# Trade unions and labour law: *past and future*

PAUL BENJAMIN* discusses trade union experience of the law in South Africa from the 1970s onwards, and examines the challenges posed in the years to come.

The use of litigation (court cases) and other legal strategies has been an important part of the policies of the independent trade unions in South Africa. A look at the history of the union movement shows that it has faced different legal challenges over time.

## Looking back

In the 1970s, trade unions with African workers as members were excluded from the Industrial Conciliation Act (the previous name of the Labour Relations Act). Their contact with the law came chiefly through the criminal and security laws. These were used to prosecute workers for striking or holding unlawful gatherings; members and officials were often detained without trial. State policy, carried out by the police (often with employer assistance), was to harass union activity. The statutory conciliation structure for blacks promoted the committee system designed to undermine union development.

The failure of these approaches and of state repression to hold back union growth, was one

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of the reasons that led the Wiehahn Commission to recommend, in 1979, that the statutory industrial relations structure be extended to cover African workers.

The extension of the Labour Relations Act led, at first, to a division in trade union ranks reflected in the 'registration' debates. Those opposing registration argued that participation in statutory structures would give legitimacy to the state, and that the controls of legislation would undermine internal union democracy.

Supporters of registration argued that it would offer crucial organisational space for struggles against capital and that the existence of potential controls in the legislation did not mean that the state could impose them on vibrant trade union movements.

History soon overtook this debate and, by 1985, all of the major industrial unions in the independent camp had registered. Unions made extensive use of the industrial court and a number became members of industrial councils.

At first, the unions had considerable success in the industrial court. The requirements of procedural and substantive fairness in dismissals and retrenchments greatly increased the security of employment of workers and had a major impact on employment practice in this country. In addition, a measure of protection against dismissal was extended to employees involved in legal strikes.

During this period, unions had the legal initiative, but by 1988 the balance had swung. Employers invested extensively in legal services and became increasingly aggressive in making use of the courts to obtain interdicts against strikes and unfair labour practice orders against unions.

The 1988 amendments to the Labour Relations Act undermined many of the protections gained by workers through litigation. The changed definition of an unfair labour practice restricted the powers of the Industrial Court, and allowed legal strikes to be classified as unfair labour practices. The law was also changed to assist employers who wished to sue trade unions for the loss caused by illegal strikes.

These backward-looking changes to labour legislation led to a protest campaign, mass stayaways followed by unprecedented negotiations between organised labour, capital and ultimately the state, producing the COSATU/NACTU/SACCOLA (CNS) accord and the 'Laboria Minute'.

The 1991 amendments to the LRA (which appropriately took effect on 1 May 1991) removed most of the changes of 1988. It was the first labour statute to have its origins in an agreement between labour and capital.

A consequence of this negotiation process, was that representatives of COSATU began to participate on the National Manpower Commission (NMC). They did so on the basis that the NMC would be restructured from a purely advisory body to a representative structure dominated by the negotiating parties - organised labour and capital - and at which the executive wing of government (in the form of the Department of Manpower) is present. This restructuring, which has not yet taken place, is discussed elsewhere in this issue of the Bulletin by Adrienne Bird and Geoff Schreiner.

## The extension of labour law

One of the most pressing challenges facing the trade union movement is to extend the coverage of labour law to sectors of the economy that are either not covered or have inadequate legislation. These are agriculture, domestic workers, the public sector and the homelands. This task is complicated by the low levels of trade union membership in most of these sectors or areas.

### Farm and domestic workers

The legislative protection of farm and domestic workers has already been on the NMC agenda. By the end of 1992, it is likely that the Basic Conditions of Employment Act (BCEA), and the Unemployment Insurance Act will cover farm workers. By 1993 the BCEA could be

extended to domestic workers. While this will create legislated minimum conditions of employment, it will not bring greater security of employment or create structures for collective bargaining. Nor will it provide for minimum wage levels. These require the extension of the LRA and Wage Act.

COSATU's involvement in extending labour law to these sectors has begun to bear some fruit, but the process is not without its problems. Firstly, their experiences in regard to the agricultural sector illustrate some of the difficulties involved in converting the NMC. Although the NMC reached agreement on the basis for extending the BCEA to agriculture, the Department of Manpower made numerous changes in preparing draft bills to initiate the parliamentary process. All of these favoured employers.

The South African Agricultural Union which participated in the NMC deliberation subsequently withdrew its support of the legislation in an effort to delay the extension of protective legislation to farm workers. This appears to be an attempt to ensure less favourable conditions for employees in this sector. This would be the most likely consequence of a further fragmentation of labour legislation.

The extension of legislation to these two sectors, employing some two and a half million largely un-organised workers, raises a number of questions. How will minimum conditions of employment be enforced? It is highly unlikely that the present or a future government will be willing to spend the money required to increase the inspectorate so that these sectors could be monitored effectively.

Therefore the only institution that could realistically play a role in compelling employers to meet the new standards are the trade unions. But they are extremely weak and unlikely to develop until basic organisational rights have been gained. The most important of these is the right of access, particularly in agriculture. Unless this right is won - either through legislation or by negotiation with organised agriculture - it is unlikely that there will be significant changes in these sectors.

## Public sector workers

Historically, the public sector has had separate employment laws with permanent (predominantly white) employees having considerable security of employment, while virtually all black employees have been classified as temporary. Although, a number of Supreme Court decisions in recent years have improved the security of black state employees, all public sector workers remain without the protection of the industrial court.

In addition, there are no structures for collective bargaining and no conciliation procedures or provision for lawful strikes. Negotiations to create a public sector LRA which would contain conciliation and strike procedures and give access to the industrial court are in progress but, again, the ability of COSATU to have an impact on this process is restricted by its low level of membership among public employees.

At the same time, the development of increased security of tenure for certain public sector employees may hamper the ability of a future state to change the composition of the public sector through policies such as affirmative action.

## The homelands

The apartheid homelands policy has created a nightmare for labour law with each homeland having the power to make its own labour statutes. As a result

- Bophuthatswana has laws designed to prohibit the operation of South African unions;
- Transkei and Ciskei have more progressive laws than South Africa;
- QwaQwa and KwaZulu have copied the South African law at different times and have statues modelled on the pre-1988 LRA;
- Lebowa and Gazankulu have not made any labour laws, so that the racist South African law at the time they acquired self-governing

status - the early 1970s - still applies.

COSATU has pushed for the development and harmonisation of labour laws and its representatives have negotiated with some homeland governments or sat on their NMCs.

A democratic South Africa will not necessarily bring about uniform labour laws. If post-apartheid South Africa has a federal structure, it is possible that the different regional governments will be given the power to make labour laws - which is a feature of federal systems such as Australia and Canada.

This situation will perpetuate the type of confusion created by the homelands system. While the power to make labour laws may appeal to regional powers, the retention of this type of fragmentation would be disastrous for both trade unions and employers and create very many unnecessary disputes.

## The limiting of labour law

While trade unions have pressed to extend the coverage of labour law, other interests in society are arguing for it to be more limited.

### Deregulation in the small business sector

The most significant area of pressure for 'de-regulation' is the small business sector. Already there has been extensive lifting of control from small businesses. The Temporary Removal of Restrictions on Economic Activity has exempted businesses operating in Small Business Development Corporation 'hives' from much labour legislation on what appears to be a permanent basis.

In addition, the Department of Manpower has adopted a policy of not applying wage determinations or industrial council agreements to small businesses.

The term "de-regulation" is a misleading term, for only the most extreme of free marketeers argues for a removal of all labour laws.

However, present labour legislation does contain many forms of regulation that are either unnecessary or irrational. For instance, the different labour statutes place many administrative and reporting duties on employers which duplicate each other.

These could be rationalised without adversely affecting the position of workers, and care must be taken not to argue for the retention of counter-productive forms of regulation.

Arguments for less regulation in this sector often ignore the limited role that labour law plays. Employers are to a large extent ignorant of the law and a number of studies of small business indicate that law plays a relatively minor part in the success or failure of these businesses.

Where they do fail, it is most often because of a lack of managerial skills and finance. There is a danger that the protection of conditions of employment could become a scape-goat for the wider ills of the economy.

### Labour law limitations in job creation schemes

The push for lessening the control over small businesses is one of a series of pressures on the protection of employees in formal employment. With continuing high levels of unemployment, much of the rhetoric of state and business seeks to portray workers in formal employment as a relatively privileged class whose demands are responsible for economic problems such as inflation. The need to create jobs could therefore become a justification for decreased legislative protection.

High levels of unemployment are expected to be a feature of the South African economy for at least the next 30 years and it is likely that an increasingly mechanised formal sector will exist alongside job creation schemes in which participants will receive low wages. This type of divided economy will be an additional source of pressure to limit the protections that have been extended to workers in formal employment.

### Labour law evasions in the Southern African region

Similar pressures will flow from the increased regionalisation of the Southern African economy which is likely to occur once South African has democratic government. Employers may seek to move businesses to surrounding states where wages are lower, labour legislation less restrictive and union organisation considerably weaker.

This may have adverse effects on regional development, and one method of dealing with this 'social dumping' is to create a uniform structure of labour law throughout the region, as has been done within the European Community. The regionalisation of capital will need to be countered, by equivalent organisational developments on labour's side.

## New forms of protective legislation

The term protective legislation refers to those laws that

- create minimum conditions of employment such as the BCEA;
- regulate occupational health and safety;
- create structures of employment-based social security such as the Workmen's Compensation Act and the Unemployment Insurance Act.

Much of our present statutory structure has its origins in the 1920s when the PACT Government (formed by an alliance of the Nationalists and the Labour Party) introduced significant protections for white workers. Little attention has been paid to the reform of this legislation in recent years and many aspects of modern employment that are not regulated.

### Pensions and provident funds

One important illustration of this absence of regulation, is the area of pensions and provident funds. The law does not, for instance, require the appointment of employee representatives to the boards of pension funds, allowing employers effective control of funds. There also is no legal control over the minimum benefit that employees are entitled to when withdrawing their money from a fund.

This not only has the result that many employees receive unfairly low withdrawal benefits from funds they leave before retirement, but it is also economically inefficient because it adversely effects the mobility of labour. The one attempt by the state to legislate in this area, which would have prevented workers from withdrawing their money from funds prior to retirement, was ill considered and withdrawn after it had provoked massive strikes.

### Retrenchment and severance benefits

Another area unregulated by statue, is retrenchment and severance benefits. Here the court has developed the law in a rather haphazard way. Recently, the labour appeal court has held that there is no general obligation on employers to pay severance pay. The duty must be created by either collective bargaining or by statute. Unless legislation is introduced here, many workers (particularly those who are unorganised) will find that they will receive no severance benefits, no matter how long their period of employment.

### Organized and unorganized

Some of the benefits discussed above are already enjoyed by the stronger and better organised sectors of the work-force.

This indicates one of the functions of legislation in this area: to extend to the work-force as a whole the benefits secured by leading sectors. This will ensure that the economy is not divided into two sectors- the organised and the unorganised- and that employers who have conceded these benefits are not placed at any disadvantage against their competitors.

### Employed and unemployed

The development of a divide between the conditions of organised and unorganised workers is not the only division that should be borne in mind when new forms of benefits are

considered. The other divide that is increasing in extent is that between the employed and the unemployed. The position of those who are not working is being aggravated by the increasing role played by market forces in the state economy, the most important example being the privatisation of health-care.

In this regard, it is worth looking at the contrasting experiences in Canada and the USA. In Canada in the 1960s the union demanded the introduction of a national health scheme that was available to all, but in which, those who could afford it, could purchase additional benefits. The American unions, on the other hand, concentrated on the development of plant-based benefit schemes. Today, the USA and South Africa are the only industrialised societies without comprehensive health-care schemes, and the absence of adequate social security is threatening the fabric of society.

The situation is considerably more complex here as a much larger section of the population is excluded from the work-force. Unions, both in formulating demands for employers and in lobbying for legislative reform, will have to take account of the balance between improving the position of the organised, and the improvement of the position of the population as a whole.

## The challenge of a new constitution

One of the differences between the present legal structure and that of the future will be the creation of a democratic constitution and a bill of rights. This could have a dramatic impact on labour law and the positions of the trade unions in society. Two examples illustrate this point.

● **Property rights and rights of access**

The first is that the constitution will entrench the right to property. This could have a negative impact upon the ability of trade unions to have access to their members' places of work, and even the establishment of such a right in labour legislation would be overruled by the constitutional protection of property rights.

● **Freedom of association and the 'closed shop'**

A more controversial, but equally important, issue in which trade unions need to intervene in the constitutional debate, is the relationship between the freedom of association and union security arrangements such as the closed shop.

I say controversial because sentiment on this issue in the unions is divided, and many members and officials oppose the closed shop because of their historical experience of corrupt closed shops that operated through industrial councils and were used to block the growth of independent trade unions. Others support union security arrangements because they believe that they not only strengthen the position of unions but stabilise labour relations. Again, it is essential to ensure that unions make an independent contribution to these debates and are not left with a constitution that takes no account of labour's perspectives.

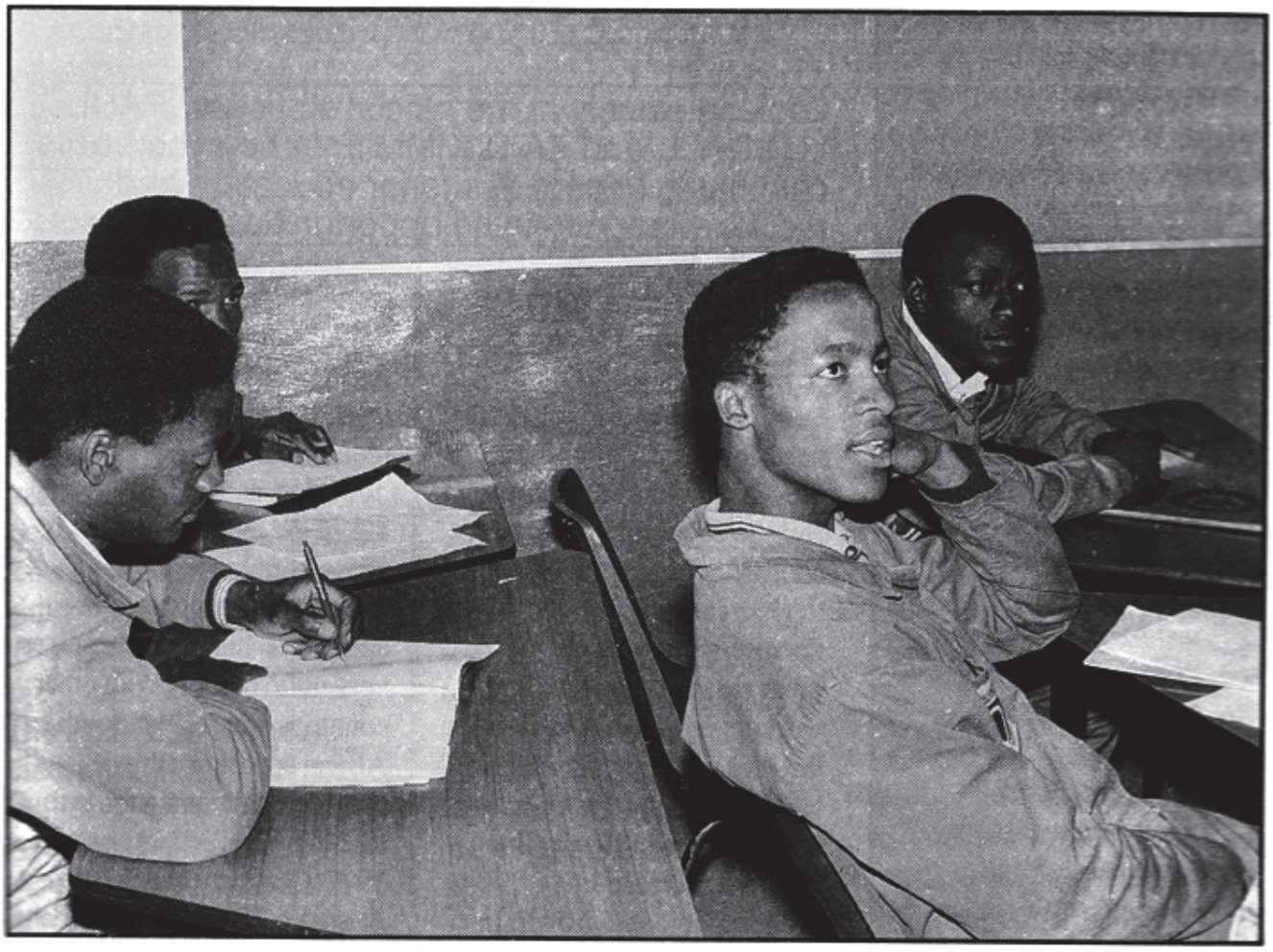
## Conclusion

The issues that have been discussed are only some of the challenges confronting the unions in the legal arena. Another is the consolidation of the Labour Relations Act which has now been amended so many times that it is full of contradictions and inconsistencies which can hinder the resolution of disputes.

At the same time that the unions take a greater responsibility for the content of labour law, they will be continuing to take cases for dismissed or arrested workers and be running disputes against employers. But their relationship with institutions such as the industrial court will become more complex once it is a legitimate government - for whom many union members may have voted - that establishes these bodies.

To date, the unions have struggled to make the best use of a legal system of which they have been extremely critical and played no part in creating. Now, they have a real opportunity to reshape that system. ☆

# Special Focus: Training



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