the onus to the accused.[3]

In so doing the legislature had not merely indicated that victimisation was to be viewed in an extremely serious light. Faced with the inherent difficulty of proving a reason which is even less likely to be stated once regarded as evidence of criminal intent, a presumption in favour of organised workers was needed for any such prohibition to be effective.

To this extent a right of organisation was established, in terms of what I characterise as "black letter" law.[4] It was the only statutory right of this kind until the introduction of the 1995 Act.[5] Surely then the proper course must be to seek legal advice, or institute legal proceedings?

Nothing barred the union from doing so at the time, in the case study on which my argument is based. For an unregistered union the remedy was to institute criminal proceedings. There was also a basis to interdict the employer in the High Court, insofar as a clear statutory right was violated.[6]

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2 S 66 of the Industrial Conciliation Act 36 of 1937 and s 25 of Act 44 of 1937 (the Wage Act). I shall refer to the Industrial Conciliation Act or Labour Relations Act simply as "the Act".

3 S 18 of what is now the Basic Conditions of Employment Act, but was preceded by the Factories Act 22 of 1941, with a corresponding provision in s 22 of the Shops and Offices Act 75 of 1964. See also s 66 of the LRA 28 of 1956 and s 25 of the Wage Act 5 of 1957.

4 "The 'black letter' tradition continues to overshadow the way we teach, write and think about law. Stated baldly it assumes that although law may appear irrational, chaotic and particularistic, if one digs deep enough and knows what one is looking for, then it will soon become evident that the law is an internally coherent and unified body of rules. The claim that law is unified and coherent is also sustained by a battery of dualisms: common law/statute law, law/policies, law/state, law/morality . . . which make it more tenable to regard law as 'pure' and 'scientific'." (Sugarman 1991.)

5 See Ch 3 of Act 66 of 1995. Certainly, I would argue, no comparable rule can be said to have been as clearly and unambiguously established in all the "unfair labour practice" jurisprudence of the Industrial Court. Compare for example the Industrial Court's ambivalence on a "right" to bargain or the "right" of a union to be consulted regarding retrenchments.

6 See Thompson and Benjamin (1995: 1017). In the *Bosman Transport* case, workers were seeking an interdict against victimisation. See *PE Bosman Transport Workers Committee v Piet Bosman Transport (Pty) Ltd* 1979 1 SA 389 (T).

But the FCWU was a registered union. The official system for the resolution of disputes was open to it. This entitled it to choose an alternative forum. It could apply for the establishment of a Conciliation Board (there being no Industrial Council). Failing resolution there it could demand the dispute be referred to arbitration.[7] In this instance arbitration would have been by the industrial tribunal.

Of course a close calculation of the union's chances was called for, before taking such a course. The starting point of such a calculation would be an analysis of the facts.

The Fattis and Monis strike of 1979 was one of the most publicised labour disputes of the period.[8] From the facts made public, people drew the obvious inferences. In the court of public opinion the employers were guilty of victimisation.

But what were the prospects of the courts drawing the same inferences, or determining a case in the union's favour, in April 1979?

3 THE NATURE OF THE ELECTION

This is not to engage in idle speculation. The workers and their union were confronted with a concrete historical choice. They could look to the courts (or the industrial tribunal) for relief. This is what I characterise as trusting in the "legal option". Or they could trust in their own organisation, and resort to self-help.

A constellation of organisations forming what became known as the emergent union movement faced a more or less similar choice. Most of them were unregistered, and many not strictly speaking unions: this merely restricted the scope of the option open to them.

But the choice that confronted the workers, the reader may suppose, was not of an "either . . . or" nature. Resort to legal strategies does not necessarily foreclose other options. Legal and organisational strategies, it is commonly assumed, can be readily combined.

Were that always possible, it would indeed be the best of all possible worlds. Yet the case of Fattis and Monis illustrates the fallacy of the assumption.

On hearing of the dismissal of the five, the workers decided to do what the union always advised in such an eventuality. That was to stand together. It was not a strike, as the workers saw it. They simply wanted to know the reasons for the dismissal of the five.

In so doing workers articulated as best they could both the nature of the right at issue, and the reasons for their action. Their faint hope was that

7 S 66(1) and (2) of the Act. Were the employers to reject this demand, the union could apply to the Minister to have the dispute referred to arbitration. There were after all "reasonable grounds" to believe workers had been victimised. A refusal by the Minister was surely a matter for review by the High Court.

8 The writer was General Secretary of FCWU from 1976 until 1986 and of FAWU from 1986 until 1988. Records on the union and the Fattis and Monis strike are in the FCWU Archive at the University of Cape Town.

the general manager would relent: perhaps pretending it had all been a misunderstanding to save face.

This the general manager would not do. Having resorted to an act of power, he could not now back off without severely diminishing his power. Instead he invoked constituted authority in his support. Inspectors of the Department of Labour were summoned.

The inspectors tried to separate the Coloureds from the Africans. The workers would not allow this. The upshot of the dismissal of five was the dismissal of them all. On the bosses' version, they "dismissed themselves".

Now consider what alternatives had been open to the workers. Their collective sense of outrage at the injustice perpetrated enabled the workers to make a united stand. That sense could only dissipate with each passing day they failed to respond. A legal strike was not even a theoretical possibility.[9] Even if it had been, it would not have been a practical proposition because of the time it would take to implement.

It would take even longer to bring the matter to a conclusion, following the "legal option". But this does not explain the "once-off" nature of the election made. That is a consequence of what the "legal option" necessarily entails: removing the power of the parties to determine the issues for themselves, and entrusting that power to a court or ostensibly neutral third party.

For the referral of a dispute, whether to a court or other forum, entails submission to an authority whom the parties acknowledge has the right to bind them, or to a legal regime whose legitimacy is accepted. By the same token, opting for self-help entails an element of disregard, even disdain, of constituted authority.

That is why for the workers the die was now cast. It would be politically impossible for them afterwards to reverse course, and reinstitute the "legal option". For even if workers could be said to have acted in ignorance of their "rights", the same could not as easily be said of the union. The union would have to sponsor any legal action taken.

4 THE CONTEXT OF THIS ENQUIRY: THE JUDICIALISATION OF LABOUR RELATIONS

In the same week that the Fattis and Monis workers went on strike the Wiehahn Report was tabled in parliament. One of its recommendations was to establish an industrial court.

However, the attention of the emergent unions was focused on what seemed more immediate challenges. It was hard to know what to make of the proposed court even though one union commented "what is absolutely

9 Not only were legal strikes practically unknown at the time, but the majority of the workforce were African. African workers were not yet permitted to belong to a registered union, and in terms of the Act only a registered union could strike.

clear is that the court is going to possess enormous 'law making' power" (Maree (ed) 1987: 179).[10]

Few would dispute that the court did indeed assume such law-making power, even though it was to be some years before it did so with confidence. As a consequence what some have called the "new" labour law has been elaborated, in an extraordinarily short space of time.

In the "black letter" tradition a court's role is merely to interpret and apply the rules. It was entirely without precedent for a court to assume law-making powers. [11] Even more so in that the industrial court was not a court of law strictly speaking, but a quasi-judicial tribunal. How then is the court's assumption of such wide-ranging powers explained?

Some have described this development as juridification. If this is an apt characterisation, there was nothing inevitable about the way it came about. The short time it took can be said to be due to the rapid growth of unions and the escalating conflict which the Fattis and Monis strike epitomised. Juridification, then, represents a state strategy to neutralise conflict through legal regulation. [12]

But this does not explain the particular trajectory the juridification of labour relations has taken in South Africa. The court started out with no clearly defined relation to the legal system, and no clear legal mission. What it became was increasingly modeled on the superior courts. In 1988 it was formally brought under the sway of the superior courts, and the judiciary.[13]

This describes a process of judicialisation. But it was not just the structural subordination of the court that was established in this process. It was the ascendance of a discourse premised on a belief that "the law" applied to labour relations: "the law" being rules which only the judiciary could authoritatively enunciate.

5 POINTS OF DEPARTURE

How did it happen that the judiciary were entrusted with the power to determine labour disputes? Why did unions accept that "the law" extended to labour relations? How could this "new" law be regarded as legitimate?

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10 This is the only published comment by a union about the proposal of the court I am aware of, and one of the very few in the period of its existence.

11 As late as 1987 in the case of *Trident Steel (Pty) Ltd v John NO* (1987) 8 *ILJ* 27 a legal challenge was mounted to the court's assumption of the power to make determinations. See especially 29-32.

12 See Clark (1985: 69). Simitis' definition of juridification is essentially apolitical: "the use of the law (labour law, social security law, commercial law, family law, etc) by the state to 'steer' social and economic life in a particular direction . . ." But for Otto Kirchheimer, who coined the term in the Germany of the 1920s, juridification was a means of neutralising political conflicts.

13 Act 83 of 1988 introduced the labour appeal court, presided over by a supreme court judge, with a further right of appeal to the Appellate Division.

The legitimacy of law is at issue where there is a clearly delineated struggle between contending forces, and a question of power is to be determined. This is more usually so with labour law than other branches of law.

The "new" labour law that evolved in the US, according to Klare (1990: 66), is animated by liberal political assumptions and values. The paradox for him is the extent to which labour has internalised these values and assumptions. His object is to explain law's "hegemonic function" in legitimating and reinforcing workplace hierarchy.

Klare's case in point is a decision of US Supreme Court concerning self-help: in this instance, in response to an employer's breach of a recognition agreement.[14] It set a crucial, anti-labour precedent. His concern is the complicity of unions and their lawyers in the process by which it was arrived at.

For it was framed in a discourse unions and their lawyers had articulated, and based on "precedents from cases brought to and won in the Supreme Court by *unions*, not by employers, cases which significantly *enlarged* unions' rights" (his emphasis).

To what extent are Klare's concerns about the "new" labour law in the US equally applicable in this country? There were significant unions which expressed serious reservations at the extent to which unions in the 1980s relied on the "legal option". However, except in the earliest phases of organising the emergent unions these reservations were rarely articulated, and not put in writing.

Such were the "gains" achieved by unions in the court (it is generally supposed) that these reservations were eventually dispelled. In such histories as there are, resort by unions to the "legal option" is portrayed as largely unproblematic. There are references to "telling gains" and "landmark victories" which unions have won through the courts. There is the even more extravagant suggestion that the court became a weapon in the hands of the unions.[15]

This is not to say there were not criticisms of the court. However, the concern of unions and their lawyers seemed to be that the court was not enough of a "real" court of law.[16] Their criticisms concerned the quality and consistency of its judgments, and the appropriateness of some rules, rather than whether it was appropriate to vest the court with rule-making powers at all.[17]

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14 *Boys Market Inc v Retail Clerks* Local 770 398 US 398 (1970).

15 See Friedman (1991: 29); Baskin (1991: 29); Thompson (1988).

16 A leading trade unionist once described the court's presiding officers as "failed advocates". I have heard the same said by trade union lawyers, from whom the trade unionist in question doubtless picked it up. By implication, if only there were "successful" advocates appointed to preside (in the same manner as high court judges are) their problems with the court would be overcome.

17 On the part of employers, the court was criticised for being too well-disposed toward labour. Interestingly, the same was said of early litigation in terms of the Wagner Act in the US. On the part of labour, there was criticism that the court was too much influenced by the common law notion of the employment contract. See, eg, Davis (1985: 425). The first fundamental criticism of the court was from a deregulationist, free-market perspective in 1993. (Rautenbach (1993).)

The industrial tribunal had been a forum with no rule-making power at all. Even so, the necessity for a court of law is undisputed in such histories as there are. Some form of court was seen as an "historical inevitability", according to one leading text on labour law.[18] As another would have it, the need for a "judicial guardian" was the logical outcome of the system introduced by the 1924 Act.[19]

Why then did it take more than 70 years to introduce a "judicial guardian", if indeed the official system required one? Why was the model the industrial tribunal represented abandoned? There is no adequate explanation. If the establishment of the court represented a decisive shift, the reasons must be explained.

What these histories have in common is their quest for a legal rationale, which will explain (and justify) the extension of the domain of "the law"; and establish a continuity which is indispensable to the idea of "the law" as ascertainable rules. Yet it is only possible to do so by regarding law as a discrete discipline, and disregarding social and political reality.

It is this apolitical and ahistorical approach I take issue with. My object in doing so is not to dispute the necessity for a forum where disputes can be referred for determination. It is the nature of that forum, and the conditions under which organised workers can hope for labour justice, that are the object of this enquiry.

My object is also not to dispute "gains" in the development of labour law. It was an obvious and necessary condition of judicialisation that "gains" of some kind would be made in the courts.[20] Yet it is in relation to key issues and struggles that the nature and limits of these gains, and the scope of the "legal option", become apparent.

Victimisation is such an issue because it concerns questions of power. There can be no effective workers' organisation without effective protection from victimisation. Without effective organisation of workers, the edifice on which the "new" labour law is constructed has no foundation. Hence my case in point, the Fattis and Monis strike.

Yet it was more than a case of victimisation, it was a struggle which assumed symbolic dimensions. The only outcome that could have mattered to the union was reinstatement. Reinstatement in any form would tilt the balance in the union's favour in the organisation not only of that factory, as it turned out, but an entire industrial sector.

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18 This was supposedly because the common-law notion of an employment contract no longer had a "commercial rationale" (Brassey *et al* 1987: 9). The suggestion that unions sought "the imposition of solutions from above", made by Brassey *et al*, is certainly not true of the tradition FCWU was part of.

19 The Industrial Conciliation Act of 1924 was the first Labour Relations Act. See Cameron *et al* (1989: 15).

20 Accordingly it is beside the point to draw up a balance sheet of "gains" and "defeats" in the court. "Gains" and "defeats" can in any event only be assessed, in my opinion, on the basis of the insider's detailed knowledge of the facts. Any narrative is selective, and only an insider can know what is omitted in the narrative on which a judgment is constructed.

It would have indeed "enlarged" union rights were any court to order such an outcome. But was it ever a realistic possibility? In addressing this question I hope to make good a silence on the part of a tradition I subscribe to. It is a tradition which emphasises the primacy of organisation. Foucault talks of "subjugated knowledges". One such subjugated knowledge is that it is through organisation and self-help, rather than resort to courts, that rights of organisation are established.

Against this subjugated knowledge I put the notion of courts having "enlarged" union rights. It is of course a truism that courts enlarge rights, if by "right" one merely means what the courts regard as such. But more than this, the notion of "enlarging" rights suggests that it is primarily through legal means, as distinct from organisation, that rights are extended.

6 ENLARGING UNION RIGHTS? THE JUDICIARY AND THE 1937 AMENDMENTS

To illustrate the extent to which courts have "enlarged" union rights, consider the reported cases of victimisation.

A line of high court and Appellate Division cases "interpreted" the 1937 amendments to the Act which made victimisation an offence. All were appeals by accused employers, convicted in the magistrates' courts. All were upheld, often on technicalities.[21]

It might be said this only goes to show the difficulty in proving the subjective state of mind of the accused employer.[22] Yet the grounds giving rise to an allegation of victimisation are objective. What the statute required was for the courts to draw the appropriate inference.

The superior courts were unwilling to do so, manifestly. Instead they reached out to protect the accused.[23] Yet they were to prove less than willing to reach out to other accused in other statutory crimes where the onus was similarly reversed.[24] The obvious explanation for this is that in victimisation cases the accused is an employer, drawn from their own class.[25]

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21 See *R v Gutner* 1934 TPD 278. The technicality here was that the employer was not an employer as defined in terms of the Industrial Council Agreement in terms of which he was charged. Though the judge could have referred the matter back to the Attorney-General to determine whether there had been an offence in terms of the Wage Act, he did not: "that course does not seem necessary to me". See also *R v Bolon* 1941 AD 345; *R v Sachs* 1940 *SALJ* 412; *R v Wilson* 1948 1 SA 1170 (T); *R v Bassa* 1944 NPD 239; *R v Watson* 1948 1 SA 511 (T).

22 Cf Thompson (1988: 340) "Victimisation . . . is notoriously difficult to establish."

23 *Bolon*'s case explicitly affirms this. Tindall, J in *Ex parte Minister of Justice: in re R v Bolon* 1941 AD 345: "The construction pressed upon us by the attorney general might often result in an erroneous condemnation of an accused employer . . . I am not prepared to hold that the legislature . . . used that expression in a sense which might tend to such a result."

24 Notably the offences created by the Terrorism Act 83 of 1967.

25 "Judicial officers are not unideological disinterested robots or computers . . . most are former advocates and for that reason part of the economically most prosperous level of the population. All these sectors make it advantageous for judges to help sustain (albeit subconsciously) a *status quo* which privileges the minority group to which they belong." (Du Plessis 1992: 75.)

The fact that magistrates were overruled in all the reported cases probably reflects the different class composition of the magistracy, and a greater willingness on their part to uphold the social objects of the legislation. *Bassa*'s case[26] conveys some sense of this. It is remarkable not only for the intemperate terms in which the judge criticises the magistrate, but that he considered the employer's attitude to trade unions of such little consequence in a case of victimisation:

> ". . . he [the magistrate] has taken an entirely wrong view of the case. He appears to think that if an employer expresses or holds the view that he is opposed to trade unions, then when he dismisses an employee the reason for the dismissal is because he suspects or believes that the employee belongs to a trade union."[27]

What, then, is one to make of the fact that the one case which the court was prepared to draw the kind of inference the statute called for was not reported.[28] Certainly the judge was not lacking eminence (Solomon AJP). Could it be the reason that *Sarkin*'s case was not reported was that it was differently decided?

Sarkin's case illustrates the danger of basing one's analysis of "the law" on reported judgments. "The law" is after all not discovered, as the "black letter" tradition would have it. It is produced. Editors of the law reports and commentators, as much as the judiciary, are part of the machine doing so.

7 THE ALTERNATIVE WHICH THE 1956 ACT CREATED

In practice, "the law" on victimisation established by the superior courts was thus as follows: although an offence on paper, it was not one courts would enforce. Not even if the workers were white.[29]

This stance of the courts did not merely reflect an unwillingness to intervene in a struggle between organised workers and their employer. In each case it was to determine an outcome to such struggles.

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26 *R v Bassa* 1944 NPD 239.

27 Hathorn, JP in *R v Bassa* 1944 NPD 239 240. The judgment is an essay in class prejudice. Some gems: "When he [the victimised worker] had finished his work for the appellants at about 10.30 am he did eight hours' work for another employer. I would have thought that in itself was a reason for dismissing him instantly. Then he sometimes shaved in the bakery, a most disgusting thing to do. And he sometimes slept in the van."

28 *R v Sarkin* TPD 1944, cited in *R v Wilson* 1948 1 SA 1170 (T), where the following passage from the judgment of Solomon AJP is quoted : ". . . it seems to me that the section is so worded that if the illegal motive intrudes itself at all into the mind of the accused employer and influences him in any way to dismiss employees . . . he brings himself within the ambit of this section." There is no other reported judgment where a similar approach is adopted.

29 In about 1977 I was told by the regional head of the department of labour that there had never been a successful prosecution of an employer for victimisation. As an example of the unwillingness of the courts to convict an employer of victimisation, see eg *R v Wilson* 1948 1 SA 1170 (T). Even where victimisation is shown, it is not sufficient unless it is shown to have been the effective cause of dismissal rather than one of a number of considerations.

Thus in *Watson*'s case the victimised worker was part of the "reform group" seeking to oust the corrupt leadership of the Mine Workers Union.[30] The "reform group" in turn was part of the drive of Afrikaner nationalism to secure a base in the union movement.[31]

Afrikaner nationalism gave rise to one of the two important labour struggles which were to determine the character of the union movement until the late 1970s. The other was the struggle of mainly unskilled, mainly African workers to organise themselves into unions, and the tradition of non-racial unionism it gave rise to. FCWU was formed in this latter tradition.[32]

"The law" on victimisation had not changed by 1979. But the party the white workers helped vote to power had in the meantime created an alternative. The 1956 Act created a new body to arbitrate disputes, the industrial tribunal.

The tribunal was not a court of law. It did not adopt a judicial mode, or attempt to articulate a body of legal principles in determining disputes. It also did not distinguish between so-called "disputes of right" and "interest" when doing so.

It comprised a chair and two other persons appointed "by reason of their knowledge of the interests" of employers and employees respectively.[33] Its decisions were majority decisions of the panel of three.[34] In effect it was a tripartite body. It was its tripartite character which enabled it to deal with organised labour justly, from the point of view of the established unions of the time.

Yet this was an established union movement representing primarily white, skilled workers. The object of the 1956 Act was to consolidate their position in the workplace hierarchy. At the same time it was to eradicate the vestiges of non-racial unionism, represented by the tradition FCWU was part of.

Non-racial unionism was not simply at odds with the apartheid agenda. It signified a tradition of unionism that was an alternative locus of power in the workplace. It would be the historic mission of the emergent unions of the 1970s to establish (or re-establish) this tradition.[35]

This was the underlying political reality which in the final analysis determined that any case brought in any court on behalf of the Fattis and

30 See O'Meara (1983: 78), and *R v Watson* 1948 1 SA 511 (T).

31 See also O'Meara (1983: 89).

32 FCWU was founded in 1941 and registered in terms of the 1937 Act. Soon afterwards it affiliated to the Trades and Labour Council. That body split over the "racial" issue into two components in the early 1950s, one of which became the Trade Union Council of SA (TUCSA). The other, to which FCWU affiliated, was the SA Congress of Trade Unions (SACTU).

33 S 17(1) of Act 28 of 1956. There were in fact two panels of employer and employee representatives: one for local authorities and one for all other employers and employees.

34 S 17 (8) (b) of Act 28 of 1956. Arbitrations could take place in terms of ss 45, 46 and 49.

35 "Traditions, when vital, embody continuities of conflict" (MacIntyre 1985: 222).

Monis workers would certainly have been lost. To understand why requires an explication of the political assumptions underlying the dispute, without which any analysis of Fattis and Monis actions would be perfunctory.

8 THE POLITICS OF VICTIMISATION

Coloured workers were selected for dismissal, on the underlying assumption that Coloureds will not strike in support of each other. A safe assumption, given the debilitated state of Coloured working class organisation in Cape Town.[36]

The same assumption did not apply to the Africans workers, who were considered more militant. This explains why Africans were not dismissed, even though they (unlike the Coloureds) were technically members of an unregistered union.

Because of the cultural divide between Africans and Coloureds, fostered by apartheid, it was further assumed Africans would not come out in support of Coloureds. To do so would be unprecedented. Being in the main migrants, they also had far more to lose.[37]

When an employer dismisses, there is an assumption of entitlement in his exercise of power. Underpinning this, in the case of Fattis and Monis, was that it both relied upon and was giving effect to what were then central tenets of government policy: to divide African and Coloureds, and prevent effective organisation of industrial workers emerging.

Organisation amongst the Coloured workers was bound to collapse as a consequence of the dismissals. Assuming the union could do nothing to protect the Coloured workers, organisation amongst the African workers would be impossible to sustain.

Yet it is only when the dispute is understood in the context of FCWU's contest with the established union movement that the object of the employers strategy becomes apparent. Fattis and Monis had long recognised another union in respect of a small section of the factory.[38] It was affiliated to the leading federation in what was then the established union movement. This was their foil to the charge of victimisation.

9 THE FUNDAMENTAL ASSUMPTION

Courts in this analysis, whether courts of law or tribunals, are not neutral arbiters in a contest between equals. They constitute a regime in which some are more equal than others.

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36 This is as a consequence both of being an underclass in relation to the coloured middle class and relatively privileged in relation to the African working class.

37 Almost all the African workers were "migrants" and resided in company hostels. For migrants, the inevitable consequence of striking was not merely dismissal, but being bussed back to the homelands.

38 The National Union of Operative Biscuit Packers.

One has only to appreciate the nature of the regime the industrial tribunal constituted to appreciate why a referral to the Tribunal in the case of Fattis and Monis could never have been contemplated.

The fundamental assumption underlying resort to any kind of court is that it will be impartial. The tribunal could not be impartial: but this was not because of the mere fact that there were representatives of the established union movement on it. Its whole function was bound up with maintaining the collaborative relationship between employers and the established union movement of the time, premised on white privilege.[39]

Would a court of law have been impartial? I would argue that through the tripartite composition of a tribunal the question of bias is at least openly addressed. To believe a court of law would determine a just outcome would require it to transcend its role as an organ of state, in upholding constituted authority.

Yet all indications were that the Fattis and Monis dismissals were not the aberrant act of an isolated employer. They were the considered response to a perceived threat to employers as a class: a response, moreover, entirely consistent with state policy at the time. The inherent problem with referring such a dispute to court is thus its political nature.

There is a further problem particular to a case of self-help. It should go without saying that workers do not resort to self-help without a reason, but the value judgment a court of law would have to make is whether they were justified in doing so. It is a value judgment a court of law is peculiarly ill-equipped to make, for a number of reasons. Fundamental amongst them is the fiction which the "black letter" tradition operates to maintain, that it is the prerogative of the courts to establish rights. Self-help represents a challenge to this prerogative. In essence it is about enforcing "rights" by means of power.

9 ADVOCATING THE "LEGAL OPTION"

It is well known that the emergent unions were established against the opposition, the established union movement of the time.

Less often remembered is the keenness of the contest among the emergent unions that marked its establishment.[40] It was a contest for membership. It was also a contest for dominance between the different traditions of organisation each represented.

In a free market of organisations, the unions that would prosper would be those best able to survive on their own resources. But capital was not to be a passive onlooker. Victimisation was a strategy whereby it could intervene, in favour of whichever tradition was to its liking. It was also a strategy that could backfire, as Fattis and Monis found out. For above all

39 Concerning its function in determining job reservation disputes, see Coetzee (1976: 46 87 135).

40 I regard the period of the establishment of the emergent union movement as being from 1976 until about 1985.

else, workers would support a union which effectively countered victimisation.

It was in the quest for effective redress against victimisation that officials and advisers to certain emergent unions first began to advocate the "legal option". But it was a strategy which they could never have contemplated without donors to put up the money for them to do so.[41]

The attractions of the "legal option" were obvious. Organisation was embryonic. Unions were up against hostile employers. Mass dismissal was regarded as the inevitable consequence of a resort to self-help.

But these were reasons of weakness. They were not the kind of reasons a union could admit to its members, or with which to win the confidence of the unorganised; particularly at a time when different unions were contending for ascendancy.

To justify legal strategies there had at least to be some prospect of success: some belief that through the courts unions could perhaps more easily win as much, if not more, than through a course of struggle.[42] Even if there was no realistic basis for such a belief, a notion of courts "enlarging" union rights had to be propounded.

This is not to say it was not a sincerely held belief. Nonetheless it was a self-serving one on the part of legal professionals who had a material interest in advocating the "legal option".

The emergent unions they advised were mainly unregistered. Consequently their recourse in cases of victimisation had to be to the ordinary courts.[43] Anything less than reinstatement would mean the employers had to an extent succeeded.

But to achieve reinstatement through the ordinary courts it was first necessary to persuade the high court this was possible. The decision *of Schierhout v The Minister of Justice*[44] was regarded as authority for the proposition that "the law" did not permit an order of specific performance in the case of an employment contract. So an argument was constructed with the object of persuading the judiciary it was. Several of those involved in articulating it would subsequently be prominent in the development of the "new" labour law. Indeed the judicialisation of labour relations can be traced back to their efforts to do so.

This necessitated disregarding the unambiguous message the courts had sent out on the 1937 amendments. Instead they based their argument on a 1953 case, regarding the eviction of a white worker from a company

42 Principally through the International Confederation of Free Trade Unions substantial sums of money were made available to certain unions for, amongst other things, "legal assistance".

42 The adversities faced by the unions that adopted legal strategies were typically overstated. "You can't organise in a Nazi concentration camp", one lawyer is quoted as saying. See Friedmann (1991: 317).

43 If the state refused to prosecute, as frequently happened, this entailed instituting a private prosecution.

44 1926 AD 99.

housing. This was authority for the proposition that dismissals in contravention of statute were null and void. Assuming victimisation could be proved, it went, the remedy in law must be reinstatement.[45]

In the event, it failed to achieve its object. The Transvaal high court refused to reinstate the victimised member of an emergent union in 1975.[46] It was wrongly decided, these advocates of the legal option insisted. So further cases were fought and lost.[47] To the extent that they can be said to have eventually succeeded with this line of argument, it was in persuading the Transvaal high court on appeal not to uphold an *in limine* point that reinstatement was not possible. That was in 1982, in the *Stag Packing*'s case.[48]

For me there is no irony that this "triumph" came at the stage it did.[49] It is confirmation of the thesis I wish to advance. For some two years earlier a "right" to reinstatement had been won through organisation, as the outcome of the Fattis and Monis strike will illustrate. This was a significant period of time, in what was a formative period for the emergent unions.[50] Perhaps the courts could be said to have consolidated a "right" won through organisation. But this is a much more modest proposition than the advocates of the "legal option" were advancing: that through the courts unions could enlarge or win rights. The former implies that without organisation such rights would not be recognised. The latter implies that "the law" and the courts could themselves be vehicles of change.

10 WIEHAHN AND THE COURT

The notion of courts as vehicles of change must be located in the era of political reform which the appointment of the Wiehahn Commission heralded.[51] It was consonant with a political project of persuading people to seek change through legal, rather than extra legal means.[52]

Could a court of law be a vehicle of change for organised workers or the working class? The Commission's proposal to establish an industrial court

45 This was on the basis, following *Rooiberg Minerals Development Co (Pty) Ltd v Du Toit* 1953 2 SA 505 (T), that a dismissal in contravention of the Act was null and void, and hence the contract of employment was resuscitated (Cheadle 1980: 1).

46 *Kubheka v Imextra (Pty) Ltd* 1975 4 SA 484 (W).

47 See, eg, *Mabaso v Nel's Melkery (Pty) Ltd* 1979 4 SA 358 (W); *Makhanya v Bailey NO* (1980) 1 *ILJ* 219 (T). See also Cheadle (1980) and Benjamin (1982: 22-34).

48 The case of *NUTW v Stag Packings (Pty) Ltd* 1982 4 SA 151 (T).

49 "It is ironic", according to Thompson and Benjamin (1995), that this "triumph" came at a time when the trade unions were beginning to focus their attention on the industrial court.

50 Many or most of the unions which were to achieve significant power in COSATU grew significantly in the period 1979 to 1981. Eg, MAWU (now NUMSA), NUTW (now SACTWU) CCAWUSA (now SACCAWU) GWU (now T&GWU) and FCWU. This growth coincided with a brief economic upturn. Amidst fanfare from the government about reform, the various relations between the unions, capital and state had begun to crystallise.

51 The Centre for Applied Legal Studies was established in 1978, the Legal Resources Centre in 1979.

52 For a political-economic characterisation of the period, see Gelb (1991: 1-32).

pertinently raised the question. But it was never squarely addressed by the unions. A related question exercised the emergent unions instead, in what has been characterised as "registration debate". This was whether to register in terms of the 1979 Act. Registration represented the gateway to the official system. Yet implicit in their position on the official system was a standpoint on the "legal option".

It was understandable that some should elevate not registering to an issue of principle, given the political climate at the time. Clearly it was not. Yet it also suited the proponents of registration to characterise the debate in these terms.

The proponents of registration argued that by operating within the official system unions could "win" rights. But it was never clear how participation at that specific juncture would enable them to do so.[53] For it was always the terms on which registration was proposed that was at issue.

The political problem unions were confronted with was as follows: how to reconcile a non-racial tradition of organisation with the registration of racially separate unions for "blacks" only. For the African workers at Fattis and Monis this would be to cement the very division, opposing which the workers had placed their jobs on the line for.

The "solution" some advocated was to promote the uncritical acceptance of the "legal option" by workers and unions. Thus unions were to apply for non-racial registration. When this was refused (as it inevitably would be) unions would challenge their registration as racially exclusive unions in the courts.

This not only suggested a capacity (or inclination) on the part of the courts to disregard the unambiguous terms of the Act and take the unions' part. It was to look for legal solution to what was a political problem. At the same time it underestimated the unions' strength outside the system.

Of all the arguments against registering one was decisive. At the juncture at which the state opened the option of registration, it needed to draw unions into the official system. For that very reason, the capacity of the emergent unions to change the system was greatest: provided they stayed out and voiced credible reasons for doing so. Without credible participants the system itself was not credible.[54]

By exactly the same logic, the capacity of the emergent unions to influence the character of any court, or "win" rights, would lie in its need for them to submit to its authority, to establish its legitimacy.

11 WINNING A RIGHT TO REINSTATEMENT

Some seven months after they went out, the Fattis and Monis workers were re-employed, amongst them the five who had been victimised in the

53 According to Fine and others "the winning of rights from the State has been a vital part of all labour movements". Their article evoked indignant responses (correctly so, in my view) because of its characterisation of those opposed to registration as "boycotters". (Fine, De Clercq & Innes 1981, and Hirsch & Nicol 1982.)

54 One might describe this as collective bargaining by non-participation, as distinct from collective bargaining by riot.

first place. They were not paid for the time they had been out. They did not necessarily return to the same positions in the factory. Yet workers had won far more than mere re-employment and the economic benefits a job implies.

In terms of the settlement agreement negotiated, Fattis and Monis undertook to formally recognise the union. Other "rights" were also won. The employer's power to dismiss workers without a final warning was expressly constrained.[55]

However, the recognition agreement Fattis and Monis put forward was designed to constrain the union. Its centerpiece was a "disputes procedure" coupled with a clause which generally goes under the euphemistic title "labour peace" obligation. This entailed the determination of "disputes of right" by arbitration, and a renunciation of the right to strike over them.

Fattis and Monis was in no position to impose terms at the time. Yet this was the first of many negotiations with a variety of employers, in which disagreements turned on the same issues. Employers would put forward their draft as the basis of negotiation. It would feature a distinction between "disputes of right" and "interest". "Disputes of right" would usually be innocuously presented as synonymous with dismissal disputes.[56] Employers would then argue for the determination of all "disputes or right" by arbitration, or the court.

Workers could not be expected to forfeit resort to self-help, the union would respond. Victimisation concerned a right which in the last resort workers were bound to enforce themselves. Refusing to renounce self-help was not a recipe for lawlessness. It was the workers' best safeguard against violations of their right.

Rather than a bad agreement, the union preferred no agreement. For the point of an agreement was to create an alternative to the official system. Employers were susceptible to an alternative. Some accepted that unions had legitimate reasons for staying out of the system.[57] Some hoped unions could be persuaded (or bluffed) in the negotiation process to forfeit any right to self-help they still retained. In all cases employers wanted union participation in some system.

Probably the most important agreement the union negotiated was at the next factory organised in the same sector as Fattis and Monis. After protracted negotiations with the Premier group, an agreement was

55 For a period of one year, a copy of such warning was to be sent to the union. Two exceptions were permitted, for what workers regarded as objectively verifiable offences: drunkenness and assault.

56 I do not suggest that this is how "disputes of right" should be defined. The essence of such a definition ought to be a right that is claimed by a party, whether by virtue of statute, contract or collective agreement, which is the position in France (Blanc-Jouvan 1971: 9).

57 They were open to persuasion primarily because the unions that articulated this position had an organised presence in their factories.

concluded.[58] By 1982 practically the same agreement had been extended to branches in all the national centres.

The following clause in a "labour peace obligation" sets out the basis on which the union was prepared to forfeit resort to self-help:

> "If a strike, sit down, work-stoppage, go-slow or lock-out takes place before or while the procedures embodied in this agreement are being utilised, the company and the union shall make every endeavour to ensure that normal working conditions are restored. *Should a dispute have arisen from the dismissal of an employee(s), such employee(s) shall be reinstated until the dispute settlement procedure has been exhausted.*"[59]

In short, as a condition for the adherence to agreed procedures for the resolution of disputes, including disputes regarding dismissals, a right to reinstatement was established. It goes without saying that the dispute settlement procedure did not include compulsory arbitration.

Reinstatement, in the context of the negotiations which gave rise to this agreement, meant reinstatement in the workplace. Anything less than actual reinstatement would place the workers and union at a disadvantage in any procedures that ensued. For in any determination of a question of power, the tendency is to confirm the status *quo*.

12 THE ESTABLISHMENT OF THE COURT

Law is usually taken to be statute law or what the courts pronounce. Yet the agreement above established a rule emanating from organisation, at a time when no such rule had previously existed.[60] It was in the context of the development of "law" such as this that the establishment of the court must be located.

The court the Wiehahn Commission wanted was a court of law.[61] It would be premised on a distinction between "disputes of right" and "disputes of interest", and operate on the basis of judicial precedent. It would thereby create "a mechanism whereby the strike weapon could be replaced by a judicial inquiry into the dispute" (Wiehahn Commission Report 1979: 4.2-4.6).

As to why the tripartite model the tribunal represented could no longer work, the Commission was silent. This may seem surprising given the tribunal's importance to the established union movement of the time and their representation on the Commission.

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58 The group was represented by the MD of its most important operating division. Companies were frequently represented by very senior persons at negotiations during this period, both because of the perceived importance of labour relations and the perceived incompetence of management to deal with it.

59 Recognition agreement between SA Milling Co and FCWU and AFCWU, clause 5.2, 1981.

60 Cf Arthurs (1985: 83). Legal pluralism advances a notion of law as emanating from a variety of sources, and permeating all aspects of social and economic life.

61 A court of law was distinguished from what it characterised as the "labour-management relations model" of tribunal (Wiehahn Commission Report 1979: 4.28.6).

The explanation for this silence is not unrelated to the Commission's preference for a court of law. There was no inherent problem with a tripartite tribunal: the problem was rather how organised workers were to be represented on such a tribunal once trade union rights were extended to African workers. In short, it was a political problem.

A court of law represented a solution so long as it was accepted as legitimate. To this end section 43 of the Act was amended in September 1982. The industrial court (as opposed to the minister) was empowered to grant status *quo* relief. [62] In cases of dismissal the court could now order temporary reinstatement, although it seldom meant being physically reinstated in one's job.[63]

The status *quo* remedy has been described as one suited to unions, primarily because it is unions that would want the status *quo* restored. Yet it was a remedy decided on the papers. This placed a premium on skillful drafting, and legal argument. It necessitated dependence on lawyers, and promoted the characterisation of labour disputes in terms of a legal discourse.

The 1982 amendments signified an important shift in state policy. The overriding objective of the Wiehahn Commission had been to prevent the growth of a dualistic system. To achieve this it was hoped unions would register or be obliterated. When the Act was amended in 1981 to allow non-racial registration for the first time, the position of those who had opposed registration was vindicated.[64] Yet other amendments to the Act in 1981 provided unregistered unions with fresh reasons to stay outside the system.[65]

By 1982 it was clear that these unions would neither register or be obliterated. On the contrary, they were growing, and becoming increasingly politicised. At the same time, at the interface between the emergent union movement and manufacturing capital, an alternative system was evolving alongside the official system. This alternative system promised to enlarge union rights in significant ways. The undertaking in the Premier agreement to physically reinstate dismissed workers illustrates this.

The only compelling reason for a policy shift was to arrest this development. Henceforth it would be policy to invite their participation through the dispute resolution procedures of the official system and the medium of the court.[66] But if the court was to enlist credible participants, concessions would have to be made to labour. The remedies the court could offer had

62 Act 51 of 1982 came into operation on 1 September 1982. See Thompson (1988: 339).

63 S 43(7).

64 It is suggested by Bendix (1989: 306) that the 1981 amendments were also a result of litigation by unions challenging the industrial Registrar's refusal to register them on a non-racial basis. However, if this had been the extent of the opposition, it is scarcely plausible that the state would have found it necessary to change tack.

65 Act 57 of 1981 allowed for the registration of non-racial unions but at the same time introduced a number of controls aimed at unregistered unions.

66 Unregistered unions were now able to apply for conciliation boards and refer disputes to the industrial court.

at least to be on a par with what could be achieved in the alternative system.

Compared with other jurisdictions, reinstatement as the remedy for dismissal is perhaps the most significant "right" the court has established.[67] But well before it was "won" through the court, it had been won through organisation and consolidated in agreements. It was the capacity of emergent unions to compel reinstatement in South Africa that explains the court's preparedness to do so. To achieve credibility in the circumstances, the court could hardly offer less.

13 THE SCOPE FOR AN ALTERNATIVE

Despite aspirations to evolve an alternative system, the capacity of unions to do so was always limited. To the extent that it was a system that evolved, it did so in an unco-ordinated manner, and was not informed by any common perspective on the part of the emergent unions.

It scarcely could have been otherwise, given unresolved differences between emergent unions on the "legal option" and like matters. And so long as the contest between emergent unions persisted, the private agreements each negotiated remained private.[68]

The implications of the distinction between "disputes of right" and "disputes of interest" illustrates the dimensions of the problem confronting emergent unions in recognition negotiations. Far more was at issue than a mere scheme for the convenient resolution of dismissal disputes.

Underpinning the distinction was capital's desire to preserve a separation of the political and the economic spheres. The notion that industrial action was legitimate only in relation to economic issues flowed from that separation. So too it legitimated judicial regulation of labour relations. Ultimately it insulated capital against challenges to its authority.[69]

It was difficult enough to appreciate these implications. It was quite another to articulate alternatives in negotiations with employers. Wittingly or unwittingly, emergent unions unhesitatingly adopted compulsory arbitration for so-called "disputes of right".

Moreover, the underlying problem with any system premised on private agreements is one of enforcement. If it was unwise to renounce resort to self-help, it was equally impractical to have to rely on it to enforce agreements. This problem could conceivably have been addressed if there had been some co-ordinated strategy on the part of unions to do so. In its absence, recourse to some form of authority became inevitable.

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67 In the US, eg, the accepted remedy for unfair dismissal is compensation. The Appellate Division significantly watered down the application of this remedy in the case of *Pact v PPWAWU* (1994) *ILJ* 15 (A) 65.

68 This was in marked contrast to the employers who often used the same consultants, attended the same seminars, and swopped agreements.

69 It seems to me that at the core of liberal legal theory is a conceptualisation of power as merely economic power, which disavows the fundamental political and economic inequality between capital and labour.

14 A "LANDMARK" CASE OF VICTIMISATION

The "landmark victories" and "telling gains" alluded to must be situated in the light of the failure of emergent unions to articulate an alternative and in the light of the imperative of the court to achieve legitimacy. How then should such claims be evaluated?

The 1983 case of *United African Motor & Allied Workers Union v Fodens (SA)*[70] is one such victory. It concerned the archetypal rogue employer. Victimisation was one of a shopping list of allegations against him. The court ordered him not to victimise his employees (again). Also the *dictum* that it could be unfair not to furnish an undertaking not to victimise was established.

Certainly this decision had a symbolic importance. The message was to call employers to order. Yet the extent of the "gain" for labour should not be overstated. At the start of the proceedings, the employer had in effect thrown in the towel.[71] So too had the union. For even though it had asked for the reinstatement in its papers, its own representative submitted reinstatement would not be appropriate.

This is not the only indication that the tradition of unionism UAMAWU represented was anathema to what other emergent unions stood for. Its witnesses were from the industrial council, the department of labour and the employers' association. It is hard to resist the assumption that they were coming to the rescue of a compliant union that was contending with less compliant unions for membership.[72]

If the role of the court was to be extended, it was necessary to declare itself against victimisation. In *Fodens'* case it was able to do so without disturbing the balance of power in any way.

These were the first crucial years of the court's "active existence" as well as the period of the establishment of the emergent union movement. Yet apart from this case, victimisation hardly features in the reported cases. This is certainly not because victimisation ceased to occur.[73]

Even more so than in *Fodens'* case, the message from the court where rights of organisation were at issue was hardly ever as unambiguous as some commentators would have us believe.[74] Optimistic readings of judgments were possible, because there was a consensus amongst a new layer of managers and professionals about the role of the court in labour relations. This new layer included, alongside labour lawyers, the hitherto

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70 (1983) 4 *ILJ* 212 (IC).

71 The employer handed in an undertaking amongst other things not to victimise workers, and to negotiate with the union. Thereafter it did not participate in the proceedings.

72 Foden's was engaged in the manufacture of trucks. The union was thus in competition with NAAWU and MAWU, and was never a significant player in the industry.

73 See Thompson & Benjamin (1995: 1020C), where it is suggested that the incidence of victimisation is not so great as to warrant such an "array of legal sanctions". The fact that there were no recorded prosecutions for victimisation for the period 1980-1983 is cited in support of this. However strikes arising out of dismissals were highly prevalent throughout this period and subsequently.

74 *Bleazard v Argus Publishing* (1983) 4 *ILJ* 60 (IC) is a case in point.

unknown *personae* of the industrial relations manager, mediators and arbitrators.

15 "LAW" IN AN ERA OF REPRESSION

Victimisation also hardly features in the reported case from about 1985 until 1990, the period in which what had been the emergent union movement was established.[75]

It might be argued that this was because of the "unfair labour practice" remedy itself. It was not necessary for the court to find victimisation to find there had been an unfair labour practice, or to order reinstatement.[76]

A 1986 case illustrates the argument. Amongst a group of workers who stayed away from work during a period of so-called unrest, only the shopsteward was dismissed.[77] He was probably selected because he was a shop-steward, the court said. Whatever the motive, it was not a proper one.[78]

Yet what are we to say of the coyness of the court in giving the employer's conduct its appropriate label? It is too easily ascribed to the difficulty of attributing a motive to him.

Insolence and insubordination are what I characterise as offences against authority. Motive defines them, only the motive of the subordinate worker in the eye of the employer. This has not prevented the court from elaborating a concept of what these offences entail.[79]

There was only one reported case concerning a victimisation dismissal in this period.[80] It was decided on the papers. The union alleged victimisation. The company denied it. The presiding officer was not able to decide the matter on the papers. But because the union ought to have anticipated that he would not be able to do so, he awarded costs against them.[81]

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75 The 1990 "accord" between COSATU, NACTU and the employer federation SACCOLA marked its definitive establishment.

76 See, eg, *NUM v Unisel Gold Mines Ltd* (1986) 7 *ILJ* 398, where victimisation is suggested but not in so many words, and the worker is reinstated.

77 See *Black Allied Shops Offices & Distributive Trade Workers Union v Homegas (Pty) Ltd* (1986) 7 *ILJ* 411 417.

78 In *Marievale Consolidated Mines Ltd v NUM* (1986) 7 *ILJ* 108 (W) the argument (amongst others) raised in the high court was that dismissal for participation in a lawful strike could constitute victimisation. It was rejected on the facts of the case. In *NAAWU v Atlantis Diesel Engines (Pty) Ltd* (1989) 10 *ILJ* 948 (IC) the issue was an inducement by the employer to resign from the union, which did not constitute victimisation in the strict sense.

79 See, eg, *Ngubo v Hermes Laundry Works CC* (1989) *ILJ* 591 and *Tubecon (Pty) Ltd and NUMSA* (1991) 12 *ILJ* 437 (ARB).

80 *National Union of Food Workers v Champ Food Manufacturing Group* (1989) 9 *ILJ* 469 (IC). In *Mazibuko v Mooi River Textiles Ltd* (1989) 10 *ILJ* 875 (IC) the issue related to inter-union rivalry, and a bid by the majority union to enforce what amounted to a closed shop, by having members of the other union dismissed. This, the court found, was tantamount to victimisation. However, it was victimisation at the instance of the majority union, where the employer had clean hands.

81 The application was in terms of s 17(11)(a) of the Act. Landman AM presided.

The award of costs against a union sends out a particularly strong message. Did it relate to the bringing of an application on the papers, as the judgment states? Or was it also an expression of disapproval, at victimisation being alleged?[82]

On the facts disclosed in the judgment, one can only speculate. What is clearly absent in this judgment is the sort of enquiry an experience of union organisation or a perspective on working class reality calls out for.[83]

So too, from a working class perspective, the nature of the "unfair labour practice" remedy cannot be a sufficient explanation as to why the court failed to develop a jurisprudence of victimisation. For that would be to give a "legal" reason primacy, instead of the organisation and politics of the time.

In the workplace, strategies of repression were increasingly giving way to strategies of incorporation as the emergent unions consolidated their position there.[84] Outside, the country was in the grip of recession. Widespread retrenchments were the order of the day. To eradicate an unwanted union presence retrenchment was the obvious course.[85]

Retrenchment became the focus of much of the court's jurisprudence. But recourse to the court was by now well established. The opinion of unions and their lawyers no longer mattered so much. Increasingly the court devised rules which were patently intended to enhance capital's power over labour: a notable example being its invention of the so-called "no difference" principle.

CWIU v Sopelog[86] illustrates the application of the "no difference" principle. Two union members were selected to be retrenched, ostensibly on "merit". But there were reasons to believe it was really because of their union profile. Victimisation was alleged in the pleadings, but no weight was given to this in the judgment, or to the subjective nature of a "merit" assessment. Consultation had clearly not been adequate, but because

82 In an unreported interlocutory judgment I was told about by an official of the Food and General Workers Union, costs were awarded against the union when it applied to amend its statement of case in s 46(9) proceedings to include an allegation of victimisation.

83 The employer's reason for dismissal was a threat he alleged the shopsteward made: to necklace a worker who did not pay his subscriptions. Sufficient reason to dismiss (one would have thought) without any additional justification. Curiously, the employer adds two additional reasons. More curiously, these reasons patently could not constitute valid grounds for dismissal (both related to warnings for unrelated offences, at least one of which was some two years previously). The presiding officer fails to comment on this and other peculiarities about the employer's version.

84 Of the political alliance that ultimately became the mass democratic movement, the trade unions alone were able to continue functioning throughout the state of emergency.

85 Unskilled workers in the manufacturing sector were particularly hard hit by retrenchments. They had been the organisational base of the emergent unions in the period of their formation. As a consequence the class composition of the workforce was changing. This in turn was to facilitate strategies of incorporation on the part of employers (Hindson & Crankshaw 1990: 23).

86 (1988) 9 *ILJ* 846.

consultation would have made "no difference" to their selection, the retrenchments were not unfair.

A roll-back of earlier union "gains" had always been on the cards once recourse to the court was established. But the economic crisis was also a political crisis. In devising this kind of partisan jurisprudence the court was acting in concert with the repressive state. It was also inspired to do so by the 1988 amendments to the Act.

16 CODIFICATION VERSUS JUDICIALISATION

The focus of the unions' campaign against the 1988 amendments was against the provisions that inhibited strike action and facilitated the award of strike damages against unions, and the codification of the unfair labour practice definition.

The object of the codification was to restrict the unlimited scope for interpretation of the old definition. But it did so by seeking to qualify and limit the potential unions had to make "gains" in the court. One commentator described it as "an attempt to claw back control and reverse the new body of case-built law" (Thompson & Benjamin 1995: para A1-30)

Yet the more enduring amendment was to be the introduction of a right of appeal to a labour appeal court, presided over by a judge, with a further appeal to the appeal court. This was to set the seal on the judicialisation of labour relations at a time when the judiciary were more involved than they ever had been in shoring up the authority of employers in the workplace.[87]

The paradox is that this did not feature at all in the campaigns against the amendments. In fact, some of the sharpest criticisms of the industrial court from "union lawyers" would be over its failure to respect the authority of the labour appeal court.[88]

This was one of the issues the labour appeal court confronted in the *CWIU v Sopelog* appeal. It found the retrenchments were unfair and rejected the "no difference" principle.[89] The more even-handed approach this epitomised goes some way to explain why judicialisation was not, it seems, an issue in the accord that gave rise to the 1991 Act either.[90]

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87 It was symptomatic of the economic and political crisis that labour disputes increasingly gave rise to occupations, sleep-ins and the like. See O'Regan (1988: 959) for an example of the constrained tones in which the judiciary is criticised that characterises much academic legal writing.

88 See, eg, the *Employment Law* editorial vol 9 no 5 May 1993: "Mohamedy's Meets the Mountain" regarding the court's ruling concerning the issue of consultation prior to retrenchment.

89 The LAC hearing was shortly after the court's judgment in *TATU v Spoornet* (1993) 2 LCD 323 (IC), in which the industrial court declined to follow the judgment of the LAC in *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 *ILJ* 642 (LAC), in more or less open defiance of the higher court. The case provides an illuminating example of judicial discourse. *TATU v Spoornet* is not explicitly criticised. Instead the judge analyses the reversal of one of his own decisions on appeal, thereby suggesting that a court ought to abide by the higher court's decisions.

90 Act 9 of 1991 reflecting the accord between government, capital and labour that is known as the Laboria minute.

Yet underlying this more even-handed approach was, I suggest, a well-founded fear that the court's partisan image was eroding its legitimacy. How much had the unions' achieved through this body of case-built law? Would unions not be better served by a codification restricting the scope for judicial intervention, especially now they were able to influence its content?

The "gain" of the National Union of Mineworkers in the *Marievale Consolidated Mines* case rectified an anomaly.[91] For until this decision the court drew no distinction in principle between workers dismissed on a lawful strike and workers who had resorted to self-help unlawfully.

Yet where workers resorted to self-help lawfully, in the case of *MacSteel v NUMSA*,[92] it was found to be unfair. And where workers attempted to take lawful strike action over the dismissal of their fellow workers it was held that in doing so in preference to "quasi-judicial remedies" they had forfeited the protection of the court.[93]

The thrust of the cases, I would argue, has been to restrict the organisational capacity of unions. The fact this is not more often acknowledged above all reflects the absence of a critical legal tradition. This absence is explained by the fact that labour's lawyers are themselves part of the machine producing the "new" law. It is therefore not surprising that it should have been a union labour lawyer who first legitimated the unlawful resort to self-help by an employer.[94]

So too, the extent to which the cases have established union rights has been limited. The "right to bargain" *Fodens*' case conferred was one most emergent unions had won through organisation. The outcome was calculated to preserve the weak in the marketplace of organisations. It did not assist MAWU that there was such a right, when it asked the court to compel plant level bargaining.[95] It also did not extend to assisting a union seeking to compel an employer to negotiate a recognition agreement with it.[96]

Over the first years of the court's active existence until 1986 FCWU grew no more slowly than any other emergent unions. At the stage when MAWU was seeking to compel plant level bargaining, it had already achieved centralised bargaining in the milling and baking sector, whose organisation the Fattis and Monis strike had generated. Yet it did not find it necessary to resort to the court to secure its gains. There was no right of organisation it did not enjoy for failing to do so.

In 1986 the union merged with other unions that had a different approach to the courts and law; and in 1988, if the commentators are to be believed, it won a "landmark victory" in the courts.

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91 *NUM v Marievale Consolidated Mines Ltd* (1986) 7 *ILJ* 123 (IC).
92 11 *ILJ* 995 (LAC).
93 *Chemical Workers Industrial Union v Bevaloid (Pty) Ltd* (1988) 9 *ILJ* 447.
94 *Gubb & Ings Ltd v SACTWU* (1991) 12 *ILJ* 415 (ARB).
95 *MAWU v Hart* (1985) 6 *ILJ* 478 (IC).
96 This "right" was only recently affirmed in the case of *FGWU v Design Contract Cleaners* (1994) 13 *ILJ* 1078 (IC).

The case of *FAWU v Spekenam Supreme*[97] concerned the mass dismissal of workers who resorted to self-help in response to the refusal of their employer to settle a recognition agreement. The message sent out was greeted with applause by the labour law fraternity for its unequivocal rejection of voluntarism and its affirmation that ". . . in general terms it is unfair for an employer not to negotiate *bona fide* with the representative union . . ."

The outcome of the case was the mass dismissal of over 600 workers and the union's worst organisational defeat to date. It is a reminder to lawyers to beware of their own propaganda.

17 WIEHAHN MARK 2

In 1993 the minister of manpower (as he then was) asked Professor Wiehahn to conduct an investigation: a commission was not the appropriate form for a political regime in transition to adopt. Its aim was to investigate amongst other things the "esteem in which the court is held and the respect for the court or lack thereof" and the "perceived bias" of its presiding officers.[98]

Implicit in this was that the court faced a crisis of legitimacy. In the event the nature of the crisis was never confronted. The investigation was curtailed by the process which resulted in the 1995 Act.

An editorial in *Employment Law* acknowledged such a crisis in the following terms:

> "What will be required is more than just a change in complexion, though the symbolic value of replacing whites by blacks and males with females should not be underestimated. Judicial officers will have to be appointed who understand and articulate working class concerns and aspirations . . . To survive the court will have to become what it has never been: a forum in which labour carries as much weight as management."[99]

But the implications of this last statement were not developed. For if the court had been biased in favour of management, as this statement suggests, what is one to make of the law it has elaborated? Certainly the received wisdom that unions "enlarged" rights through the court would have to be re-evaluated.

The object of this article has been to assert the primacy of organisation and the capacity of workers to resort to self-help in the process by which rights are established. Rights recognised by the courts were often rights recognised in actual practice. Yet the form in which the court recognised such rights was often a truncated or distorted one.

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97 *FAWU v Spekenam Supreme* (1988) 9 *ILJ* 628.

98 Circular letter dated 5 April 1993, from Prof N Wiehahn, Chairman of the Industrial Court Development Project. I received my copy through the Cape Town Attorneys' Association.

99 Editorial *a propos* Prof Landman's appointment "Landman Ahoy" *Employment Law*, July 1993 vol 9 no 6. It adds: "The public which the court serves is not a general one. There are 'interested parties' which have to be satisfied with the way it functions."

As to whether a court is capable of establishing rules which will accommodate the aspirations and concerns of the working class, no court will do so (it should go without saying) merely as a result of the character of the persons appointed to preside. It will need a discourse which acknowledges political realities to counter the discourse in terms of which labour law has thus far been elaborated.[100]

A court of law, operating within the constraints of the legal tradition, is not likely to elaborate such a discause. Why could a tripartite body not have been formed to determine disputes in the final instance? Alternatively, why did unions not agitate for a bipartite body?[101]

18 THE ALTERNATIVE THE 1995 ACT HAS CREATED

Some have interpreted the 1995 Act as curtailing the process of judicialisation. To the extent that it does, it is through the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA) and the codification of certain rights: notably the right of an unfairly dismissed worker to be reinstated.

It remains to be seen to what extent the CCMA will be able to shake off the constraints of the jurisprudence the court evolved. Yet its capacity to do so is restricted by its narrow jurisdiction. On fundamental issues, it is the new labour court which has the final (if not exclusive) say.

Workers are, for example, permitted to strike in defence of the limited organisational rights described in sections 12 to 15 of the Act. But when they are dismissed for doing so, allegedly because of the employer's operational requirements, it is the labour court which will decide whether these dismissals were fair.[102]

On the other hand workers are not permitted to strike when their fellow workers are victimised. For the very reason that victimisation concerns the violation of the most fundamental right of organisation, it is regarded as the labour court's province to determine.[103]

Take the latter day equivalent of what happened at Fattis & Monis in 1979. The union could refer the case of victimised workers to the CCMA to conciliate. But failing a resolution through conciliation, it would have to go to the labour court for a determination.[104]

Ironically, the only way the union could have the dispute heard by the CCMA would be on the basis that the workers did not know the reason for

100 According to Woodiwiss, cited in Du Toit (1994), "The law is a set of state-enunciated discourses which interpellates the subjects it addresses in such a way that they will be law-abiding, provided that the same subjects do not successfully resist this disciplining because of prior or other interpellations produced by counter-discourses."

101 Bipartite tribunals composed of employer and worker representatives determine disputes in France, a country with a tradition of political unionism.

102 Ss 67(5) and 191(5)(b).

103 The right concerned is described as the "right to freedom of association" in the Act. See ss 4 and 5.

104 S 191 (5)(b)(i). I assume there would be little prospect the parties would agree to let the CCMA arbitrate in these circumstances.

their dismissal.[105] That was of course the case at Fattis and Monis in 1979. But it would not be sufficient, it seems, for workers merely to allege there was no reason. To be dismissed for no stated reason is not the form victimisation is likely to take in the 1990s.

If then the workers were to resort to self-help over victimisation, it is the labour court which will decide whether it would be appropriate to order the union or the workers to pay compensation.[106] Similarly, it is the court which will decide whether the workers were validly dismissed.[107]

The labour court is composed of a president and deputy who are judges appointed by the Judicial Services Commission. To this extent the judiciary still sets the parameters for the development of rights through the court.

What is surprising in the context of the adoption of the 1995 Act, is that the question as to whether this is appropriate is not even being asked.

Sources

Arthurs H "Understanding labour law: The debate over industrial pluralism" *Current Legal Problems* (1985) vol 38

Baskin J *Striking back* Ravan 1991

Bendix S *Industrial relations in SA* Juta 1989

Benjamin P "The unwilling employer" (1982) 3 *ILJ* 22

Blanc-Jouvan X in Aaron (ed) "Labour courts and grievance settlement in Western Europe" University of California 1971

Brassey *et al* *The new labour law* Juta 1987

Cameron *et al* *The New Labour Relations Act* Juta 1989

Cheadle H "The long shadow over Kubheka" (1980) 1 *ILJ* 206

Clark J "The juridification of industrial relations" (1985) 14 *ILJ* (UK) 69

Coetzee JAG *Industrial relations in SA* Juta 1976

Davis D "Refusing to step beyond the confines of contract – the jurisprudence of advocate Erasmus SC" (1985) 6 *ILJ* 425

Du Plessis L *An introduction to law* Juta 1992

Du Toit D "Towards a critical analysis of labour law in South Africa" in Kalula E and Woolfrey D (eds) *The new labour market* Labour Law Unit UCT 1995

Editorial "Landman ahoy" *Employment Law* vol 9 no 6 July 1993

Friedman S *Building tomorrow today* Ravan 1991

Fine De Clercq and Innes "Trade unions and the State: the question of legality" *SA Labour Bulletin* vol 7 1 and 2 September 1981

105 S 191 (5)(a)(iii).

106 S 68(1)(b). This is ironic in the light of the campaigns against the 1988 Amendments.

107 S 191(5)(b)(iii). The only circumstance in which a resort to self-help would not be illegal, interestingly, would be in response to an illegal lock-out. To this limited extent self-help is legitimated. See s 64(3)(c) and (d).

Gelb S "South Africa's economic crisis: an overview" in Gelb (ed) *South Africa's economic crisis* 1991

Hindson D and Crankshaw O "New jobs, new skills, new divisions – the changing structure of SA's workforce" *SA Labour Bulletin* (1990) vol 15 no 1

Hirsch A and Nicol M "Trade Unions and the State: a response" vol 7 4 and 5 February 1982

Klare K "Critical theory and labor relations law" in D Kairys (ed) "*The politics of law*" Pantheon NY 1990

MacIntyre A *After virtue* Duckworth 2ed 1985

Maree J (ed) "WPGWU comments on the question of registration" in *The Independent Trade Unions 1974-1984* Ravan 1987

O'Meara D *Volkskapitalisme* Ravan 1983

O'Regan C "Interdicts restraining strike action – implications of the Labour Relations Amendment Act 83 of 1988" *ILJ* 959

Rautenbach F *Set the workers free – why deregulation will solve South Africa's labour problems* Options Publishing 1993

"Speaking Supreme" *Employment Law* vol 4 no 3 May 1988

Sugarman D "A hatred of disorder: legal science, liberalism and imperialism" in P Fitzpatrick (ed) "*Dangerous supplements, resistance and renewal in jurisprudence*" Pluto 1991

Thompson C and Benjamin P *South African labour law* Juta 1995

Thompson C "Trade unions and the law" in Corder (ed) "*Essays in law and social practice*" Juta 1988

Thompson C "Borrowing and bending: the development of South Africa's unfair labour practice jurisprudence" *International Journal of Comparative Labour Law and Industrial Relations* (1993) 9 (3) 183