SECOND CARNEGIE INQUIRY INTO POVERTY
AND DEVELOPMENT IN SOUTHERN AFRICA

Poverty and Co-option:
The role of the courts

by

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POVERTY AND CO-OPTION: THE ROLE OF THE COURTS

"...the only permanently effective Trade Union victories are won by limitation of the numbers in the particular trade, and the excluded candidates necessarily go to depress the condition of the outsiders. The Trade Unionist can usually only raise himself on the bodies of his less fortunate comrades." (1)

This paper seeks to analyse and assess the role of the courts in the application of legislation to the industrial process in South Africa. The focus rests in particular on the manner in which the courts contributed to the co-option of a large element of the white working class after 1924 (2), and the effect of such a strategy on the economic condition of those workers. The insights gained from this study are then applied to the policy currently employed by the State with regard to black workers, in an attempt to establish a basis for speculation on the effects of such an initiative on the poverty of those workers.

LABOUR LEGISLATION IN THE APPELLATE DIVISION BEFORE 1950

The first years in the existence of the Union of South Africa witnessed widespread industrial conflict, primarily between white workers and their employers on the Witwatersrand (3). Disruption of production, particularly on the mines, was endemic, and this unrest culminated in the bloody violence of the Rand Revolt of 1922, when government troops were used to suppress worker discontent. Although it seems that the situation of white gold-miners remained parlous for some time after this emphatic demonstration of their grievances (4), this series of clashes combined with the impoverished condition of a large section of the electorate to induce a programme of industrial legislation by successive governments from 1924 onwards (5).

These enactments held out substantial economic advantages to those whose working lives were governed thereby, but the price paid was compulsory participation in a cumbersome collective-bargaining machine, which attempted to diffuse worker antagonism. A crucial part in this process was assigned to the courts, which were faced with the unenviable task of implementing State regulation of an area of legal relations (the employment contract) hitherto regarded as/........
as substantially private. In order to test judicial reaction to this unaccustomed function, the judgements in industrial matters of the Appellate Division of the Supreme Court, the country's highest tribunal, will be considered. It is acknowledged that this sample is somewhat limited in scope, and that the Appellate Division, by the nature of its function, might present a somewhat untypical picture, yet the leading position of this bench of judges, both formally and influentially, justifies such an exercise.

Before 1924, the only industrial legislation which had occupied the A D to any degree was that governing workmen's compensation (6). Here the court had, with the odd exception (7), been relatively sympathetic to the plight of injured workers (8), although it had insisted upon rigid compliance with the procedural requirements of the Act (9). In the face of disputes revolving around the enforcement of employment contracts regulated by the common law, however, the judges had displayed a certain measure of unimaginative inflexibility (10).

From 1924 until the 1950's (when amendments procured by the National Party government sought to achieve avowedly racist objectives (11)), the courts were faced with industrial legislation which aimed to control almost every facet of the employment relationship. Although not always overtly racist in tone (12), these laws served to bolster the position of semi- and unskilled white workers in several ways (13), thereby alleviating their poor economic condition somewhat. This strategy was also an attempt to discourage industrial action by dissatisfied workers: that it appears to have succeeded (14) may in some measure have been due to its implementation in the spirit of the times by a sympathetic court. This was achieved primarily in three ways.

Firstly, the court accepted this statutory interference with the "freedom" of contract in a comparatively nonchalant manner (15), as well as the rights of trade unions to organise and bargain on their members' behalf (16). In doing so, however, the A D insisted upon the highest standards of conduct in the internal management of those unions (17), and strongly discouraged any form of worker action/......
action outside the stipulated dispute-resolving process (18).

(The appellate judiciary had previously showed scant mercy to those charged under the criminal law with offences arising from the Rand Revolt (19)).

Secondly, when it came to questions regarding the validity of industrial conciliation agreements and wage determinations, the A D appeared to be reluctant to strike down such an instrument, on account of some minor non-compliance with required procedure. Such cases did indeed occur (20), but they were overshadowed by those in which the court saved the industrial agreement from extinction, despite often inept drafting (21). To this end, the judges extended the doctrine of law applicable to subordinate legislation (22), which states that the whole is valid if an invalid part thereof is severable without detracting from the sense of the remainder (23). An important aspect of most of these appeals is that they were brought by erring employers who hoped to escape conviction for non-compliance with the statutory provisions by challenging the validity of the agreements themselves (24).

Thirdly, the court seems to have applied the legislation in such a way as to maximise the benefits obtained by workers (25), in spite of some early indications to the contrary (26). The cases generally display a willingness to coerce recalcitrant employers into submission to the strictures of the new regime (27), even enforcing closed-shop wage regulations in favour of black employees who by definition were excluded from membership of the trade union concerned (28). By the end of the 1940's the appellate judiciary was applying complex and often technical agreements with competence and adroitness (29).

The picture which emerges is one of steadfast determination by the A D to implement the industrial legislation of the period 1924-1950 in such a way as to show workers that their remedy lay with the courts, rather than strike action. Although there is little direct reference to race in these cases, most of the employees involved appear to have been white (30), and there is ample evidence in other cases at this time (31) that the court was acutely aware of divisions among the white population, whether
on grounds of language or of social class. The judges' attitudes here appear to conform with a pattern whose sub-conscious intention was to forge unity among white people.

The outcome of such judicial action was that the legislative intention of preferment and improvement of the position of white workers was carried out to the full. Although this period did not witness the complete eradication of white poverty, especially among Afrikaners (32), substantial strides along the way were made, and the foundation laid for the National Party's policy of white Afrikaner economic advancement after 1950. Although, too, there seems to be no direct evidence that white preferment was obtained at the expense of further impoverishment of blacks, much research points in this direction. (33)
THE INDUSTRIAL COURT AND BLACK WORKERS

1. WIEHAHN COMMISSION'S RECOMMENDATIONS

In 1977 the Wiehahn Commission was appointed to investigate the industrial relations system of South Africa. The decision to appoint such a Commission was taken in the light of immense pressure which had been exerted upon the crude industrial relations system governing the labour relationship of Black workers at that stage.

Hence, the cumulative effect of foreign investors having produced fairly enlightened codes of labour conduct for their South African subsidiaries, South Africa being confronted by an acute shortfall of skilled labour in the 1970's and the urban uprisings of 1976 contributed to the perception that a new labour strategy was needed. The rationale behind the thinking of the Wiehahn Commission is well expressed by Phil Bonner as follows, 'Two basic concerns pervade its recommendations, the first was that there existed a real prospect of a dual system of industrial relations developing in South Africa. To some extent this had been pre-figured by the legislation granting negotiating powers to African workers via liaison committees in 1977. With mounting external and internal trade union pressure, the Commission argued there was now an increasing likelihood of 'power groups' forming which would 'force employers ... to negotiate outside of the statutory system'. This would not only 'disturb wage structures' but would effectively allow greater freedom to African unions by freeing them from the 'protective and stabilising' elements of the statutory system. A regulated unitary system of industrial relations should therefore be instituted to pre-empt this situation.

The second major worry agitating the Commission was the danger of external groups manipulating the unregistered trade union movement. Unregistered trade unions were free to acquire and disburse money in whatsoever manner they wished, and were able to participate in party politics in a way registered unions could not. The operation of the law should be extended to all those whose actions outside the law might disrupt industrial peace,' the Commission argued. 'Denial of union rights ... would constitute a rallying point for underground activity; an industrial relations problem would become a security problem.'35
In this connection, one of the Commission's major proposals was to recommend the establishment of an Industrial Court. The Commission reported that an overwhelming majority of witnesses emphasized the need for a special body to deal with disputes involving a conflict of rights or aspects of a legal nature. Thus the evidence placed before the Commission suggested that the labour court was seen as a mechanism whereby the strike weapon could be replaced by a judicial inquiry into the dispute. The time had come for those rights derived from labour law to be adjudicated more appropriately - in a labour court. The aim was to encourage judicial rather than strike action. It is a fact that countries with labour courts have experienced fewer strikes and have developed their labour law to a greater extent. 36

The Commission thus recommended that the Industrial Tribunal be redesignated as the Industrial Court and restructured so as to be a court of law with country-wide jurisdiction and that its functions should include:

i) the interpretation of the provisions of labour laws and regulations, industrial agreements, wage determinations, awards, exemptions, orders and other such instruments;

ii) the hearing of alleged cases of irregular and undesirable labour practices such as unjustified or unfair changes in the established labour pattern of an employer or other actions which threaten industrial peace or lead to dissatisfaction;

iii) the investigation and hearing of alleged cases of unfair dismissal, inequitable changes in conditions of employment, underpayment of wages, unfair treatment and other cases of grievances;

iv) the adjudication of the legality in terms of the law of strikes, lock-outs, picketing, intimidation, boycotts or other instances of similar action; and

v) in addition to the present statutory functions of, inter alia, settling disputes of a non-legal character, to adjudicate generally on conflicts of rights and settle labour disputes of a legal nature which the general courts would ordinarily decide, including the issuing of orders or instructions. 37
2. **EARLY OPERATION OF THE COURT**

The Court made a rather inauspicious start by handing down a decision in the case of Moses Nkadimeng v Raleigh Cycles\(^{38}\), which effectively reduced its scope of operations. In the Nkadimeng case, the Court was required to interpret S17(11)(a) of the Labour Relations Act which requires the Industrial Court to perform all the functions, excluding the adjudication of alleged offences, which a Court of Law may perform in regard to a dispute or matter arising out of the application of the laws administered by the Department of Manpower. The applicants were employees of the respondent. They alleged, inter alia, that they had been 'locked out' by the respondent in contravention of s 65 of the Act, which makes certain lock-outs illegal. They sought an interdict restraining the respondent from continuing the lock-out, basing their claim on the well-established principles enunciated in *Patz v Greene*. This relief was refused. Parsons P held that because a 'lock-out' is an offence, it falls outside the court's jurisdiction, notwithstanding the fact that the relief claimed is civil. The question is whether the words 'excluding the adjudication of alleged offences' merely exclude criminal jurisdiction or whether, in addition, they exclude civil relief based on acts that have both criminal and civil consequences. Ehlers, D.P., in a separate judgment, seemed to be of the view that it is only the criminal jurisdiction that is excluded, although he did consider that the argument that 'in attending to the (present) application, this court would have to decide whether what had been done ... amounts to an alleged offence, and this the court was expressly forbidden ... to do ...' had 'some substance'. Ehlers, D.P. seemed to dispense with the claim on the ground that the applicants had not exhausted 'every other remedy', even though there is no specific domestic remedy for an illegal lock-out in the Act.

Given that most disputes arising out of the application of labour legislation can amount to an offence, (such as strikes, lock-outs, victimization or failure to observe wage-regulating measures) the reasoning adopted by Parsons, P., left the court without jurisdiction where it is most needed, as the effect of the judgment was to exclude from the court's jurisdiction seemingly all the major legal disputes arising from labour legislation.\(^{41}\)
Having itself effectively curtailed its 'court of law' functions, the Court appeared to be doomed as another unsuccessful creation of the Wiehahn strategy. However, in 1980 it heard its first unfair practice case, in which, in the words of its president, 'the court held that an unregistered trade union had locus standi as a party and representative in proceedings in that matter before the court. I believe this caused quite a stir in certain circles. It nevertheless goes to prove what I said in my lecture this morning that the oath of office requires the court to administer justice in accordance with the law as the court sees it without fear, favour or prejudice.' Not only did the judgment 'cause a stir' but it heralded the arrival of the court as possibly the most successful component of the Wiehahn strategy.

3. UNFAIR LABOUR PRACTICES

The initial recommendation of the Wiehahn Commission was for the Court to develop a body of law relating to fair employment practices. However, the concept of an unfair labour practice was defined initially in so vague a manner so as to provide the court with any clear guidelines by which to develop a tangible legal concept of an unfair labour practice. Consequently the definition was developed by subsequent legislative amendments so that the current statutory definition is that an unfair Labour Practice means -

(a) any labour practice or any change in labour practice, other than a strike or lock-out, which has or may have the effect that (i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security or physical, economic, moral or social welfare is or may be prejudiced or jeopardised thereby; (ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby; (iii) labour unrest is or may be created or promoted thereby; (iv) the relationship between employer and employee is or may be detrimentally affected thereby; or

(b) any other labour practice or any other change in any labour practice which has or may have an affect which is similar or related to any effect mentioned in paragraph (a).

In the Mauchle case, a worker Maponya, who was a member of a union, had been employed by a company in terms of a migrant labour contract. Upon expiry of each 'contract period' of a year, it was practice for such a worker to...
return to their 'Homeland' to attest a new one year contract as a prerequisite to resuming employment. This process of renewal was facilitated by a 'call-in card' in which the employee give the employer an indication of his intention of renewing the contract.

However, when Maponya's contract terminated the employer, contrary to his usual practice, refused to grant Maponya such a card, allegedly on the grounds of his trade union activities. The court held that an unfair labour practice, as alleged, could constitute such a practice but declined to test the matter without establishing the relationship between the parties and the issue in dispute.

In the second reported case, that of S.A. Diamond Workers' Union v The Master Diamond Cutter's Association of S.A.,\(^45\) a union alleged that the employers' association was engaged in a deliberate attempt to 'undermine' the protected position of skilled workers in the industry. This was allegedly done by various stratagems by the retrenchment of skilled workers in contravention of an industrial agreement promulgated in terms of s48 of the Labour Relations Act, while employers continued to employ unskilled workers in categories of work traditionally done by skilled workers, and by refusing to agree to proposals put forward by the union to introduce stricter controls and monitoring of industrial agreements. The court concluded that these stratagems constituted unfair labour practices and accordingly made a determination (a) reinstating the retrenched employees; and (b) requiring the employer in the industry to comply with the controls and monitoring of the industrial agreements as proposed by the union. Although it is difficult to distil principles from the judgment, owing to the factual complexity and the nature of the judgment itself, it is clear that the court considered dismissal, in certain circumstances, to constitute an unfair labour practice and that reinstatement is competent relief. Further the court held that the refusal to agree to certain proposals by the union constituted, in the circumstances, an unfair labour practice.

The court's development of the concept of an unfair labour practice has been extended more recently in the Fodens case,\(^47\) where the question arose, inter alia, as to whether the dismissal of two union shop stewards and a migrant worker constituted an unfair labour practice.

The /...
The court took the view that the onus rested on the employer to establish that the termination of employment was justified on good grounds. The employer contended that it was not obliged to give more than 24 hours notice of retrenchment because the employees involved were hourly paid and where longer notice was given, sabotage was committed. The employer argued further that retrenchment compensation was not paid to anybody as it was not contractually obliged to do so.

Given the hostile attitude of the employer to the union of which the employees were members and the non-compliance by the employer with established retrenchment practices, namely, prior proper warning of proposed retrenchments, fair application of agreed retrenchment selection criteria, prior consultation with a representative union, adequate steps to look for alternative employment, the adoption of the principle of first in, last out, the court held that the employer had not discharged the onus which rested upon him.

Possible the most significant of the unfair labour practice cases decided by the Industrial Court was that of Metal & Allied Workers' Union v Barlows Manufacturing Co. Ltd, where workers dismissed by their employer, who sought to terminate their contracts of employment by paying them in lieu of notice of termination, approached the court on the basis that the employer's act constituted an unfair labour practice.

The workers argued that the dismissals were not procedurally valid since no warnings had been given prior to dismissal and that the dismissals may have unfairly affected or prejudiced their work security and physical and economic welfare.

In deciding that a status quo order could be granted on the basis of an unfair labour practice, Ehlers, D.P. said, 'to confine the unfair labour practice jurisdiction of the court in respect of dismissals to those that were wrongful only would effectively render the legislative intent behind the provision of such a jurisdiction nugatory, for the employee would then be given no further rights than those he has all along enjoyed at common law'. Hence the consequence of this decision is that the employee has been given a potential right to work which can be defended against attack from the employer, notwithstanding the latter's compliance with the common law.
4. STATUS QUO ORDERS

Apart from the determination made in respect of unfair labour practices, the court's major contribution has been in respect of status quo orders, which have begun to play an important part in the activities of the Industrial Court. This development is possibly due to the fairly time-consuming requirements which must be complied with prior to the court hearing a substantive issue concerning an unfair labour practice, namely:

(a) where a dispute has arisen concerning an alleged unfair labour practice it must be referred for settlement to an Industrial Council having jurisdiction. Where no Industrial Council has jurisdiction, application must be made to the Minister for the appointment of a Conciliation Board.

(b) In the event of the Industrial Council or Conciliation Board failing to settle the dispute within a period of 30 days from the date upon which it was referred to the Council, or from the date upon which the Minister approved the establishment of the Conciliation Board, or within such further period or periods as the Minister may determine, the dispute shall be referred to the Industrial Court for determination.\(^52\)
An attempt was made in *Grafton Furniture Manufacturers (Pty) Ltd. v Industrial Council for the Furniture Manufacturing Industry, Nata*4 to circumvent these procedures and approach the Court directly but the court decided that it could only be seized of an unfair labour practice after compliance with the legislative procedure.

Another factor which has contributed to the important role played by status quo orders was the amendment to the Labour Relations Act in terms of which the court was empowered to hear applications for such orders, whereas previously it had been within the power of the Minister to give a status quo order.

In this connection, the Wiehahn Commission, in recommending such a legislative amendment, provides an important insight into the thinking upon which the recommendations were based when it suggested that: 'there is however one respect which the Commission considers certain amendments to the Act to be justified. Though little evidence was received on the subject of the Minister's involvement as a decision-making authority under the Act, an analysis of the Act shows that these functions could in a number of instances more appropriately be performed by the Court. In view of the imminent rationalisation of the country's labour legislation, the Commission does not propose to cite each instance where such a transfer would be desirable but believes it adequate at this stage to stake its belief that there should be maximal substitution of the Court for the Minister in all those instances where a decision is in a strict sense of a judicial or quasi-judicial nature. This would have the added advantage of lessening the burden of responsibilities placed upon the Minister.'54

**Status Quo Orders - the procedure**

Section 543 of the Labour Relations Act makes provision for status quo relief in respect of certain types of dispute, namely:

(a) the suspension or termination of the employment of an employee or employees, or a proposal to do so,
(b) the change or proposed change in the terms or conditions of employment of an employee or employees (except to give effect to any relevant law or wage regulating measure),
(c) an alleged unfair labour practice.

A / ...
A status quo order is one made by the industrial court requiring an employer party or an employee party to restore the status quo that existed prior to the act giving rise to the dispute. Such an order may involve prohibiting a proposed dismissal, a change in the terms and conditions of employment or the introduction of an alleged unfair labour practice.

The effect of a status quo order is well illustrated in the case of Bleazard and other v the Argus Printing and Publishing Co. Ltd. The applicants were journalists on newspapers owned by the newspaper companies of the respondent.

For many years the South African Society of Journalists, an unregistered trade union, representing a significant number of journalists on respondent newspapers had negotiated salaries and working conditions with the newspaper companies in terms of a collective bargaining agreement, called a 'non-statutory conciliation board' agreement.

In 1982 the newspaper companies gave notice of their intention to withdraw from the conciliation board.

Different reasons were advanced but it appeared that the major objection was to negotiating across the board increases when different economic considerations applied in the regions where the companies were based.

The SASJ contended that the threatened withdrawal, without good cause, constituted an unfair labour practice and sought a status quo order directing respondents:

i) to remain members of the South African Press (Editorial) Conciliation Board (the name of the collective bargaining agreement);

ii) to negotiate in good faith with the SASJ upon such matters as may properly fall within the scope for which it was constituted.

In deciding the matter the court decided that the applicants had to show a prima facie right, apprehension of irreparable harm and the absence of an alternative remedy. Where the right is prima facie established but was open to some doubt, it would apply the 'balance of convenience' test in deciding whether the relief sought should be granted. It would weigh up the prejudice to the union if the relief was withheld against the prejudice to the company if it was granted.
In this regard the court found that the applicant had established a prima facie right, but one to which was some doubt.

Thus in applying the balance of convenience test the court held:

'In this matter a complete breakdown in the collective bargaining mechanism could follow if respondents withdrawal from the board became reality. While the continued operation of the board would facilitate negotiation of agreements on a national basis SASJ would no longer be in the position to so negotiate if the board ceased to function. Negotiations would then have to be conducted at another level, probably through SASJ's editorial chapels. The board, being inoperative, would no longer be assisting in ensuring compliance with the agreement reached. On the other hand the possible prejudice caused respondents by the making of the order had not been shown. It is not clear how the restoration of a position which had prevailed for so long could place any undue hardships on respondents.'

The court is of the view that the prejudice to applicants had the order not been made may have outweighed the prejudice which in the absence of other immediate alternative relief could ensue with reference to respondents should an order be made, which in effect is to continue a prevailing practice. The balance of convenience therefore clearly favoured the applicants.56

The court confirmed its order requiring the newspaper owners not to withdraw from the collective bargaining agreement. This enabled the parties to the board to endeavour to achieve the objects of their agreement and for the purposes of achieving these objectives, the court ordered that negotiations should commence within one month of the date of the order or at any other time the parties might agree to.

In Matshoba and Other v Fry's Metals (Pty) Ltd,57 employees were dismissed inter alia, for refusing to obey an instruction to work overtime. Although there was an express contractual stipulation to the effect that overtime work was compulsory, the employer's practice revealed that overtime was not in fact compulsory. All that the practice required was that an employee give a reasonable explanation as to why he was unable to work overtime. In the present case the employees had furnished reasons for refusing to work the overtime requested, and the court found that the refusal was reasonable given the circumstances, which were: the instruction to work overtime was given on short notice, the urgency and importance of the overtime work appeared not to have been conveyed to the applicant employees; and the applicant employees had already made other arrangements for the period in question.
The employer sought to justify the dismissal on the additional grounds that the employees had refused to obey an order to report to the production foreman and to attend the disciplinary inquiries convened by the respondent. The court found that the employees had been reluctant to see the production manager or attend an inquiry individually, but were prepared to do so as a group. The court found that the production manager's refusal to hold a joint inquiry was unreasonable in the circumstances.

The disciplinary inquiries were held in the absence of the employees. The disciplinary procedure provided that a disciplinary inquiry could only be conducted in the absence of an employee where the employee representative agreed. No proof of such agreement was placed before the court and accordingly the applicants' absence at the inquiry was in breach of the disciplinary procedure.

The failure by the employees to exhaust the disciplinary procedure by prosecuting an appeal was condoned for the following reasons: there was some confusion as to whom the appeal should be directed; applicants and their union had attempted to settle the dispute with management; and the time limit imposed by s43 gave the applicants little time for pursuing a dispute with the employer.

For these reasons the court held that the employees had made out a prima facie case for reinstatement, and that they would suffer irreparable harm from their dismissal by way of loss of earnings which would affect their livelihood and that of their dependants.

Thus the court held that they be reinstated in their employment for as long as the order remained operated in terms of s43(6) of the Labour Relations Act.

Similarly in Metal & Allied Workers Union and Other v Stobar Reinforcing (Pty) Ltd. and Another employees were dismissed en masse for allegedly participating in a 'go-slow'. The employees joined with their union to bring application under s43 of the Labour Relations Act for their reinstatement pending the resolution of the dispute. They alleged that their dismissal was unfair on two grounds: substantively, because they had not participated in a 'go-slow' and had thus given no justification for their dismissal; and procedurally, because, contrary to clause 35 and an established practice for the resolution of disputes, the employer had not investigated the allegations or given them an opportunity to state their case. The
employer admitted the established practice but denied any obligation to adhere to it or to the industrial agreement which they averred to be void for vagueness. They maintained that the dismissals were in any event justified by the 'go-slow'.

The court held that to defeat a dismissed employee's application for reinstatement in terms of s43, the employer must show that the dismissal was justified and that, on the facts, the dismissals were not justified in substance, since it was not a reasonable inference that the applicant employees had embarked on a 'go-slow', nor were they procedurally proper, since the employer had not adhered either to the established practice for the resolution of disputes or to clause 35, which was valid and binding upon it. Thus employees should be reinstated in their employment pending the resolution of the dispute with effect retrospective to the date of their dismissal.

THE RECORD AFTER FIVE YEARS

Although its early decisions did not afford cause for optimism amongst unions, it is submitted that the Industrial Court has become the most successful part of the Wiehahn strategy. The court is used frequently by the black unions and this development has accelerated dramatically after the Labour Relations Act empowered the court to give status quo order in terms of s43. It is thus small wonder that the Financial Mail has warned the government not to interfere with the operation of the court as a dilution of the court's power would shift industrial conflict from the court room to the shopfloor, which was the exact antithesis of the Wiehahn programme.

The success of the court in encouraging a greater commitment to the industrial relations legislation by the black unions has not been achieved without cost to the employer. As a result of the decisions discussed above the court effectively has created rights for workers which would not have existed in terms of South African common law of master and servant. Thus the duty of employers to bargain in good faith with recognized trade unions, the duty of employers to comply with proper retrenchment procedures and not to employ selective retrenchment criteria have all contributed to the employees' ability to redress the inequality of bargaining strength between the parties.

Consequently /...
Consequently the court by its record has complied with the Wiehahn Commission's requirement for successful co-optation of the unions, namely, 'the Commission is aware that a number of trade union leaders have expressed the view that the consent and collaboration of trade unions and their members in the introduction of a non-discriminatory new labour dispensation depends to a large extent on the assurance that the court will afford the individual's protection, as in instances where their position is threatened by the introduction of 'cheap labour'."
CONCLUSION

It is believed that the foregoing case studies display a number of similarities, the implications of which are significant for the debate which surrounds the potential role of the courts in the alleviation of poverty.

Firstly, it is claimed that the courts assumed a sympathetic and co-operative stance in their implementation of industrial legislation after 1924, and again recently, an approach which was crucial in each instance to the State's policy of the co-option of the target group involved. While it is readily acknowledged that the AD and the Industrial Court are thoroughly distinct in nature, composition, and jurisdiction, an important common feature is to be found in their perceived neutrality and independence, which the State has successfully used in order to achieve its objectives. In this way the courts can indeed contribute to an improvement in the economic condition of a significant portion of the materially poor.

Secondly, it seems clear from the analysis of the earlier period above, that gains for the target group of the working class implied relative deprivation for those not of that group. While no clear trend has yet been discerned for the current period, there are indications that support a similar outcome. Present State strategy appears to be based on an attempt to differentiate between urban and rural blacks, through conceding legal and economic benefits to the former, while intensifying control over the movement of and job opportunities for the latter.

It is proposed that the extension of rights to black workers by the Industrial Court is a tangible example of the execution of such a policy. Thus, it appears as though the cost of decreased poverty for urban black workers is related to some extent to the further impoverishment of the rural poor.

Thirdly, it seems that, although the process of co-option brings concrete amelioration of the condition of the target group, such a process is only induced in the first place as a result of socio-economic pressures which the State finds it difficult to contain by other means. Once co-option is initiated, a space is created within which the target group can promote its interests. In this
instance, the employer becomes aware of the fact that excessive manipulation of his workers can be checked through legal action in the courts.

However, the target group must continue to be powerful enough, through organisation and their potential for disruption of the industrial process, to exploit this space. The law and the courts alone cannot provide such a forum for the achievement of economic gains: the socio-economic pre-conditions must exist.

The irony is that co-option is intended to minimize disruption and hence the potential for utilising the space created. Co-option will no longer be necessary when the potential for disruption dies away, as it must do, unless the group earmarked for co-option is constantly widened. Could it be that herein lies the challenge to the independent trade union movement in South Africa, which is simultaneously a challenge to the present means of distributing wealth?

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27.2.1984
FOOTNOTES


2) It is not suggested that the courts were merely an instrument of the ruling group in this process: rather, that the judges' record should be seen in the light of the ideological and legal climate in which they operated.

3) For a graphic account of certain of these well-documented events, see the report in the case of Lindsay and Pirie v The General Accident Fire and Life Assurance Corporation Ltd 1914 AD 574.

4) See in particular the evidence of numbers of white gold-miners and levels of real wages remaining at low levels in Yudelman, D. *The Emergence of Modern South Africa*, Westport, Connecticut: Greenwood, 1983, passim.


6) Several Acts were passed by the colonies which constituted the Union, and these were consolidated in the Workmen's Compensation Act, 25 of 1914.


8) See, for example, Sanders v Eddy Bros 1912 AD 558, and Vermeulen v Heyne 1913 AD 542.

9) See Paine v Randfontein Central Gold Mining Co Ltd 1912 AD 576, and Cape Town Council v Jacobs 1917 AD 615.
10) Examples are Boyd v Stuttaford and Co 1910 AD 101, and Fichardt Ltd v Faustmann 1910 AD 168.

11) See, in particular, the various racially-exclusive clauses of the Industrial Conciliation Act, 28 of 1956.

12) For example, the Wage Act forbade any reference to race in the determination of wage levels in terms of its procedures. See section 3(3) of Act 27 of 1925, confirmed in R v Lewin 1930 AD 344.

13) See, for example, the exclusion of "pass-bearing natives" from the definition of "employee" by virtue of the Industrial Conciliation Act, 11 of 1924, section 1, which cut most male African workers out from any benefits obtained under the Act; and the detailed analysis of Davies Capital, State and White Labour in South Africa 1900-1960, Brighton, Sussex: Harvester Press 1979, particularly Chapters 5 and 6. It is vital to note here that economic improvement, at this time of recession, should be measured in terms of staying in employment, rather than real wage levels.


15) Especially if their action is compared with that of their judicial mentors, the British bench, who reacted vigorously to such intrusions: see Abel-Smith and Stevens Lawyers and the Courts 114-116.

16) See Matthews and Others v Young 1922 AD 492; Tramway and Omnibus Workers' Union (Cape) V Heading 1938 AD 47; and National Union of Distributive Workers v Cleghorn and Harris, Ltd 1946 AD 984.

17) See Crisp v South African Council of the AEU 1930 AD 225; Stuart v Ismail 1942 AD 327; and Mine Workers' Union v Brodrick 1948(4) SA 959 (AD).

18) See R v Herschel 1920 AD 575; and Matthews and Others v Johannesburg Municipal Pension Fund 1924 AD 532.
19) See *R v Erasmus* 1923 AD 73; *R v Viljoen and Others* 1923 AD 90; *R v Jolly and Others* 1933 AD 176.

20) See *Ex parte Minister of Justice: In re R v Barone* 1930 AD 412, and *Ex parte Minister of Justice: In re R v Cohen* 1934 AD 521.

21) See *R v Chadwick* 1941 AD 31; *R v Associated Trade Suppliers, Ltd and Ano* 1945 AD 611; and *R v Hoffman* 1936 AD 316.

22) As enunciated in *Arderne, Scott, Thesen Ltd v Cape Provincial Administration* 1937 AD 429.

23) See *R v Stoller* 1939 AD 599, and *Kneen v Minister of Labour and Another* 1945 AD 400.

24) In contrast to the cases cited above, employers' convictions were set aside in *R v Lewin* *supra*, and *Ex parte Minister of Justice: In re R v Gerstner* 1930 AD 420.

25) See *Ex parte The Minister of Justice: In re R v Weinrich* 1930 AD 184, and *Ex parte Minister of Justice: In re R v Bolon* 1941 AD 345; and *Ex parte The Minister of Justice in re R v Schlohs* 1943 AD 80.

26) See *Gravenor v Dunswart, Iron Works* 1929 AD 299; *R v Becker* 1940 AD 19; and *Manoim v Veneered Furniture Manufacturers* 1934 AD 237.

27) See *K W V v Industrial Council for the Building Industry and Others* 1949(2) SA 600 (AD), and *R v Reichlin* 1939 AD 271.

28) See *R v Lipschitz* 1948(1) SA 781 (AD), and *R v Green* 1948(2) SA 476 (AD).

29) See *R v Woodstock Sweets Co, Ltd* 1944 AD1, and *R v Beerman* 1948(1) SA 954 (AD).

30) This is speculation, as the employee is sometimes not mentioned, but the general impression created by a reading of the cases leads to this conclusion.

32) This had to wait for the accession to power of the National Party in 1948: see Adam and Giliomee *The Rise and Crisis of Afrikaner Power* chapter 6.

33) A striking example of this is to be found in Davies *Capital, State and White Labour in S.A.* 218-232, in his analysis of the sweet-making industry and the 'civilised labour policy'.


36. Wiehahn Commission, Part I, para. 4.65

37. Wiehahn Commission, Part I, para. 4.28.5.1 - 428.55

33. (1981) 2 ILJ 34.

33. The Industrial Conciliation Act 95/80 and the Labour Relations Amendment Act 51/81.

40. At 54G

41. Parsons, P. seemed to suggest a further limitation upon the court's jurisdiction when he suggested at 46B-E that the disputes upon which the court could decide had to be disputes arising from the application of labour laws. For instance, s54(3) provides that an order by a criminal court to pay underpayments to a specified officer is deemed to be a civil judgment. 'In applying this to enforce rights, any dispute or matter arising from its application (which would be the enforcement of the judgement) would be a matter in regard to which a court of law would perform a function and which therefore probably may be performed by the industrial court' (at 46B-E).

See in general the criticism of J.D. Van Der Vyver, 'Die Nywerheidshof' (1981) 2ILJ 159.

42. Metal & Allied Workers Union & another v A. Mauchle (Pty) Ltd. t/o Precision Tools (1980) 3 ILJ OC 227.


44. 1907 TS L28. They also sought an interdict against an alleged unfair labour practice.


48. It thus followed the decision in Sigwebela v Huletts Refineries Ltd. (1980) 1 ILJ 5.

49. At 230 - 231.

50. (1983) 4 ILJ 283 51. at 294

52. S46(a) of the Labour Relations Act.

53. (1982) 3 ILJ 294

54. Wiehahn Commission, Part I, para. 4.44.3

55. (1983) 4 ILJ 60.

56. At 82.

57. (1983) 4 ILJ 107


59. Wiehahn Commission, Part I, para. 4.44.1