

**DISCOURSES OF SILENCE: JUDICIAL RESPONSES TO  
INDUSTRIAL ACTION AS AN ARCHAEOLOGY OF  
JURIDIFICATION**

by

**CARL MISCHKE**

submitted in accordance with the requirements

for the degree of

**DOCTOR LEGUM**

at the

**UNIVERSITY OF SOUTH AFRICA**

**PROMOTER: PROFESSOR PAK LE ROUX**

**CO-PROMOTER: PROFESSOR D VAN DER MERWE (RAU)**

**AUGUST 1997**

\*\*\*\*\*

## **ACKNOWLEDGEMENTS**

I would like to thank my promoter, Professor PAK le Roux, and my co-promoter, Professor D van der Merwe, for their patience, support and invaluable guidance throughout this long and challenging project.

Many thanks also to my parents for their unwavering support and assistance during the research and during the writing of this work.

The research which forms the basis of this study would not have been possible without the able assistance of various librarians and the staff of the following research institutions: the Law Library of the University of South Africa (Nico Ferreira and Karen Breckon), the library staff at the *Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht* in Heidelberg, Germany, and the library staff at the *Institut für Arbeitsrecht und Arbeitsbeziehungen in der Europäische Gemeinschaft* in Trier, Germany.

## SUMMARY

A study of silences: as a metaphysics of the law, juridification silences the text of the law in order to enable an allegorical reading of the law. This silencing of the legal text can only be avoided through a non-metaphysical archaeological reading. Similarly, the programme of comparative labour law is silent at its most pivotal points, leaving some concerns of the programme indeterminate and indeterminable.

As context, the dominant discourses of the labour law systems of the Federal Republic of Germany (*Tarifautonomie*), Great Britain (collective *laizzes faire*) and South Africa (fairness) are identified and the agents of the jurisprudence (the courts) are briefly outlined. The silence operating within the phenomenology of the labour judiciary and the concept of a ‘court’ is also examined.

The study then proceeds to read, in an archaeological manner, the industrial action jurisprudence in Germany, Great Britain and South Africa, such readings again yielding silences within the discourse of the law.

The silences occurring throughout (and the resulting normative breaches in the rationality of the legal discourse) are the prerequisites for juridification, a process in terms of which the meta-juridical standard is imported into the legal normative system and thereby rendered part of the archival discourse of the law.

## KEY TERMS

Juridification

Industrial action jurisprudence

Labour Courts

Strikes and lock-outs

Discourse analysis

Comparative labour law

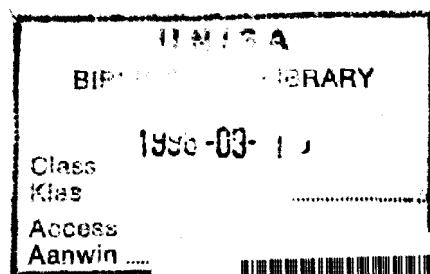
Comparative labour law: methodology

I have attempted more and more systematically to find a non-site, or a non-philosophical site, from which to question philosophy. But the search for a non-philosophical site does not bespeak an anti-philosophical attitude. My central question is: from what site or non-site can philosophy as such appear to itself as other than itself, so that it can interrogate and reflect upon itself in an original manner?

— Jacques Derrida in interview in Richard Kearney *Dialogues with contemporary continental thinkers: The phenomenological heritage* (1984) 105 at 108.

Give me a firm place to stand, and I shall move the earth.

— Archimedes (ca. 289 BC)



34 344.1068 MISC

0001707602

# CONTENTS

---

<b>1</b>	<b>INTRODUCTION</b>	
<b>THE DEATH OF METAPHYSICS AND JURIDIFICATION-AS-DISCOURSE</b>		
[FIRST PARABLE: LOST IN THE FUNHOUSE (Continued)]		1
[INTRODUCING ... THE INTRODUCTION		
(Discourse of Order Series 2 Part 1)]		2
1.1	THE ARCHAEOLOGY OF JURIDIFICATION	4
1.1.1	The long, long words of juridification	4
1.1.2	Juridification as metaphysics	11
1.1.3	The Death of Metaphysics (including the Death of the Judge)	12
1.1.4	Juridification-as-discourse and transgression of the closure	18
1.1.5	The Archaeology of Juridification-as-discourse	20
1.2	LEVELS OF SIGNIFICATION	25
1.3	STRUCTURES	28
1.3.1	Context contratext	28
1.3.2	Discourses of silence	29
1.3.3	Discourses of order, parables and citations	29
<b>PART 1: CONTEXT/CONTRATEXT</b>		
<b>2</b>	<b>DISCOURSE OF ORDER (SERIES 1 PART 1)</b>	
<b>COMPARATIVISM IN LABOUR LAW: BAKE IN HOT OVEN</b>		
[SECOND PARABLE: THE COOKING LESSON]		34
2.1	MAGICAL RECIPES	35
2.1.1	The concerns of comparative labour law	35
2.1.2	Follow(ing) (in) these (foot)steps	38
2.1.3	The limitations of the programmes of the canonical texts	42
2.2	WHAT IS (REALLY) COOKING? (Is there nothing outside the text?)	43
DISCOURSE OF ORDER (Series 2 Part 2)		49
<b>3</b>	<b>THE SYSTEM OF LABOUR LAW IN THE FEDERAL REPUBLIC OF GERMANY</b>	
<b>THE EVERPRESENT (BASIC) LAW</b>		
3.1	CONCEPTUAL FOUNDATIONS	51
3.2	PLANT-LEVEL EMPLOYEE REPRESENTATION IN WORKS COUNCILS	54
3.3	EMPLOYEE PARTICIPATION IN MANAGERIAL STRUCTURES (CO-DETERMINATION OR MITBESTIMMUNG)	56
3.4	COLLECTIVE BARGAINING	57
3.5	MEDIATION	59

*Contents*

---

<b>4</b>	<b>THE SYSTEM OF LABOUR LAW IN GREAT BRITAIN KEEPING OUT OF THE WAY — THE ABSENCE OF LAW IN BRITISH INDUSTRIAL RELATIONS</b>	
4.1	CONCEPTUAL FOUNDATIONS .....	60
4.2	HANDS OFF: COLLECTIVE BARGAINING AND THE LAW .....	62
4.3	CONFLICT RESOLUTION AND THE LAW .....	64
<b>5</b>	<b>THE SYSTEM OF LABOUR LAW IN SOUTH AFRICA FIGHTING FOR FAIRNESS</b>	
5.1	CONCEPTUAL FOUNDATIONS .....	66
5.2	COLLECTIVE BARGAINING .....	69
5.3	THE RESOLUTION OF DISPUTES .....	72
<b>6</b>	<b>DISCOURSE OF ORDER (SERIES 1 PART 2) AN ANTI-PHENOMENOLOGY OF THE LABOUR JUDICIARY: DEFINITION, DESCRIPTION, RECOGNITION AND OTHER ELEPHANTS [THIRD PARABLE: MRS PLESS AND THE ELEPHANT]</b>	
6.1	THE DEVELOPMENT OF LABOUR JUDICIARIES .....	77
6.2	WE HOLD THESE COURTS TO BE SELF-EVIDENT (Describing the Elephant) .....	81
6.3	BEFORE THE LAW: KAFKA, DERRIDA, AND AT LEAST TWO NON- COURTS (no elephants allowed) .....	86
6.4	ELEPHANTINE EXPECTATIONS .....	91
6.4.1	Cheap, quick, no fuss, no lawyers .....	91
6.4.2	Expecting experienced experts .....	93
6.4.3	A normative paradigm for the functioning of the labour court .....	94
6.4.4	The disappointment of categorical expectations .....	95
<b>7</b>	<b>THE GERMAN LABOUR COURT SYSTEM</b>	
7.1	DEVELOPMENT .....	98
7.2	JURISDICTION .....	100
7.3	STRUCTURE AND COMPOSITION .....	102
7.3.1	Labour courts of first instance .....	102
7.3.2	Appellate labour courts .....	103
7.3.3	The Federal Labour Court .....	103
7.4	ASPECTS OF PROCEDURE .....	104
7.4.1	General .....	104
7.4.2	Continual conciliation .....	105
7.4.3	Expeditiousness .....	105
7.4.4	The role of the presiding judge .....	106
7.4.5	Appeals .....	106
<b>8</b>	<b>THE BRITISH COURT SYSTEM</b>	
8.1	DEVELOPMENT .....	107
8.2	STRUCTURE, JURISDICTION, AND COMPOSITION OF THE COURTS .....	109

## *Contents*

---

8.2.1	The House of Lords .....	110
8.2.2	The Court of Appeal .....	111
8.2.3	The High Court .....	112
8.3	ASPECTS OF PROCEDURE .....	112
8.3.1	General .....	112
8.3.2	Adversarial proceedings and the passive role of the judge .....	113
8.3.3	Appeals .....	114
<b>9</b>	<b>THE SOUTH AFRICAN INDUSTRIAL COURT</b>	
9.1	DEVELOPMENT .....	115
9.2	JURISDICTION .....	117
9.2.1	The industrial court .....	117
9.2.2	The Labour Appeal Court .....	118
9.3	COMPOSITION AND STRUCTURE .....	119
9.3.1	The industrial court .....	119
9.3.2	The Labour Appeal Court .....	119
9.4	ASPECTS OF PROCEDURE .....	120
9.4.1	General .....	120
9.4.2	Pre-hearing conferences .....	121
9.4.3	Appeals .....	121
	DISCOURSE OF ORDER (Series 2 Part 3)(Crisis of Versus) .....	123
	<b><i>LA BRISURE</i></b>	
<b>10</b>	<b>DISCOURSE OF ORDER (SERIES 1 PART 3)</b>	
	<b>LAW(S) VERSUS STRIKES: CRISIS OF VERSUS II</b>	
	<b>THE EMBRACE</b>	
	[FOURTH PARABLE: ARABIAN NIGHTS #1 — #1001+] .....	126
10.1	LAWS AGAINST STRIKES [NIGHT#1] .....	128
10.2	STRIKE('S) STORIES [NIGHT#1—NIGHT #1001] .....	129
10.2.1	The tale of the balanced scale .....	129
10.2.2	The tale of do-it-yourself rule-makers and enforcers .....	130
10.2.3	The story of forced labour .....	132
10.2.4	Finally: A story of feeling better .....	132
10.2.5	And the best story is ... .....	133
10.3	THE EMBRACE AND THE SEEING OF THE SELF [NIGHT # 1001 +] (lost in the funhouse) .....	137
	DISCOURSE OF ORDER (Series 2 Part 4) .....	141

## PART 2: ARCHAEOLOGIES OF SILENCE

<b>11</b>	<b>ARCHAEOLOGY OF SILENCE I (OBLITERATION, CONSTRUCTION, TRANSGRESSION): THE TRANSGRESSION OF NORMATIVE CLOSURE IN THE INDUSTRIAL ACTION JURISPRUDENCE OF THE GERMAN FEDERAL LABOUR COURT</b>	
	[PROLOGUE: AN ACT OF READING (Discourse of Order Series 2 Part 5)]	143
11.1	OBLITERATION AND ESTABLISHMENT (1955)	144
11.1.1	Act of obliteration	145
11.1.2	Act of establishment	147
11.1.3	The justification of the first principle	149
11.1.4	The legitimization of the first principle	152
11.1.5	Obliteration, establishment and contamination	153
11.1.6	The archival implications of the principles	157
11.2	OBLITERATION AND ESTABLISHMENT (1971)	159
11.2.1	Principles new and not-so new	159
11.2.2	Proportionality as limitation	163
11.2.3	The new normative paradigm in the wake of proportionality	164
11.2.4	Transgression and juridification	165
11.3	THE EMPIRE STRIKES BACK (1980)	166
11.3.1	Affirmation of principles	167
11.3.2	In slavery to freedom (I): <i>Die Tarifautonomie</i>	167
11.3.3	In slavery to freedom (II): Freedom of association	170
11.4	NORMATIVE CLOSURE AND JURIDIFICATION	170
<b>12</b>	<b>ARCHAEOLOGY OF SILENCE II (SILENCE AND POWER): JUDICIAL RESPONSES TO INDUSTRIAL ACTION IN THE JURISPRUDENCE OF BRITISH COURTS</b>	
	[PROLOGUE: READING THE HALLOWED BODY OF THE COMMON LAW (Discourse of Order Series 2 Part 6)]	172
12.1	AT THE BEGINNING: ILLEGALITY	174
12.2	THREE TEXTS (AT THE TURN OF THE CENTURY)	176
12.2.1	The rights of the individual	176
12.2.2	Conspiracy: the power of the many (part 1)	179
12.2.3	The unbridled power of the few	181
12.3	CONSPIRACY: THE POWER OF THE MANY (part 2)	183
12.4	THREATS OF POWER AND THE DISAPPEARANCE OF THE TRADE DISPUTE	186
12.4.1	The mere threat of power	186
12.4.2	These are not trade disputes?	190
12.5	COLLECTIVE POWER AND THE POWER OF THE LAW	193
12.5.1	The legitimacy of power is subjective (part 1)	193
12.5.2	The legitimacy of power really is subjective (part 2)	196
12.6	POWER, LAW AND JURIDIFICATION	199

<b>13</b>	<b>ARCHAEOLOGY OF SILENCE III (THE DICTATES OF FAIRNESS): THE STRUCTURE AND SILENCE OF FAIRNESS IN THE INDUSTRIAL ACTION JURISPRUDENCE OF SOUTH AFRICAN COURTS</b>	
	[PROLOGUE: READING THE FINITE ARCHIVE WITHIN A SERVO-MECHANICAL LOOP (Discourse of Order Series 2 Part 7)]	200
13.1	BEYOND LAWFULNESS: THE PRIMACY OF FAIRNESS	201
13.1.1	The establishment of the archive	201
13.1.2	Structuring the vision of silence	206
13.1.3	A discourse of power and silence	208
13.1.4	The application of the archive of equity	209
13.2	LAWS FOR FAIRNESS	213
13.3	FUNCTIONALITY AS TRANSCENDENTAL SIGNIFICATION (the system strikes)	215
13.3.1	The rise of functionality as normative paradigm	215
13.3.2	The limits of functionality	219
13.4	THE RETURN OF FAIRNESS (fairness dictates)	221
13.5	WITHIN THE SILENCE (JURIDIFICATION)	228
<b>14</b>	<b>ENDGAME (COUNTING THE SPACES) MOMENTS OF SILENCE</b>	230
	Bibliography	237
	Table of cases	248

# 1

## INTRODUCTION

### THE DEATH OF METAPHYSICS AND JURIDIFICATION-AS-DISCOURSE

---

'The newly vaunted demise of metaphysics has been cast as a theoretical jurisprudence which, nevertheless, leaves law as unknowable as it finds it.'

-- Gillian Rose *Dialectic of Nihilism: Post-Structuralism and Law* (1984) 1.

'Long Words. Excellent Words. I can hear them now.'

-- Peter Gabriel and Laurie Anderson 'Excellent Birds' from *Mister Heartbreak*, Warner Brothers Records, 1984

'I have not tried to write the history of that language but, rather, the archaeology of that silence.'

-- Michel Foucault *Madness and Civilization* (1961) x-xi.

---

#### [FIRST PARABLE: LOST IN THE FUNHOUSE (Continued)]

Ambrose spent some considerable length of time amongst the machines and technologies that make the funhouse such fun (at least, for some). He wandered past the machines that created illusions, that projected images on the walls, strange and contentedly humming pieces of technology that he failed to understand, for he could, from his present vantage point, not see what the machines were doing, he was precluded from sharing in the fun of the others (for whom the funhouse is fun).]<sup>1</sup>

---

<sup>1</sup> Discourse of Order Series 3 Part 1: This now-obscure, but vitally important, first parable---a reflection of some of the concerns of this specific part of the instant text---is derived from J Barth 'Lost in the Funhouse' in the collection of short stories entitled *Lost in the Funhouse: Fiction for Print, Tape, Live Voice* (1969). Essentially, the conceit of the story is as follows: a young pubescent boy (Ambrose) accompanies his parents, his uncle Karl, his brother and a girl to an amusement park, Atlantic City, on a family excursion during World War II. Amongst the entertainments presented at the amusement park is a fun-house, where persons are frightened or have their sensory perceptions altered in other ways through various mechanisms of illusion. The elder brother and the girl enter the 'fun-house' and enjoy the spectacle, while Ambrose becomes trapped 'behind the scenes', in and amongst that which is creating the illusions. Textually, the story is continually interrupted by an authorial voice explaining the rhetorical devices (such as plot, character, tension, the use of italics) as the story progresses (and digresses) and as these rhetorical devices are applied in the story. The relevance of this parable lies in the fact that a 'viewer' (in the case of the story, the protagonist, Ambrose) is trapped behind the illusion, occupying the very place from which the illusion stems. So too, the reader of the story is continually and forcibly reminded of the fact that he/she is perceiving (viewing) an illusion (fiction) and offered, at the same time, a glimpse of the 'machinery' (the rhetorical devices of the fiction) which is being employed to present the illusion. In much the same way, the following section(s) of the instant text reveals machines, technologies of produc-

## [INTRODUCING . . . THE INTRODUCTION (Discourse of Order Series 2 Part 1)

This, then, is the beginning of the actual text: everything that appears before this point is not *of* the text; prompted by the institutional frame within which this text is offered, it is, to a greater or lesser degree, *pretext*.

The introduction as an initiation into the (this) discourse . . . the function of the introduction is one of initiating the reader into the discourse, into what is going to be said. The introduction is part of the text, yet not part of it: much like a preface, it comes before the text (and this is strange, because it is often written after the text has been completed). It is then simultaneously a pre-text and post-text, but also, strangely, of the text.

In short: the introduction is then a prophecy.

For the introduction may indeed summarise the text, pre-imposing an interpretation of the text upon the text, ironically, before it has been read: 'this is what will be meant in chapter 7', 'this is what will be said in chapter 12'. Summary as introduction means closure of the text before the text has been opened, before the page has been turned; making any reading superfluous before reading has even begun. The introduction is, then, conclusion.<sup>2</sup>

But the introduction may, instead of pre-empting the text, establish that within which the text is, the frame within which the text performs *itself*, establish ever-fluid and liq-

---

(footnote continued from previous page)

tion, and, above all, a sense of having lost the way into that which is occurring behind the scenes. The functioning of the parables and the Discourse of Order Series 3 are explained in 1.3.3. below.

<sup>2</sup> 'The preface [introduction] would announce in a future tense ("this is what you are going to read") the conceptual content or significance . . . of what will *already* have been *written*. And thus sufficiently *read* to be gathered up in its semantic tenor and proposed in advance. From the viewpoint of the fore-word [introduction], which recreates an intention-to-say after the fact, the text exists as something written --- a past --- which, under the false appearance of a present, a hidden omnipotent author (in full mastery of his product) is presenting to the reader as his future. Here is what I wrote, then read, and what I am writing that you are going to read. After which you will again be able to take possession of this preface [introduction] which in sum you have not yet begun to read, even though, once having read it, you will have anticipated everything that follows and thus you might just as well dispense with reading the rest. The *pre* of the preface [introduction] makes the future present, represents it, draws it closer, breathes it in, and in going ahead of it puts it ahead. The *pre* reduces the future to the form of manifest presence. This is an essential and ludicrous operation: not only because writing as such does not consist in any of these tenses (present, past or future insofar as they are all modified presents); not only because such an operation would confine itself to the discursive effects of an intention-to-mean, but because, in pointing out a single thematic nucleus or a single guiding thesis, it would cancel out the textual displacement that is at work "here".' J Derrida *Dissemination* (transl Barbara Johnson (1981) at 7.

uid foundations: expressing or outlining methods, structures, issues, concerns, topics, without 'disclosing' that which is to happen in the course of the text (this being the aim of the present introduction).<sup>3</sup> In this sense, the introduction functions as an 'opening' of the text - that through which the text is accessed and read (in Afrikaans, this sense is reflected in the notion of an *inleiding*, in German: *Einleitung*). The discursive motion is different: in the case of introduction-as-summary, that which is said flows backward in(to) the introduction, and the introduction encapsulates, in miniature form, that which will be said. But if the introduction functions as opening of/to the text, that which is said in the introduction flows forward into the text, into and through that which is going to be said. Then the introduction is itself a discourse of order (a concept discussed in more detail below): within the space of the (this) introduction, all or some of the 'concerns' of the text are established. These concerns are not limits or strict boundaries (implying closure or limitation of meaning), for the text will undermine, over-reach, ignore, and return to those concerns (even though the discourse of the introduction orders that which follows upon it, this process of ordering is not absolute - it folds in upon itself). The introduction does not close the text, it is, in this sense, an opening *of* the text and an opening *to* the text.]

Insensitive, for the present moment, to all the considerations of phenomenology. . . . What is the instant text? Or, better, what is the instant text *about*? A potential summary could read as follows: A study in/of/about juridification. The rest of this section, purportedly an 'introduction', is a set of improvised variations on this single phrase:

### A study in/of/about juridification

This phrase contains two nouns: 'study' and 'juridification'. The questions that crowd a superficial analysis of the phrase are: 'what is juridification?' and 'what is study?'. In dealing with these two fundamental questions, one would, in the first place, have to respond by defining juridification, re-situating it in its (own? Is the possessive form appropriate here?) historical and theoretical context and indicating the potential problems that are borne in the wake of the concepts and the discourse employed when talking about 'juridification'.

---

<sup>3</sup> Methodologically, this approach brings with it a severe disorientation, the effect of which is, at best, an apparent arbitrary montage of seemingly unconnected texts, events, discourses, themes. At worst, this approach leads a potential reader into dismissing it as an improvisation upon a number of themes. Operative in these responses is a quest for the stable beginning, a single and fixed point of departure, from which the text proceeds to outline its argument, much like a well-constructed German symphony of the nineteenth century, progressing from a single theme through variations and counter statements of various related themes (or even counter-themes, inversions, reversals . . .)

Also of importance is the term 'study'; used at this stage and in this case as a noun, but a noun which refuses to divest itself of its activity (the noun refuses to be rid of the verb: to study). The name (the noun) is incessantly disrupted by the activity it attempts to name. In dealing with this second and dynamic aspect of the phrase, issues of methodology arise: how should juridification be studied, what is the apposite way of dealing with juridification, what are the processes involved in a 'study'?

The untidy mix of prepositions in the middle signify a certain discomfort in interpretative position: *It is amongst the ruins of the metaphors in prepositions that this study, displaying a characteristic self-reflexivity, finds itself.* To say that it is a study 'in' juridification could create the impression that methods, terms, and discourses of the existing juridification discourse will be applied (and simply reaffirmed in that simple application). Measured against this standard, this present text will fall short of being a 'study' in juridification, as totally different methods and techniques are used, implying totally different interpretational paradigms. Nor can this be a study 'of' juridification. This usage may indicate a study of 'juridification' as a full and complete concept as the term is understood and used. Again, this present study represents a perilous breach (*brisure*) with the juridification discourse.

The best that can be said, at this uneasy stage, is that this study is 'about' juridification (über Verrechtlichung). In this sense, then, the ungainly prepositional links between the two nouns in the phrase are a warning: that the positions from which the interpretative processes (the 'study') are to take place are not stable, will shift, and will, on more than one occasion, undermine themselves.

## 1.1 THE ARCHAEOLOGY OF JURIDIFICATION

### 1.1.1 The long, long words of juridification

For the present moment, as a (temporary) textual (starting) point (an 'establishment of the concerns'), a definition of juridification as it appears in Jürgen Habermas's *Theorie des kommunikativen Handelns* contains some of the essential strands of the juridification discourse:

'The expression "juridification" [Verrechtlichung] refers quite generally to the tendency toward an increase in formal (or positive, written) law that can be observed in modern society. We can distinguish here between the expansion of law, that is the legal regulation of new, hitherto informally regulated social matters, from the increasing density of law, that is, the specialized breakdown of global statements of the legally relevant facts [Rechtstatbestände] into more detailed statements.'<sup>4</sup>

---

<sup>4</sup> J Habermas *The Theory of Communicative Action Vol 2: Lifeworld and System: A Critique of Functionalist Reason* (1987) 357. German terms and poor syntax in the original. An American author expresses juridification in the following terms: 'As a result of two centuries of law-making every aspect of an American's life has either been prescribed for or proscribed by laws that even as they are promul-

Habermas identifies four 'epochal juridification processes':

'The first wave led to the *bourgeois state* which, in western Europe, developed during the period of Absolutism in the form of the European state system. The second wave led to the *constitutional state [Rechtsstaat]*, which found an exemplary form in the monarchy of nineteenth-century Germany. The third wave led to the *democratic constitutional state [demokratischer Rechtsstaat]*, which spread in Europe and in North America in the wake of the French Revolution. The last stage (to date) led finally to the *democratic welfare state [soziale und demokratische Rechtsstaat]*, which was achieved through the struggles of the European workers' movement in the course of the twentieth century . . .'.<sup>5</sup>

Rüdiger Voigt lists some of the terms associated with the juridification discourse, including '*Gesetzesflut*' (flood of legislation)<sup>6</sup> and '*Paragraphendickicht*' (thicket of [legislative] paragraphs).<sup>7</sup>

The metaphors of the discourse of juridification are simultaneously vegetative (forests, thickets) and, if not actually nautical, distinctly aquatic: juridification takes place in waves. The picture painted by these metaphors is daunting: wave after inexorable wave of trees, vines, undergrowth; legal thickets on the march, entwining everything in their path, ruthlessly growing. This does not mean that they are ineffective: one gets the picture.

The metaphor of the wave is a metaphor of sequentiality: as one ocean wave follows upon the next, so one wave of juridification marches in(to) the wake of its predecessor. This sequentiality of juridification immediately implies a certain *diachronism* in approach: juridification cannot be observed as a phenomenon of finite duration: it can, according to the metaphors, only be read diachronically; over an extended period.<sup>8</sup> Juridification is not instant, nor, if one bears in mind the metaphor of the marching forest, particularly quick off the mark. Quantitative and qualitative growth/increase in

---

(footnote continued from previous page)

gated split amoeba-like to create more laws. The end to this Malthusian nightmare of law metastasized is nowhere in sight.' G Vidal 'How to Find God and Make Money' in *The Second American Revolution and Other Essays* (1976-1982) at 195.

<sup>5</sup> Habermas *loc cit.* Emphasis in original.

<sup>6</sup> Teubner uses the term 'flood of norms'. See G Teubner 'Juridification -- Concepts, Aspects, Limits, Solutions' in G Teubner (ed) *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate, Antitrust and Social Welfare Law* (1987) 6.

<sup>7</sup> R Voigt 'Vorwort des Herausgebers' (Editor's Preface) in R Voigt (ed) *Gegentendenzen zur Verrechtlichung* (1983) IX *Jahrbuch für Rechtssoziologie und Rechtstheorie* at 7.

<sup>8</sup> Teubner speaks of 'the wider historical context of juridification'. Teubner *op cit* note 6 at 11.

law is ascertainable only through a historical (diachronic) analysis of juridification following upon juridification.

The term 'juridification' has been expropriated (appropriated?) by a number of disciplines. In *legal* discourse, juridification is thought of in terms of legal growth, increase (in volume), dynamic processes of 'becoming more'.<sup>9</sup> In quantity the law expands exponentially, as more and more legislation is passed by law-makers and increasing numbers of decisions are handed down by various courts. This view has led to 'juridification' degenerating into a counting of pages of legislation or of the number of new cases brought before certain courts.<sup>10</sup> Viewing the notion of juridification from within this narrow frame of reference ignores changes to the quality of the law, and the historical specificities determining juridification.<sup>11</sup>

Legal *sociology* focuses upon 'juridification as a process in which human conflicts are (through formalisation) torn out of their living context and distorted by being subjected to legal processes. Juridification, as it were, is the expropriation of conflict'.<sup>12</sup>

Juridification is also a *dialecticity*, there is an ambivalence in/of juridification: 'the ambivalence of a guarantee of freedom that is at the same time a deprivation of freedom'.<sup>13</sup> The ambivalence refers to a dialectical co-existence of a guarantee -- deprivation of freedom.

Juridification is furthermore also seen as entailing the *depoliticization* of disputes, this in turn being linked to its dialecticity: it can be said, for example, that labour law **not only** 'protects and guarantees certain interests of employees and ensures that labour unions have scope for action' **but also** 'the repressive nature of juridification tends to depoliticize social conflict by drastically limiting the labor unions' possibilities of militant action'.<sup>14</sup>

Juridification has a context, and this context provides illuminating glimpses of what juridification 'represents'. In nineteenth century German legal theory a distinction was

---

<sup>9</sup> 'In legal discussion juridification is described primarily as a growth phenomenon'; Teubner *op cit* note 6 at 6.

<sup>10</sup> See the discussion of the work of Hubert Rottleuthner, replete with diagram, in T Raiser *Rechtssoziologie* (1987) at 169-73.

<sup>11</sup> See Teubner *op cit* note 6 at 7. In discussing legislative amendments in Great Britain and the interpretation to be placed on the legislation, McCarthy notes: 'Obviously, if intervention of this kind is to count as evidence of juridification, the concept becomes synonymous with a *mere addition to law*, irrespective of content or intention.' W McCarthy 'The Rise and Fall of Collective Laissez Faire' Chapter I in W McCarthy (ed) *Legal Intervention in Industrial Relations: Gains and Losses* (1992) 1 at 29. Emphasis added.

<sup>12</sup> Teubner *op cit* note 6 at 7-8.

<sup>13</sup> Teubner *op cit* note 6 at 4.

<sup>14</sup> Teubner *op cit* note 6 at 9.

drawn between conceptual jurisprudence and a jurisprudence of interests.<sup>15</sup> Conceptual jurisprudence was related to the view that the law had its origin in universal human 'laws' (this view was in effect an attempt to make law more 'scientific'):

'In terms of the history of the social sciences, the latter quarter of the nineteenth century was characterised in no uncertain manner by neo-Kantianism. The revival in question was aimed at rehabilitating the Kantian concept of science as a system, unified essentially by the *idea* of a system, rather than by any more realistic or historical classification of its subject matter. The most notable and far-reaching effects of this revival were to be the constitution of the sciences of linguistics and of law. In both cases, the major portion of the nineteenth century had been dominated by attacks upon the received orthodoxies of universal grammar and of exegetical legal studies respectively, and their displacement by the uncertainties of creationist and historical methodologies. It was only towards the beginning of the twentieth century that the fully scientific and objective status of the disciplines in question could again be proclaimed and the community of the faithful be reassured. The manner of such reassurance was strikingly similar within the disciplines of language and law. It may be characterised broadly as that of the project of constituting autonomous sciences or axiomatic normative systems, whose principal value adherence was to transpire to be the positivistic postulate of order and of the logic of its internal development within a social life rationalistically conceived as being governed and regulated by imperative linguistic and legal codes.'<sup>16</sup>

The rules falling within the purview of conceptual jurisprudence would then transform and generate new law.

A jurisprudence of interests was structured upon a view of law as being in the service of society and life, and that the law should promote justice between citizens: the law, in other words, had to serve certain interests (which interests were never clearly established).<sup>17</sup>

Against this background, Max Weber saw law as a rational enterprise in which the creation and application of the law depended upon articulated general (universal) principles.<sup>18</sup> Weber drew a distinction between formal rationality and material rationality.<sup>19</sup>

---

<sup>15</sup> See D van der Merwe '*Es lässt sich nicht lesen -- Reflections on the status and continued relevance of the South African common law*' (1994) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 660 at 675-6.

<sup>16</sup> P Goodrich *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (1987) 11. See also Van der Merwe *op cit* note 15 at 674f.

<sup>17</sup> See A Brand 'Ethical Rationalization and "Juridification" - Habermas's Critical Legal Theory' (1987) 4 *Australian Journal of Law and Society* 103 at 107f.

<sup>18</sup> Rationality must, in this context, be contrasted with irrationality: 'Law is substantively irrational where every case is decided on its merits by the judge's intuition. Law is formally irrational where decisions turn on some test beyond human control, such as an oracle or an ordeal. Law is substantively rational where decisions are made by reference to general principles which are not confined to rules deductible from legal texts. Law is formally rational where every case is decided by logical deduction from existing legal rules and concepts constituting a gapless system.' J W Harris *Legal Philosophies* (1980) 246.

<sup>19</sup> See M Weber *Economy and Society* (1978) at 653ff. .

**Formally** rational law functions by means of reference to general (universal) principles and rules. This formal rationality is, in modern law, both substantive and procedural: the substantive facts of the case are subsumed under the general rule or principle, and the substantive outcome is determined by means of simple legal (logical) syllogistic deduction. Procedurally, cases are decided in terms of rules and regulations of procedure which apply to all cases (therefore the rules of procedure are also 'universal').

In modern societies (postwar and industrialized), however, the law is **materially** rationalized, this material rationalization taking, for instance, the form of particularization of the law (including increasing state regulation of the contents of contracts). In this material rationalization process, the formally rational legal norms in terms of which cases are decided are supplanted (eclipsed) by other norms, such as rules of ethics (good/bad), rules of economics (does something make business sense?) or sociological rules (for instance: the good of society).<sup>20</sup> This aspect of material rationalization will prove to be the most fertile ground for an analysis of juridification, as the shifts from the strict application of a legal norm to the consideration of the meta-juridical (that which is outside the law) appears to be at the very core of the processes of juridification.

The materialization of the law is especially prevalent in the modern welfare state, as the state increasingly has to intervene in society --- the main reasons for this intervention being 'the appearance of phenomena of economic power and/or a societal need for social protection'.<sup>21</sup>

This shift from formal rationality to material rationality is characterised by three processes:

- (a) The law undergoes a functional change: the law 'is no longer tailored only to the normative requirements of conflict resolution but to the political intervention requirements of the modern welfare state. It can be instrumentalized for the purposes of the political system which now takes on responsibility for social processes - and this means the definition of goals, the choice of normative

---

<sup>20</sup> In the case of material rationality, the goals of the law are 'external to the law', while in the case of formal rationality, the goals which the law had to attain were internal to the law: 'The formally rational character of law had to do with the goal of its *internal logic* which was served by deductive stringency on a high level of abstraction.' Brand *op cit* note 17 at 109-110. Emphasis in the original.

<sup>21</sup> Teubner *op cit* note 6 at 14.

means, the ordering of concrete behavioral programs and the implementation of norms'.<sup>22</sup>

- (b) The law undergoes a legitimization change. Formally rational law resolved disputes --- in the resolution of disputes (and nothing more) lay the legitimization of the classical formal law. Beyond the resolution of disputes lay autonomy --- if citizens were not in dispute or not in contravention of a law, they were autonomous. Formal law 'viewed itself to be confined to the delimitation of abstract spheres for private-autonomous action'. Materially rational law 'legitimizes itself by the results it achieves by regulation'.<sup>23</sup>
- (c) The transformations of function and legitimization 'also affects the norm structure and inner order of the law itself. The effects range from a weakening of the idea of generality to changes in methods of interpretation'.<sup>24</sup> This includes the incorporation of meta-juridical (extra-legal) norms into the legal process - the inequality between employer and employee (itself a meta-juridical consideration) is, for example, incorporated into the law as a norm, finding expression in various (dis)guises.

These, then, can be seen as moments of juridification: law no longer (merely) resolves disputes. In the modern welfare state, the law is an instrument for political intervention in society by a state that has taken over more and more responsibility for the condition of the society. This new function of the law is legitimated by the results that are obtained from the law (social benefits) --- no longer is the only worthwhile result the preservation of a zone in which an individual is free to do as she pleased. The material rationalization of the law means a shift away from the legal rule towards policies, towards the social ideal or the social aim that has to be achieved by the law. The law is increasingly 'result oriented'.<sup>25</sup>

---

<sup>22</sup> Teubner *loc cit* note 21. 'Classical formal law saw itself as having to provide only a formal framework within which social autonomy could develop, and no particular control effects were thereby intended' (at 18).

<sup>23</sup> Teubner *op cit* note 6 at 15.

<sup>24</sup> Teubner *loc cit* note 23.

<sup>25</sup> 'As a general rule it can be said that the predominant rule orientation is being increasingly overlaid by an instrumental orientation. . . . Instead of strictly applying precisely defined legal norms (conditional programs), legal experts now tend to administer ill-defined standards and vague general clauses (purpose programs). This is causing a dramatic shift in the mode of legal thinking, a shift which can be adequately defined by the term "result orientation". Teubner *op cit* note 6 at 16.

Habermas indicated that those meta-juridical norms that serve as the foundation of materially rationalized law are also rationalized aspects of the modern lifeworld; the material rationalization of the law ---

' . . . is not pictured as rationalization in the realm of ethics but as a disturbance in the cognitive-instrumental rationality of law. In general, progress in the development of law is judged from the point of view of formal rationality. Weber did not sufficiently recognize, says Habermas, that the rationalization of law could only take place on the basis of a "post traditional" development of moral consciousness, which came about through the rationalization of the normative aspect of world views.'<sup>26</sup>

Another point of criticism levelled against Weber by Habermas is that Weber's theories of rationalization failed to take full account of the phenomenon of 'colonization of the lifeworld'. For Habermas, communicative action is the basic type of social inter-action. This communicative action takes place within the context of the lifeworld: shared (but not expressed) social ideals, ideas, concepts, norms. These elements of the lifeworld structure the actions of human beings in society. Rationalization, for Habermas the basis of social evolution, increasingly rendered the lifeworld not only rational, but knowable, expressable, articulable and therefore colonised.

For Habermas, juridification is merely a type of empirical research which would document the colonization of the lifeworld.<sup>27</sup> Juridification is, then, a type of legal-historical analysis, seeking to establish to what extent the sources of the law (be it in the form of legislation or court decisions) increase and change, and, furthermore, the effect that this increase and change in law has upon the individual members of society.<sup>28</sup> In its most superficial (legal) form, juridification represents number-crunching, counting pages of legislation, numbering and counting cases.<sup>29</sup> In less superficial forms, juridification is a diachronic account of the quantitative increase in the law and the

---

<sup>26</sup> Brand *op cit* note 17 at 111.

<sup>27</sup> See Habermas *op cit* note 4 at 357.

<sup>28</sup> See, for example, R Rogowski 'Rechtsgläubigkeit oder die Antizipation vermuteter Rechtsfolgen', D Grunow and F Hegner 'Sozialpsychologische Konsequenzen der Verrechtlichung: Alltagskontakte mit der Verwaltung' and E Reidegeld 'Vollzugsdefizite sozialer Leistungen: Verrechtlichung und Bürokratisierung als Grenzen der Sozialpolitik' in R Voigt (ed) *Verrechtlichung* (1980) at 247ff.

<sup>29</sup> The juridification discourse is forced to disavow this superficiality: ' . . . juridification is not to be understood primarily as a quantitative phenomenon of the growth of law and regulation. Rather, it has to be seen in its qualitative dimensions, that is, as the emergence of new structures of law to keep pace with the growth of the welfare state. To the degree that the law is used for the regulatory and compensatory purposes of the welfare state, extensive changes in the structure and function of law are involved'. G Teubner 'Preface' in G Teubner (ed) *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate, Antitrust, and Social Welfare Law* at v.

qualitative change of the law from regulation to intervention by the modern social welfare state.<sup>30</sup>

### 1.1.2 Juridification as metaphysics

The term 'juridification' is a representation of that which is, somehow, present: 'Juridification is an ugly word -- as ugly as *the reality which it describes*'.<sup>31</sup> The word 'juridification', in other words, 'describes' something real ('reality'): it 're-presents' some thing, by naming it, the term 're-presences' something beyond itself.

Juridification is a tendency, a tendency to quantitative increase and qualitative change of function in law; it functions as a description or re-presentation of reality. The aim of the juridification discourse is to reveal a single, stable trend or tendency (reality) 'beneath the shifts and changes of political events', a tendency marked by the 'movements or accumulation and slow saturation, the great silent, motionless bases' covered with a thick layer of legislation, court decisions, administrative acts.<sup>32</sup>

By what economy is this process of naming determined? What is the price that must be paid when the law is gazed upon and pronounced upon thus: 'tending toward juridification'?

This very act of naming depends on an *act of silencing*, where the realisations (manifestations) of law (legislative acts, court decisions) are silenced and made to speak through a diacritical gesture: Enactments, decisions, all the monuments of past legal development, are turned into **documents** (in the sense of 'documenting' or 'proving' the tendency --- signifying for the other), or, in the case of mathematical juridification, into ciphers.<sup>33</sup> They are the 'documentary proof' of juridification; the instruments of the law become the 'founding documents' of juridification.

The silencing takes place in that the law is given a meaning other than the one it articulates itself: the shift is away from the content, or the 'stated' meaning of the legislation towards the mere instance that the legislation represents in the calculation or listing or progression of juridification. The monuments of past law are silenced (their content is largely ignored), while they are turned into documents to prove or to speak through the formulae as proof of juridification (the signification for itself or in itself by the monument is silenced to become a signification-for-another as a document).

---

<sup>30</sup> See Teubner *op cit* note 6 at 12.

<sup>31</sup> Teubner *op cit* note 6 at 4.

<sup>32</sup> M Foucault *The Archaeology of Knowledge* (1972) at 3.

<sup>33</sup> '... history, in its traditional form, undertook to "memorize" the *monuments* of the past, transform them into *documents*, and lend speech to those traces which, in themselves, are often not verbal, or which say in silence something other than what they actually say...' Foucault *op cit* note 32 at 7.

This methodological aspect of juridification has significant implications. The silent (turned-into-document) monuments of the law are *interpreted* as supportive of a thesis, an interpretation. The law thus interpreted provides one with access to the 'reality' described by the word 'juridification'. The legal monuments are read (in the silence of having been turned into documents) in order to situate them in a model of quantitative increase and qualitative change.

The concern here is that this methodology rests upon the assumption that the quantitative/qualitative 'juridification' is in fact *there* (real): that, as Teubner would have it, the term 'juridification' 'describes' a 'reality', that the word **refers** to a 'trend' or to a 'tendency', that 'juridification' is a **re-presentation** of a 'reality' (using the word 'juridification' somehow 'makes the thing present', the word re-presences the tendency), and all that needs to be done is for the evidence (the legal documents) to be *arranged* and *interpreted* properly (like a deck of conjurer's cards) for juridification to be 'disclosed' in its full coherent brilliance. The interpretative process will 'yield' the model.

Juridification, in other words, is a *conclusion drawn from legal monuments-turned-into-documents*. It is the allocation of meaning (and new existence): juridification 'produces something which had previously been invisible or unintelligible'.<sup>34</sup>

The discourse of juridification does not concern itself with the existence or the conditions of existence (ontology) of its own discourse. The 'existence' or 'presence' of the juridificatory trend or tendency is accepted as given: it is accepted as self-evident, axiomatic: all that the observer need do is to closely observe an astonishingly fat deck of cards, all apparently pointing in a single direction, the direction of proof of juridification. Through interpretation, juridification is brought into 'existence', it is given a 'presence', it has been 'liberated' from the mass of empirical evidence covering up this underlying tendency, a tendency seen as *structuring* the mass of legal monuments. It is the light of a unifying tendency, of a 'reality' that renders those thousands of enactments and court decisions into a single structural coherence: their single meaning is 'exposed' (made to speak) by virtue of an imposed silence. Millions of legal texts can be represented (re-presented) upon a single Rottleuthner graph. The products of the law (enactments, decisions) are, in other words, 'merely an appearance; the [single] object of the critic's gaze [juridification], is located behind or within it'.<sup>35</sup>

### **1.1.3            The death of metaphysics (including the death of the judge)**

In the sentence quoted at the beginning of this chapter, Gillian Rose suggests that post-structuralism has sounded the death-knell of metaphysics. This demise is based upon

---

<sup>34</sup> R Young 'Post-Structuralism: An Introduction' in R Young (ed) *Untying the Text* (1981) at 5.

<sup>35</sup> Young *loc cit* note 34.

the recognition that what is normally perceived and presented as 'presence' or as 'reality' is nothing of the sort and that concepts (such as juridification) which appear to be ontologically self-sufficient (their existence is immediately cognizable) do not exist outside the discourses which contain them:

'... if reading must not be content with doubling the text, it cannot legitimately transgress the text toward something other than it, toward a referent (a reality that is metaphysical, historical, psychobiographical, etc.) or toward a signified outside the text whose content could take place, could have taken place outside of language. . . . *There is nothing outside the text.* . . . [I]n what one calls the real life of these existences "of flesh and bone," beyond and behind what one believes can be circumscribed as [the] text, there has never been anything but writing; . . . And thus to infinity . . . the absolute present, Nature, that which words like "real mother" name, have always already escaped, have never existed; that which opens meaning and language is writing as the disappearance of natural presence.'<sup>36</sup>

The 'death of metaphysics' entails that absolutes such as 'presence' or 'real' or 'clear' or 'obvious' have been deconstructed to show how they rest upon further assumptions, other textual foundations or discursive figurations.<sup>37</sup> A written signifier ('juridification') does refer to a signified (a 'concept'), but it does not refer to a 'reality'

---

<sup>36</sup> J Derrida *Of Grammatology* (transl G Spivak) (1967) 158-9. Emphasis in the original.

<sup>37</sup> This statement requires explanation. The essential moment of deconstruction lies in the distinction (usually regarded as self-evident and unproblematic) between writing and speech: 'Written words are the secondary symbols that stand in for speech and so -- at one further remove -- assist in the process of communication. Already there is the outline of a hierarchy here, a descending order of priority in which writing ranks a very poor third on account of its irrevocable distance from origins, truth and self-present meanings. . . . It is because spoken words are thought of as symbolizing ideas "directly" -- without the further passage through a supplementary medium of written signs -- that speech can be safely maintained within the zone of a privileged relation to truth. Thus writing is the inferior term in this series, the term that is marked by its *exclusion* from the intimate circuit of exchange set up between ideas and truth. For Derrida, this [a moment in philosophy harking back to Aristotle] is the founding gesture of a whole philosophical tradition, one that will henceforth invest spoken language or its analogues (presence, origins, truth) with the value of a positive and self-authenticating truth.' 'Deconstruction' lies then in reading the cardinal texts of philosophy 'with an eye to their figural twist and complications. The more firmly writing is denied or demoted, the more clearly it leaves its problematic mark on the metaphors, allegories and detours of argument resorted to by thinkers in the mainstream (logocentric) tradition. Such, Derrida writes, is its [writing's] position in the history of Western metaphysics: "a debased, lateralized, repressed, displaced theme, yet exercising a permanent and obsessive pressure from the place where it remains held in check. A feared writing must be cancelled because it erases the presence of the self-same within speech." Derrida then establishes that 'this uncanny reversal, this "return of the repressed", is no mere accident or momentary lapse, but a *rigorous necessity* inscribed in the nature of all "metaphysical" thinking.' C Norris Derrida (1987) 65-68. The quote is from Derrida op cit note 36 at 270. See also J M Balkin 'Deconstructive Practice and Legal Theory' (1987) 96 *Yale Law Journal* 743 at 746f.

(juridification does not refer to some THING) - '[t]he world as we know it is only a world of representations, and representations of representations, ad infinitum'.<sup>38</sup>

This means that 'the space of writing is to be ranged over, not pierced; writing ceaselessly posits meaning ceaselessly to evaporate it, carrying out a systematic exemption of meaning'.<sup>39</sup> The writing cannot and does not disclose that which lies beyond it.

If there is nothing which can escape from the text (and if there is nothing outside the text), the law itself is forcibly returned to whence it could not escape from in the first place: textuality. The law, then, is not a platonic shadow or a representation of an ideal ('Justice', 'Fairness'): it exists in discourse, in language, and nowhere else.<sup>40</sup> Law, as discourse, as text, is not the speech of an idea, it is not the enunciation, the spoken word of Justice.

Or is it?

In literary theory, one of the metaphysical absolutes that had to be brutally murdered was the concept of the Author. Before the hecatomb of post-structuralism, the Author reigned supreme in literature:

'The image of literature to be found in ordinary culture is tyrannically centered on the author, his person, his life, his tastes, his passions, while criticism still consists for the most part in saying that Baudelaire's work is the failure of Baudelaire the man, Van Gogh's his madness, Tchaikovsky's his vice. The *explanation* of a work is always sought in the man or woman who produced it, as if it were always in the end, through the more or less transparent allegory of the fiction, the voice of a single person, the *author* "confiding" in us.'<sup>41</sup>

The text (the book, the novel, the poem) is interpreted in the light of something 'outside' it: the work of literature has no meaning (or has insufficient meaning) in and for itself, and needs to be supplemented by the metaphysical Author in order to sensibly exist, in order to make it make sense.

In legal theory, the Author has a forbidding sister --- the Judge. The 'work' of the Judge (the decision she hands down) is seen as the result not only of the facts of the

---

<sup>38</sup> Balkin *op cit* note 37 at 760.

<sup>39</sup> Barthes 'The Death of the Author' in R Barthes *Image Music Text* (1977) at 147.

<sup>40</sup> This does not, however, mean that law is literature, even though they are both textual in nature. The structures, tropes and generative principles of literature differ totally from those of the law. In law, for example, the concept of *authority* is of vital importance, relating as it does to the legitimization of the statement for which authority is being given. In giving authority for a statement, the law transfers the issue of legitimacy away from itself: saying, in effect, that another court has already decided the issue (and, by implication, placing the responsibility for the legitimacy of the decision upon the court which made the decision used as authority), and that decision has passed into the legal discourse, making it iterable (usable in the making of subsequent decisions).

<sup>41</sup> Barthes *op cit* note 39 at 143. Emphasis in original.

case, but especially also the moral and political predispositions of the person sitting on the bench.<sup>42</sup> In the same way that the Author is the metaphysical saviour of the literary text (the Author 'makes the text full', or 'supplements' the text), the Judge is the holder and keeper of the law: the law 'resides' **within** the Judge, is accessible through her and speaks through her intercession:

'The judge is the *prototypical* legal institution. In his robed and exalted independence, he is the very *apotheosis of fairness*. The "social service" that he renders to the community is, in Lord Devlin's words, "the removal of a sense of injustice". The impartiality that *informs* his judgments in the settlement of disputes is nothing short of an article of faith in a free and just society. While this attractive and abiding conception of the judicial function has long been exposed as, at best, a myth, *no amount of cynicism can easily dislodge the image of the judge as keeper of the law, protector and repository of justice.*'<sup>43</sup>

A careful reading of this passage reveals a startling role for the Judge. For just as the Author holds sway over her text, the Judge, as 'repository of justice' is the **metaphysical point from which meaning derives in law**: the Judge is the highest point of fairness, and through her (not through anyone or anything else), 'impartiality' (nothing short of an article of *faith* -- the faith is placed not in 'men' but in 'Justice') flows to inform (to structure) a decision. The Judge is the doorkeeper of the Law, it is only through her that access to Justice or to the Law can be obtained. Consequently, a decision may be criticised as reflecting considerations of social class or politico-racial prejudice, while another decision may receive fulsome praise as being a 'true *reflection*' of (the) law. The Judge expresses the law: she 'keeps' and 'protects' that other metaphysical rosetta stone: Justice. She has access to Justice, while at the same time determining (in a sense 'barring') access to Justice by others.<sup>44</sup>

---

<sup>42</sup> See generally J W Harris *Legal Philosophies* (1980) at 93-102.

<sup>43</sup> R Wacks 'Judges and Injustice' (1984) 101 *South African Law Journal* 266. Footnotes omitted, but emphasis added.

<sup>44</sup> Wacks's quoted text here finds resonance in a short text (a 'story', a fiction, a non-truth) by Franz Kafka, entitled *Before the Law*: 'Before the Law stands a doorkeeper. To this doorkeeper there comes a countryman and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. "It is possible," says the doorkeeper, "but not at the moment." Since the gate stands open, as usual, and the doorkeeper steps to one side, the man stoops to peer through the gateway into the interior. Observing that, the doorkeeper laughs and says: "If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last. The third doorkeeper is already so terrible that even I cannot bear to look at him." These are difficulties the countryman has not expected; the Law, he thinks, should surely be accessible at all times and to everyone, but as he now takes a closer look at the doorkeeper in his fur coat, and with his big sharp nose and long, thin, black Tartar beard, he decides that it is better to wait until he gets permission to enter. The doorkeeper gives him a stool and lets him sit down at one side of the door. There he sits for days and years. He makes many attempts to be admitted, and wearis the doorkeeper by his importunity. The doorkeeper frequently has little interviews with him, asking him

Like her brother, the Author, the Judge does not have a fully blank sheet on which to write freely. Both the Author and the Judge are constrained by that which came before, by numerous other earlier texts.<sup>45</sup> A potential charge against the preceding argument could be that the Author is being equated with the Judge, that they are indiscriminately being compared, no account being taken of the differences in the functions they perform.

It is not, however, the aim of the present argument to lead to the conclusion that a Judge is 'like' an Author or that an Author is 'like' a Judge. The argument does not aim at establishing an identity. The concern here is that irrespective of the differences in methods used and the constraints placed on both the Author and the Judge, modern legal theory sees the Judge as the 'saviour' of the text: without the Judge, her personality, her dislikes, her prejudices, and, above all, her role as intermediary (bringing Justice among the people) the text of the law is seen as 'incomplete', and only once the Judge has been invoked, can the text of the law be seen as complete and full. The Judge 'keeps' the law, she bears the key to the exalted places in the temple of 'Justice'.

---

(footnote continued from previous page)

questions about his home and many other things, but the questions are put indifferently, as great lords put them, and always finish with the statement that he cannot be let in yet. The man, who has furnished himself with many things for his journey, sacrifices all he has, however valuable, to bribe the doorkeeper. That official accepts everything, but always with the remark: "I am only taking it to keep you from thinking you have omitted anything." During these many years the man fixes his attention almost continuously on the doorkeeper. He forgets the other doorkeepers, and this first one seems to him the sole obstacle preventing access to the Law. He curses his bad luck, in his early years boldly and loudly, later, as he grows old, he only grumbles to himself. He becomes childish, and since in his yearslong contemplation of the doorkeeper he has come to know even the fleas in his fur collar, he begs the fleas as well to help him and to change the doorkeeper's mind. At length his eyesight begins to fail, and he does not know whether the world is really darker or whether his eyes are only deceiving him. Yet in his darkness he is now aware of a radiance that streams inextinguishably from the gateway of the Law. Now he has not very long to live. Before he dies, all his experiences in these long years gather themselves in his head to one point, a question he has not yet asked the doorkeeper. He waves him nearer, since he can no longer raise his stiffening body. The doorkeeper has to bend low towards him, for the difference in height between them has altered much to the countryman's disadvantage. "What do you want to know now?" asks the doorkeeper. "You are insatiable." "Everyone strives to reach the Law," says the man, "so how does it happen that for all these many years no one but myself has ever begged for admittance?" The doorkeeper recognizes that the man has reached his end, and to let his failing senses catch the words, he roars in his ear: "No one else could ever be admitted here, since this gateway was made only for you. I am now going to shut it." 'F Kafka 'Before the Law' quoted in J Derrida 'Before the Law' in D Attridge (ed) *Acts of Literature* (1992) 183-4.

<sup>45</sup> The Author is also constrained by what came before: he is working within a certain tradition, a certain genre, a certain language. He is also writing into and through all the texts that come before him, and, in a sense, all those that are to follow in the traces of his words.

The concern is, simply, that **not entirely dissimilar discursive operations are functioning when we talk about the Judge and when we talk about the Author.**<sup>46</sup> For modern literary theory, the Author is dead:

'Once the Author is removed, the claim to decipher a text becomes quite futile. *To give a text an Author is to impose a limit on that text, to furnish it with a final signified, to close the writing.* Such a conception suits criticism very well, the latter then allotting itself the important task of discovering the Author (or its hypostases: society, history, psyché, liberty) beneath the work: when the Author has been found, the text is "explained" - victory to the critic. . . . In the multiplicity of writing, everything is to be *disentangled*, nothing *deciphered*; the structure can be followed, "run" (like the thread of a stocking) at every point and at every level, but there is nothing beneath: the space of writing is to be ranged over, not pierced; writing ceaselessly posits meaning ceaselessly to evaporate it, carrying out a systematic exemption of meaning. In precisely this way literature (it would be better from now on to say *writing*), by refusing to assign a "secret", an ultimate meaning to the text (and to the world as text), liberates what may be called an anti-theological activity . . . '<sup>47</sup>

One could substitute 'Judge' for 'Author' in the above passage (and make the appropriate disciplinary changes):

'Once the Judge is removed, the claim to decipher the law becomes quite futile. *To give the law a Judge is to impose a limit on the law, to furnish it with a final signified, to close the law.* Such a conception suits legal interpretation very well, the latter then allotting itself the important task of discovering the Judge (or her hypostases: society, history, psyché, liberty [or Justice?]) beneath the law: when the Judge has been found, the law is "explained" - victory to the legal observer . . . . In the multiplicity of the law, everything is to be *disentangled*, nothing *deciphered*; the structure can be followed, "run" (like the thread of a stocking) at every point and at every level, but there is nothing beneath: the space of the law is to be ranged over, not pierced; the law ceaselessly posits meaning ceaselessly to evaporate it, carrying out a systematic exemption of meaning. In precisely this way the law, by refusing to assign a "secret", an ultimate meaning to itself [the law] (and to the world as text), liberates what may be called an anti-theological activity . . . '

---

<sup>46</sup> This entire issue must be seen within the context (a context that can only be vaguely indicated here, but a vital context nevertheless) of the legal-theoretical debates about the function of the Judge (creator of law, or mere applier of *pret-a-porter* legal principles).

<sup>47</sup> Barthes *loc cit* note 39. If one were to do the same substitutions with the Barthes passage cited earlier, the result would be as follows: 'The image of law to be found in ordinary culture is tyrannically centered on the judge, his person, his life, his tastes, his passions, while legal interpretation still consists for the most part in saying that Mr Justice Smith's pronouncements are the failure of Smith the man, Jones's his madness, Henry's his vice. The *explanation* of a the law is always sought in *the man or woman who produced it*, as if it were always in the end, through the more or less transparent allegory of the law, the voice of a single person, the *judge* "confiding" in us [telling us "what the law is"].

It is only after the death of the metaphysical Judge (and, with her, the idea that there is some dark, hidden 'secret' to the law, which only she has access to, being the repository and keeper of law) that the law-as-text comes into being.

#### **1.1.4 Juridification-as-discourse and transgression of the closure**

What are the implications of the death of metaphysics for juridification? If the law is text, and nothing but text (law-as-text), then juridification (being *in* or *of* the law) is text as well.

The discursive figurations of juridification take place where the law is made, where law is created, in the zone where social structures, concepts, notions, ideals are 'turned into law', where law, for example, changes its function (from dispute resolution to regulation) -- juridification is that which lies at the heart of materially rationalized law.

It is in this zone that what is meta-juridical or meta-law (concepts such as 'fairness', 'good industrial relations', 'sound economic policy', 'history') changes into legal norms-as-text:<sup>48</sup> they are rephrased in the language of the law, and the impact of this transformation leaves a trace (the trace of juridification), the telling ripple of juridification's discursive figuration on the smooth surface of the law-as-text.<sup>49</sup>

Juridification is not, in this view, the calculation and mathematical processing of silenced monuments of legal history: instead, those judicial monuments are allowed to return in(to) vociferous speech.<sup>50</sup> The legal text (in the case of this study, court decisions) is not silenced and made into a document which makes of it empirical proof of juridification: it is only the individual, actual text that will be of interest.<sup>51</sup>

---

<sup>48</sup> The phrase 'norms-as-text', though inelegant, is vital. Should the unadorned term 'norms' be used, the legal frame of reference immediately provides a ready-made interpretation: something beyond the text, some immutable metaphysic and meta-textual rule. The object of this section of the introduction has been precisely to undermine that impression. The same applies to the dreadful construct: 'law-as-text'. The term 'law' or, worse, 'Law', is so shot through with metatextual assumptions, that relative violence to the language is necessary to counter the virtually 'automatic' connotations.

<sup>49</sup> The concept 'trace' is of considerable importance here. If a trace is seen to be a trail, a track or spoor left by something else, a trace is then the *présence* of an absence. The word 'presence' is here placed under erasure in order to indicate the overtones of metaphysicality it bears with it. As to the concepts of placing words 'under erasure' and the idea of the 'trace' see G Spivak 'Translator's Preface' to J Derrida *Of Grammatology* (1967) at xiii-xviii.

<sup>50</sup> But this speech to which the document is returned is not allegorical: it does not stand for something else.

<sup>51</sup> In linguistic terms, the emphasis is on the *parole* (traditionally referring to a single, actual and individual speech-act) rather than on the *langue* (or language-system, in terms of which the speech-act takes place). Metaphorically, the focus is upon certain, actual games of chess (actual decisions) rather than the system of the law, or the system of juridification (the rules of chess as a game).

This approach makes it possible for the normative operations of the text and of law-as-text to be resuscitated: how are things classified as good or bad? By what economy can distinctions between prescription and proscription be made? How are norms-as-text made and what price must be paid for the making?

This methodological shift is traced, obliquely, within the juridification discourse itself:

*'Instead* of strictly applying precisely defined legal norms (conditional programs), legal experts now tend to administer ill-defined standards and vague general clauses (purpose programs). This is causing a dramatic shift in the mode of legal thinking . . . .<sup>52</sup>

This passage traces the outlines of the juridification process, and requires a reading with due care. It must be read in terms of its own structure and logic, as strange as the result may appear to be.

- The hierarchical difference is structured around '*instead*'. Instead of following one set of procedures, 'legal experts' follow other procedures. One set of procedures or techniques is used in place of another.
- The procedures that 'legal experts' '*tend*' *not to use* relate to the strict application of 'precisely defined legal norms'. These procedures (called a 'conditional programme') are dependent upon determinate meanings and definitions of norms. The status of the 'norm' cannot be questioned either: the norm is determinate, and can be 'precisely defined'.
- Instead of the conditional programme, the procedures that 'legal experts' now '*tend*' *to use* relate to the following; they 'administer ill-defined standards and vague general clauses (purposive programs)'. There is a shift in activity --- from 'application' to 'administering', the latter verb being vaguer than the first, and connoting other activities than a 'strict application'. The subject of the administering process are (a) ill-defined standards, and/or (b) vague general clauses. Instead of precise definition, there is ill-definition, instead of clarity, there is vagueness. Instead of being specific, what is being administered is regarded as 'general'.<sup>53</sup>

In formally rationalized law, concepts are clear, precisely defined, they are typical (ideal) legal norms. But in the juridification process, as the quality of the law changes

---

<sup>52</sup> Teubner *op cit* note 6 at 16. Emphasis added.

<sup>53</sup> In order to make this reading even clearer, the basic elements of the hierarchical opposition must be compared: (1) *application - precise - defined - norms* as against (2) *administer - ill-defined - standards - vague - generality*.

from regulation to intervention and the law becomes more purpose-oriented, ill-defined 'standards' (not, according to the quoted passage, norms), and vague clauses (again, not norms) are applied or, somewhat sinistly, administered.

The shift itself is, of course, relatively unimportant: any discourse shifts from one position to another, or from positions to other positions. But the importance of the discursive shift which constitutes juridification only emerges when seen in the light of the fact that it amounts to a **transgression**. It points towards a transgression (or opening, a breach) of normative closure, a characteristic of modern legal system theories.

Luhman does not hesitate to brand the legal system as a normatively closed system:

'Only within the legal system can the change of legal norms be perceived as change of the law. This is not a question of power or influence, and this is not to deny that the environment and particularly the political system has an impact on the legal system. But the legal system reproduces itself by legal events and only by legal events. Political events (e.g. elections) may be legal events at the same time, but with different connections, linkages and exclusions for each system. Only legal events (e.g. legal decisions but also events like elections in so far as they are communicated as legal events) warrant the continuity of the law and only deviant reproduction, merging continuity and discontinuity, can change the law.'

A simple fact never bestows the quality of being legal or illegal upon acts or conditions. It is always a norm which decides whether facts have legal relevance or not. After many centuries of doubts and discussions we are today used to admit that neither natural nor religious nor moral conditions have this law-making potential of legal norms. The legal system is a *normatively closed system*.<sup>54</sup>

Luhman stresses the fact that normative closure does not entail cognitive closure as well: the legal system, according to modern systems theory, is open to all kinds of information, but, as a normatively closed system, it is closed to normative control.

It is the essential argument of this text that juridification is a discursive figuration consequent upon a transgression of the normative closure and the restoration and maintenance of that very closure.

### 1.1.5      The archaeology of juridification-as-discourse

This, then, is the hecatomb of juridification as metaphysics, of juridification referring to a 'reality'; to a 'presence'. Juridification-as-discourse (instead of 'juridification' as a signifier for a 'real' signified) demands different modes of interpretation (to return to that which purports to be (at) the beginning: how is one to 'study' (now a verb) juridification-as-discourse?).

---

<sup>54</sup> Niklas Luhman 'The Self-Reproduction of Law and its Limits' in Gunther Teubner (ed) *Dilemmas of Law in the Welfare State* (1986) 111 at 113. Emphasis in original.

If there is nothing to gain access to beyond the law-as-text, the law-as-text must, instead, be ranged over. The law, the changes in the functions and structures of the law, and the increase in the law (the signposts of juridification-as-discourse) are not signifiers of a reality, of a presence - the exteriority of the law-as-text does not provide a way into some dark interior that is juridification.

Consequently, the normal modes of interpretation ('study') which characterise the current juridification discourse are insufficient.

The focus must be returned to the law-as-text as monument, not as document providing access to someTHING else.

Instead of the sequential arithmetic or empirical descriptive, method, *archaeology* may be more apposite, the object of study of the archaeological method being the *archive*.<sup>55</sup> But the archive should not be seen as ---

'... the sum of all the texts that a culture has kept upon its person as documents attesting to its own past, or as evidence of a continuing identity; [nor does it mean] the institutions, which, in a given society, make it possible to record and preserve those discourses that one wishes to remember and keep in circulation.'

Instead, the archive can be better described as being ---

'the law of what can be said, the system that governs the appearance of statements as unique events. But the archive is also that which determines that all these things said do not accumulate endlessly in an amorphous mass . . . . The archive is not that which, despite its immediate escape, safeguards the event of the statement, and preserves, for future memories, its status as escapee; it is that which, at the very root of the statement-event, and in that which embodies it, defines at the outset *the system of its enunciability* . . . [I]t is that which defines the mode of occurrence of the statement-thing; it is *the system of its functioning*'.<sup>56</sup>

The archive, then, instead of being a physical place containing dusty records of events past, is rather a conceptual containment of discourses, it contains not, as Foucault is at pains to point out, just any discourse, but that specific set of discourses 'that conditions [determines] what counts as knowledge in a particular period. The archive is dis-

---

<sup>55</sup> ' . . . my object is not language but the archive, that is to say the accumulated existence of discourse. Archaeology, as I intend it, is kin neither to geology (an analysis of the sub-soil), nor to genealogy (as descriptions of beginning and sequences); it's the analysis of discourse in its modality of *archive*' Interview with Foucault, quoted in T Flynn 'Foucault's mapping of history' in G Gutting (ed) *The Cambridge Companion to Foucault* (1994) 29.

<sup>56</sup> Foucault *The Archaeology of Knowledge* 128-129. Emphasis in original.

course<sup>57</sup> not only as events having occurred but as "things," with their own economies, scarcities, and . . . strategies that continue to function, transformed through history and providing the possibility of appearing of other discourses.<sup>58</sup>

The archive, in terms that are to become familiar with subsequent use, consists of those canonical texts which structure (inform, determine) the state of knowledge; dis-

---

<sup>57</sup> In view of the fact that the frequency of use of the term 'discourse' has increased and will continue to increase exponentially, it is necessary to briefly turn attention to the question: 'What is *discourse*?' The word 'discourse' has its origin in the Latin *discursus*, a noun in turn derived from the verb *discurrere*, meaning 'to run hither and thither.' A discourse, in a philological sense, would then be 'an utterance, or a talk of some length (not determined), whose unfolding or spontaneous development is not held back by any over-rigid intentions'. M Frank 'On Foucault's concept of discourse' in T J Armstrong (transl) *Michel Foucault Philosopher* (1992) 99. For linguistics, the largest possible unit of study is the sentence: 'If the sentence, being an order and not a series, cannot be reduced to the sum of the words which compose it and constitutes thereby a specific unit, a piece of discourse, on the contrary, is no more than the succession of the sentences composing it. From the point of view of linguistics, there is nothing in discourse that is not to be found in the sentence: "The sentence," writes Martinet, "is the smallest segment that is perfectly and wholly representative of discourse." Hence there can be no question of linguistics setting itself an object superior to the sentence, since beyond the sentence are only more sentences -- having described the flower, the botanist is not to get involved in describing the bouquet. And yet it is evident that discourse itself (as a set of sentences) is organized and that, through this organization, it can be seen as the message of another language, one operative at a higher level than the language of the linguists. Discourse has its units, its rules, its "grammar": beyond the sentence, and though consisting solely of sentences, it must naturally form the object of a second linguistics. For a long time indeed, such a linguistics of discourse bore a glorious name, that of Rhetoric. . . . If a working hypothesis is needed for an analysis whose task is immense and whose materials infinite, then the most reasonable is to posit a homological relation between sentence and discourse insofar as it is likely that a similar formation organization orders all semiotic systems, whatever their substances and dimensions. A discourse is a long "sentence" (the units of which are not necessarily sentences), just as a sentence, allowing for certain specifications, is a short "discourse." ' R Barthes 'Introduction to the Structural Analysis of Narratives' in S Sontag (ed) *A Roland Barthes Reader* (1982) 251 at 254-6. As to the position of the term 'discourse' in relation to the structural principles of Saussarian and post-Saussarian linguistics, see P Goodrich *Legal Discourse* at 132-136. For the purposes of the present study, discourse may be said to be a specific set of sentences, structures and ordered by certain principles (which principles are themselves discursive in that they are formulated through sentences). Furthermore, the discourse is delimited (again through limitations discursive in nature): it deals with what is called 'labour law' (the archival rules or discourse which makes possible this classification are largely traditional). Finally, it is important to bear in mind that the discourse of labour law consists not in a set of orally enunciated sentences (this would be discourse as well), but that the focus should be on the textual (in this case, written) *text*. Essentially then a discourse of labour law consists of a delineated and limited number of written sentences, each contained within a specific text, within a specific piece of writing. One of the problems that arise with this is the diffuse relationship between the one text and the other text on the higher level of discourse and on the lower level of the sentence. The text would, it appears, occupy a hierarchical position somewhere between the sentence (the text consists of sentences) and the discourse (a number of texts containing sentences make up the discourse). It is furthermore vital to bear in mind that the discourse is not homogenous and entirely coherent -- it would not be accurate to speak of a single discourse of labour law, for there are potentially infinite labour law discourses, each distinguishable (again through the operation of certain discursive archival structural principles) from the other.

<sup>58</sup> Flynn *loc cit* note 55.

courses that determine the existence of other discourses (in the sense that these secondary or passive discourses are 'derived' or, better, 'made possible' by the canonical discourse contained in the archive).

It is vital, at this point, not to posit the archive as a metaphysics of discourse, for the archive is a discursive construction (it exists in and through discourse only). The fact of discourse makes possible the archive and the archive in turn makes further discourse possible. In this sense, the relationship between the archive and discourse can be problematized in that neither is logically fully anterior to the other: dialectically, each determines the other, as each contains the conditions of existence of the other. Discourse, structured by the archive, which exists through discourse, then becomes fully self-reflexive, as discourse is structured through and by discourse, as one discourse structures or informs another (and, for this very reason, it may be more accurate to speak of the archive as a 'discourse of order' in the sense discussed below in 1.3.3).

What is the archive of labour law? Certainly it would include those texts, discourses all (decisions, legislation, comments), which make possible the appearance of other decisions, comments, criticism, that again lead on to others, that inform those that come after them (in a temporal sense). These pivotal decisions and other canonical discursive practices contain the 'conditions of existence' of the other (passive) discourses, in that they contain a 'body of rules' which govern the way in which things are perceived, thought about, judged, talked about, written about. That which does not 'comply' with the archive is rejected, discarded as being 'non-sense', it is censored from the archive.<sup>59</sup>

The archaeological method turns its attention to these discursive practices that structure others, the canonical texts which determine the validity of subsequent discourses. When applied to law, the archaeological method would seek to establish, as far as this is possible, those archival structures which in turn discursively structure other discourses; it would attempt to excavate those cardinal discourses which determine the (dis)appearance of others. It is, succinctly, an attempt to trace the law of discourse in the discourse of the law.

---

<sup>59</sup> See Flynn *op cit* note 55 at 30. See also D Ingram 'Foucault and Habermas on the subject of reason' in G Gutting (ed) *The Cambridge Companion to Foucault* (1994) 215 at 231-2: 'The archaeology of knowledge construes a meaning in terms of objective structure. The meaning of a statement is defined by the sequence of statements that precede and follow it. This sequence, in turn, is one possible articulation among many alternatives that are permitted by a system of statements. Such a system is not closed, however. . . . [T]he system of regularities of governing possible speech delimits the range of what can be accepted as a possible true statement, censors unacceptable themes and utterances, and silences "disqualified" speakers in a continually shifting manner. Foucault principally deploys his archaeological method in analyzing just those performative utterances that figure in the regimented language games of science. His aim is to articulate the archaeological deep structures that determine the limits and possibilities of knowledge for any given period.'

For present purposes, some key features of the method may be summarized as follows:<sup>60</sup>

1. Archaeology does not attempt either description or definition of thoughts, representations, images, themes, preoccupations or trends that are 'revealed' in the course of judicial decision-making (judicial discourse). The focus is on the discourse itself, and on the structures and rules of the discourses themselves and the discourses that inform them.<sup>61</sup>
  2. Archaeology is not commentary or interpretation, it is analysis. Commentary or interpretation allows not only the construction of a new discourse on the basis of the old, but no matter how the commentary or interpretation is approached, its function 'is to say at last what was silently articulated "beyond", in the text. By a paradox which it always displaces but never escapes, the commentary must say for the first time what had, nonetheless, already been said, and must tirelessly repeat what had, however, never been said.'<sup>62</sup>
  3. The focus is upon the canonical text, as only the discourse of the canonical text is iterable.<sup>63</sup> Iterability is an essential property of the canonical text. This means that the discourse of the canonical text (the 'ratio') can be separated from the situation, from, for example, the facts giving rise to the case and applied to other, subsequent situations.<sup>64</sup>
- 

<sup>60</sup> Sections of these methodological signposts are based on the methodology described by Foucault. See M Foucault *op cit* note 56 at 138-9.

<sup>61</sup> Foucault states that archaeology 'does not treat discourse as *document*, as a sign of something else, as an element to be transparent, but whose unfortunate opacity must often be pierced if one is to reach at last the depth of the essential in the place in which it is held in reserve; it is concerned with discourse in its own volume, as a *monument*. It is not an interpretative discipline: it does not seek another, better-hidden discourse. It refuses to be "allegorical".' Foucault *op cit* note 56 at 128-9.

<sup>62</sup> M Foucault 'The Order of Discourse' in R Young (ed) *Untying the Text* (1981) 48 at 58.

<sup>63</sup> This exclusive iterability of the canonical text is institutional. There are archival discourses which structure the selection of decisions that are to be followed by others (binding authority or the rules of *stare decisis*). In this way, the archive itself determines its own perpetuation.

<sup>64</sup> '... iterability [ ] carries with it the notion of a repetition of the same in a different context. Language can only operate to the extent that it is repeatable, but language is repeatable only to the extent that what A says means something, albeit not identical to what A meant, to another person B. According to Derrida . . . "by virtue of its essential iterability one can always lift a written syntagma from the interlocking chain in which it is caught or given without making it lose every possibility of functioning. . . ." . . . [T]he very act of "meaning" something creates a chasm between the sign and the producer's intention. This detachability makes iterability, and thus intersubjective meaning, possible. The repetition of the sign [a section of a decision, for example] in the new context is simultaneously a relation of identity and difference; the repeated sign is syntactically identical, yet semantically different' Balkin *op cit* note 37 at 779-80.

4. The analysis of the canonical texts must remain faithful to the text: the 'reading must be intrinsic and remain within the text'.<sup>65</sup>

What, then, would constitute an 'archaeology of juridification-as-discourse'? This would entail an excavation of the discourse of the law in an attempt to establish the archive, a system of discursive practices which function as normatively paradigmatic. In other words, to try to determine those archaeological structural principles which determine, inform, or lend structure to the qualitative shifts in the legal discourse, that govern the appearance or change of legal reasoning, that control the changes in the legal discourse, from the strict application of legal rules to the administration of ill-defined standards.

## 1.2 LEVELS OF SIGNIFICATION

In essence, then, this study is a reading of texts (in other words reading of a limited and select part of the corpus of the law) in order to dig and sift through the text and through the law-as-text; to identify and excavate the discursive figurations and conditions of juridification-as-discourse, to establish the rules (the textual economy) that govern these discursive figurations and, in the final analysis, the impact of the transgression of the archival structures as the archive turns in upon its own discursiveness. It is an archaeological excavation of the law-as-text, searching for the trace (the presence of an absence) of juridification-as-discourse as determined by the structural principles of the archive and the operations of the archive.

There is no one point of departure. A single 'point of departure' implies that there is one certain and stable position from which the study proceeds; that there is a single coherent light which guides the departure on some journey into the unknown. But the 'point' is no point at all: it is a cluster of departures, a place of beginnings.<sup>66</sup>

---

<sup>65</sup> J Derrida *op cit* note 36 at 159.

<sup>66</sup> One other, vital source of point(s) of departure(s) deserves brief mention: 'Sociological generalizations [about juridification] can be corrected when viewed from within the laws if they are set against specific legal material. On the other hand a dynamization of the strictly juristic perspective could be hoped for if *extralegal modes of interpretations are actually taken up and not simply dismissed*'. Teubner *op cit* note 6 at 4, emphasis added. The aim is, in other words, for an 'extra' (=outside) legal mode of interpretation. This again harks back to the issue of interpretative position mentioned in passing earlier and the motto quoted at the very outset: how is one to proceed in order that the law may reflect upon itself in an original manner. It may be apposite at this point to perform certain operations of substitutions and paraphrase to the excerpt of the Derrida interview quoted at the outset, where the term 'philosophy' is replaced by the terms 'law' and 'legal' where appropriate: the aim is then to find a non-site, or a non-legal site from which to question the law. The search for a non-legal site does not bespeak an anti-legal attitude. The central question is: how can the law as such appear to itself as other than itself, so that it can interrogate and reflect upon itself in an original manner. This study uses fictionality as a potential non-site from which to question the law: through its own (foregrounded) aesthetic aspect, its structure

One (but not, in any sense, the first) of these beginnings (which soon outgrew its origins) served as a primary hypothesis for another study by Blankenburg and Rogowski:

'(i) Labour juriciaries are suited for individual employment problems rather than for collective industrial conflict resolution; (ii) even with respect to claims for employment protection, the role of labour judiciaries tends to be restricted to regulating the consequences of dismissals; their direct impact on preventing dismissals or regulating ongoing employment relationships is rather limited; and (iii) labour judiciaries show a receptive attitude towards norms of industrial relations which also finds its expression in a high emphasis on conciliation and an institutionalised participation of collective industrial interest groups in decision-making.'<sup>67</sup>

This passage signposts a number of issues. What, for example, are 'labour judiciaries'? Are these only 'labour courts' or 'labour tribunals' or 'industrial tribunals' or does the term used include civil courts having to decide labour issues? Where and to what extent do the archival rules (which make a differentiation between these typologies possible) break down; where and to what extent are they problematized by a discourse that may transgress them, overstep the conceptual boundaries (im)posed by these paradigms? Does the fact that labour courts are 'suited' (a word again implying the functioning of normative processes --- suited/unsuited) to resolve individual conflicts mean that these courts are per definition excluded from resolving collective disputes (and would one here be in a position to observe the transgression of the paradigmatic individual/collective divide?)

For one of the issues here is the separation of individual and collective: does the way in which these labour courts deal with 'individual' issues not impact on the conduct of 'collective issues'? Is the protection of striking workers against dismissal (individual) not a regulation of the consequence of a collective conflict? Do these courts not, by

---

(footnote continued from previous page)

and presentation, fictionality (especially in the form of parables) is used to shift the interpretative position, to change the perspective or point of view on a certain problematics. This is certainly distressing, because it appears to deny the cogency, self-sufficiency, and coherence of the legal discourse, a discourse which presents itself as complete and full. But it is only by adopting admittedly unorthodox interpretative positions and paradigms that the law can be questioned *afresh*, that one could get lost in the funhouse of the legal discourse, to discover there, from a perspective newly sensitized by fictionality, those machines and machinations that make up the legal discourse.

<sup>67</sup> E Blankenburg & R Rogowski 'German Labour Courts and the British Industrial Tribunal System. A Socio-Legal Comparison of Degrees of Judicialisation' (1986) 13 *Journal of Law and Society* 67 at 68.

ostensibly deciding only individual disputes, regulate collective disputes as well. Do these questions indicate a rift or a lacuna in the archival structural rules?

Blankenburg and Rogowski's primary hypotheses can, with little adaptation, serve as one (but only one) beginning for the present study: Labour courts, even when ostensibly solving disputes between employer and employee (individual disputes) play a role in the resolution of industrial conflict, the latter usually seen as situated on a collective level. In the course of their decisions, labour judiciaries 'colonise' or 'take over' other disputes, bringing them within the purview of the law. Unregulated aspects of collective disputes are then regulated by the labour courts. In other words, labour courts, despite being seen to be 'unsuited' to the regulation of collective industrial conflict, do exactly that. In summary: labour courts, even where they are confronted by disputes normally termed individual, still play an important role in the resolution of collective industrial conflict, thereby overstepping the conceptual rules of the individual/collective san-andreas-fault.

This functional and performative practice of a court has, of course, a name: juridification. As the law colonises with law the lifeworld, law is being made (bringing with it its own archive, or determined by the old?). Often, this law is taken from meta-juristic norms, such as those of good industrial relations (themselves a matter of interpretation), the convictions of the community, the historical development of the legal system, or the perceived nature of collective disputes.

It is exceptional for a court to admit that it is 'making law', and that the source of the law so made is meta-juridical (not in legal discourse, but in the discourse of, for example, industrial relations). Usually, the law-making process is covert and the only way in which it can be accessed is through a thorough textual analysis.

The object of a textual archaeology is therefore in part to find, identify and interpret the traces left in the text by the hidden textual processes of juridification-as-discourse, this perhaps giving an idea of how the archival structures are complied with, transgressed, or, also possible, how the archival principles structure *their own transgression*. As policy is turned into law, as that which is perceived as 'good industrial relations' or 'good business sense' become written into law (juridified), the law-as-text will either cover up this process or accommodate the introduction of meta-juridical terms into the legal discourse, most commonly by relying on a silencing or obliteration of a normative (archival) structure. If a court, for example, relies on 'rough and ready experience-based values', these values are turned into law, and in this process, these values have to be given a content which is, if nothing else, iterable, and these values are determined by reference to the archive. Values and policies which are juridified into legal discourse (law-as-text) must be given a content sufficiently coherent and fixed (in a canonical text) in order that other courts or decision-making bodies can also apply these values through mere iteration. As meta-juridical values and policies are changed into law-as-text, not only will their content undergo a sea change, but the meta-juridical discourse

in which they had their origin will be turned into legal discourse --- this 'turning-into' process taking place again in terms of the structural archival principles. The fall-out from this process leaves a trace or a wound on the law-as-text, the reading of which (ranging over, not piercing) is the task of an archaeological reading.

Not all legal texts are equally relevant. Juridification-as-discourse operates hierarchically, like the courts performing the operation, dependent upon the iterability of the legal discourse (which law-as-text itself structures hierarchically). Once a superior court has transformed policy or values into law, and the product of the transformation is sufficiently iterable, lower courts will, almost blindly, apply the 'turned-into-law' values or policies. This hierarchical structure implies that the focus is upon the decisions of the highest court in any given jurisdiction, as these are *the canonical texts* of juridification.

The focus also rests upon the utterances of courts. An analysis of the policies which informed legislation (legislation is juridified policy) falls outside the ambit of this study. It is, however, vital to add that legislation (if any) establishes a framework (an archive) within which a policy decision is made by a court. Legislation is therefore not banished into irrelevance: one of the most interesting aspects of the investigation is to see how a court, when juridifying policy into law, strains against the structural frame or conceptual obstacles of the legislation.

### **1.3 STRUCTURES**

Even though it may initially appear to be wide, the scope of this study is narrow: a close reading of canonical legal texts in order to excavate the textual traces (fractures) left by the process of juridification-as-discourse.

The work is divided into two main parts.

#### **1.3.1 Context contratext**

The first part deals with the institutional frame of reference (the 'context') within which courts hand down decisions. Relevant in this regard are the dominant discourses of the industrial relations systems of the three jurisdictions under consideration:

1. The Federal Republic of Germany,
2. Great Britain, and
3. The Republic of South Africa.

These chapters are not intended to provide an in-depth view of the industrial relations system in each country, but instead to give some idea of the conceptual discursive contours (the broader archive) of the labour law system in each country.

Because this study focuses upon courts and what they do (and what they say while doing it), brief overviews of the structures of the courts, their substantive competence, and aspects of procedure are also necessary. If one thinks of juridification-as-discourse as being a type of story-telling, the court is where the story is being told. And the telling may be influenced by the place in which it is told and who tells it.

### **1.3.2 Discourses of silence**

In the second part, the methodology deserts the empirical-descriptive in favour of discourse analysis of some of the canonical (iterable) legal texts issuing from courts having competence to hear labour matters, specially referring to a special discourse, namely the discourse of the law of industrial action.

### **1.3.3 Discourses of order, parables and citations**

Discourses of order are strategically scattered throughout the text.

There are three distinct discourses of order:

- **Discourse of Order Series 1** relates to the canonical and quasi-canonical texts of the law. As will be illustrated in an example occurring later in this very paragraph, what is of concern here are those texts that structure or lay down the foundations of legal discourse.
- **Discourse of Order Series 2** relates to the instant text, the one being read at this point. This discourse has as its aim to link, to uncouple, to bring into contrast or to unhinge this text, to subvert and to apply the structural principles which in turn determine the instant text. The inclusion of this series of discourses makes the present text almost unbearably self-reflexive, as the discourse of order Series 2 relates to other discourses being presented and the manner in which those discourses are discoursed. In essence, then, the discourse of order Series 2 is a meta-text, offering commentary, interpretation, and, to an extent, prophecy as the text progresses, violently disrupting the divide between text and commentary. The importance of this Discourse of Order lies in it being an **enactment**: an enactment of interpretation, where text and countertext meet, that uncomfortable point where the commentary seeks to escape the text it is commenting upon (by maintaining a distance, by talking of 'that text') only to find itself being contaminated by that very text (in the sense that the commentary cannot free itself, but incessantly returns to the text it is commenting upon). This discourse of order will, eventually, prove sufficiently disruptive in its effect to be destructive.

- The Discourse of Order Series 3 is closely linked to the **parables**. The parables are offered, not as comic relief, but to illuminate certain concerns, through a discourse entirely different from the law. The parables may appear as lugubrious, which, within the context in which they appear, is certainly a valid charge. But the intent motivating the parables (a form of story-telling possibly pre-biblical) is entirely serious: certain concerns are expressed through the parables; concerns that are dealt with in the relevant chapter. These parables represent a (futile?) attempt to find a non-site from which the legal discourse can be viewed, it is a vantage point for the discursive events taking place. In this sense, the instant study represents the revenge of literature (fiction) over law, as fictionality has to be resorted to in order to refresh the perspective on the law.<sup>68</sup> The Discourse of Order Series 3, in a footnote, offers an interpretation of each of the parables, an interpretation that derives its authority exclusively from the fact that it is presented at the same time and in the same text as the parable (yet it is not part of the parable).
- The brief **citations** that appear at the beginning of each chapter have similar functions: they are not mere self-indulgence, for through these citations are nodes of other texts, other concerns, histories, attitudes, motivations, all of which in turn structure this text (they are those -- on a practical level -- unwritten and unwritable discourses) and which structure the texts presented and analysed: sometimes a change in attitude over time becomes apparent, or con-

---

<sup>68</sup> It is at this point apposite to present a more formalized motivation for this strategic move. It is vital to note that it is not original. In writing a history of madness, Michel Foucault, as described by his arch-enemy Derrida 'wanted madness to be the *subject* of his book in every sense of the word: its theme and its first-person narrator, its author, madness speaking about itself. Foucault wanted to write a history of madness *itself*, that is madness speaking on the basis of its own experience and under its own authority, and now a history of madness described from within the language of reason, the language of psychiatry *on* madness -- the agonistic and rhetorical dimensions of the preposition *on* overlapping here -- on madness already crushed beneath psychiatry, dominated, beaten to the ground, interned, that is to say, madness made into an object and exiled as the other of a language and a historical meaning which had been confused with logos itself. "A history not of psychiatry," Foucault says, "but of madness itself, in its most vibrant state, before being captured by knowledge." As madness has been silenced through the discourse of medicine and psychiatry, Foucault continues: "The language of psychiatry, which is a monologue of reason *on* madness, could be established only on the basis of such a silence. I have not tried to write the history of that language, but, rather, the archaeology of that silence.' J Derrida 'Cogito and the History of Madness' in *Writing and Difference* (trans A Bass) (1978) 33-34. In order to return madness (or 'unreason') to voice, Foucault has recourse to literature, to the authors of 'unreason'; Nietzsche, De Sade, Artaud, the painters Goya, Van Gogh, Bosch. See D Eribon *Michel Foucault* (trans B Wing) (1991) 97-8. In a sense, then, there is not method in Foucault's madness, but there is madness in the method.

ceptual foundations that are to serve as the basis for analysis. They are then, the faintly ringing doorbells of a larger archive.

Generally, the scheme of this text is that of an **enactment** of intratextuality: of texts flowing through texts, breaking through each other, casting different lights on each other, of difficulties of interpretation, even, at its most extreme, an **allegory** for certain processes of interpretation (such as the process of accommodating conflicting texts, establishing links between different texts, and the process of the commentary) which legal 'commentators' take for granted.<sup>69</sup>

The name 'Discourse of Order' is not, regrettably, original. It is an (intentional) inversion of 'The Order of Discourse', the title of Michel Foucault's inaugural lecture at the College de France on 2 December 1970. In this lecture, Foucault addresses procedures for the subjugation of discourse:

'[I]n every society the production of discourse is at once controlled, selected, organised and redistributed by a certain number of procedures whose role it is to ward off its powers and dangers, to gain mastery over its chance events . . . .'<sup>70</sup>

---

<sup>69</sup> One charge that may be brought against the instant text (and a charge that has been brought against the instant text as it found itself in the process of being-written) is its patent concern with its own aesthetic. For a text, even a legal text, to have an aesthetic dimension is, normally, not a bad thing. However, this 'aesthetic' does not serve the purpose of merely 'being nice', of being a 'racy style'. The impression of the operation of a textual aesthetic is based on the fact that the textual operations and economy of textual production which determine this text are **foregrounded** and **problematised** --- the instant text is a (mis)leading guide-book into the maze of its focus of attention (the archaeology of juridification-as-discourse) but also into the maze of **itself**. The being-lost-in-the-funhouse therefore applies not only to the operations being performed on other texts, but also to the text in/through which these operations are performed.

<sup>70</sup> M Foucault 'The Order of Discourse' at 52. In 'What is an Author?' Foucault identified a structure similar to the one that I have termed 'discourse of order': 'It is easy to see that in the sphere of discourse one can be the author of much more than a book - one can be the author of a theory, tradition, or discipline in which other books and authors will in their turn find a place. These authors are in a position which we shall call "transdiscursive." This is a recurring phenomenon - certainly as old as our civilization. Homer, Aristotle, and the Church Fathers, as well as the first mathematicians and the originators of the Hippocratic traditions, all played this role. Furthermore, in the course of the nineteenth century, there appeared in Europe another, more uncommon, kind of author, whom one should confuse with neither the "great" literary authors, nor the authors of religious texts, nor the founders of science. In a somewhat arbitrary way we shall call those who belong in this last group "founders of discursivity." They are unique in that they are not just the authors of their own works. ***They have produced something else: the possibilities and the rules for the formation of other texts.*** In this sense, they are very different, for example, from a novelist, who is, in fact, nothing more than the author of his own text. Freud is not just the author of *The Interpretation of Dreams* or *Jokes and Their Relation to the Unconscious*; Marx is not just the author of the *Communist Manifesto* or *Das Kapital*: ***they both have established an endless possibility of discourse.***' M Foucault 'What is an Author?' in P Rabinow (ed) *The Foucault Reader* (1984) 101 at 113-4. Emphasis added.

Foucault then identifies a number of procedures for the control of discourse: some discourses are prohibited, while other discourses are limited through internal procedures such as the commentary, the attachment to the metaphysic of the Author, or the institutional frame of reference within which that discourse is situated (the 'discipline'). Foucault's argument leads to an extension of the points made earlier about the archive, discourse, and the structural role of the archive.

One of the most important methods of controlling discourse is discourse itself (a method not expressly mentioned by Foucault): the archive as discourse structures another discourse. The archival discourse structures another discourse which may in turn structure another, which may then discursively turn back upon itself, or upon that which purports to be the original archival discourse of order, to supplement, to disrupt, to ignore or to transgress the discourse which is not itself but which is of itself (in the sense that the disrupting discourse is structured precisely by that which it is disrupting, supplementing, ignoring or transgressing). Discourse, in other words, transgresses, disrupts or supplements *itself* (which returns to the self-reflexive and self-disruptive presentation of the instant study).

The canonical (active) archival text may do a number of things: it may lay down rules, establish procedures, define terms and concepts, establish links and relations, uses, affirm or reject a methodology, etc. Discourses that do not comply with the norms-as-text of the active discourse are then rejected as 'incorrect' or 'false'.

The issues orbiting comparativism in labour law may serve as an example. There are certain canonical texts which establish rules for the conduct of research in collective labour law. Many (if not most) passive discourses would conform to the rules and procedures contained in the canonical discourse: the rules or structures of the canonical discourse would be iterated in the passive discourse and there function not as mere repetition, but as a principle structuring the passive discourse.

An analysis of the discourses of order would indicate their canonical status (the significance and influence of the active discourse), and their iterability (which section of the active discourse serves as structural element of the passive discourse). Of primary importance, though, is the economy by which the text is what it is: the inherent contradictions, shortcomings, and, ultimately, the silent and covert reliance upon silences in those discourses which structure and control others, and the extent to which the discourse turns in upon *itself* to transgress, supplement or disrupt nothing other than *itself* by *itself*.<sup>71</sup>

---

<sup>71</sup> As such, the structuring effect of the constantly developing archival discourse of order upon other discourses which in turn stand in a relationship not only to an archival discourse of order but also to other discourses becomes an allegory of the problematic of identity as discourse structures *itself* and disrupts and transgresses *itself*.

# **PART 1**

## **CONTEXT CONTRATEXT**

‘ “Context” indicates both that which accompanies the text (con- as in convocation) and that which is posed against the text (con- as in contra). Both readings are important, for the text is both dependent upon and differentiated from its context. Text and context thus exist in a relation of *differance*. There is no text without a context.’

— JM Balkin ‘Deconstructive Practice and Legal Theory’  
(1987) 96 *Yale Law Journal* 743 at 781.

# 2

## DISCOURSE OF ORDER (SERIES 1 PART 1)

### COMPARATIVISM IN LABOUR LAW BAKE IN HOT OVEN

---

'Today things will be slightly different.'

-- Gillian Rose *Dialectic of Nihilism: Post-Structuralism and Law* (1984) 11.

---

#### [SECOND PARABLE: THE COOKING LESSON

The situation is familiar (or, at least, easy to imagine): a woman wearing an apron is demonstrating to a television audience how to prepare an exotic dish. With a flourish, she lists her ingredients, some of which have not been seen in bourgeois households south of the Sahara since 1830. She then proceeds to mix together a number of these ingredients. This process takes some time.

Naturally, television being what it is, showing the demonstratrix actually mixing the ingredients for the required thirty minutes would be inexpressibly dull. A sleight of hand occurs: before the taping of the programme started, she pre-mixed her ingredients. Instead of mixing for the required thirty minutes, she reaches for a bowl containing ready-mixed ingredients. She proceeds with her demonstration, brightly guiding the viewer through a number of complex steps.

Nearing the end of the demonstration, the dish is placed into a hot oven. Again, a sleight of hand is performed: showing the forty minute baking process would be too time-consuming for the medium (television) she is trapped in, and therefore, the boring bit (watching the dish bake in the hot oven) is cut (edited) out. A few seconds later (instead of forty minutes), with another in a seemingly interminable series of flourishes, the aproned demonstratrix removes the fully baked dish from the oven.

Needless to say, it is a resounding success.]<sup>1</sup>

---

<sup>1</sup> Discourse of Order Series 3 Part 2. The concerns of this parable relate firstly to the establishment of a relatively inflexible programme (a recipe) and the implicit success attendant upon a rigid and non-deviant application of the recipe. In the demonstration of the programme, however, certain crucial problems are effectively un-written, un-named (ex-nominated). Essential procedures which determine the outcome of the programme are, because of their redundancy (in that these ex-nominated procedures are assumed not to convey any significant information), omitted, cut out or edited out of sight. Even so, it is exactly that-which-is-not-mentioned which largely determines the success of the application, and not, contrary to the expectations (and the assumptions of the programme itself), the rigid and non-deviant application of the programme. The programme claims a certain rigidity and avers that it contains all the relevant (non-redundant) information. Upon an application of the programme, however, that which is un-written

## 2.1 MAGICAL RECIPES

It is a long and hard road for those foolhardy enough to cast longing eyes upon the tempting treat of a successful comparison between aspects of labour law systems of different countries. For one thing, one has to be old and mature.<sup>2</sup>

Once this considerable hurdle is vaulted, certain canonical (archival) texts provide comparativists with ostensibly easy-to-follow recipes that guarantee success, the success itself being defined within the texts. These recipes, and the canonical texts in which they appear, are structured upon three central and general concerns.

### 2.1.1 The concerns of comparative labour law

#### Concern #1: The Institution-in-action or the Institution-as-function

There are considerable attendant perils in following the wrong procedure, in comparing, simply put, the wrong things: '[A]re we always sure that when we undertake studies in comparative industrial relations we do in fact compare comparable things?'<sup>3</sup> It appears that 'it is extremely problematical and dangerous to extract from a national industrial relations system a single institution or rule and to compare it with what *appears* to be the corresponding institution or rule in another country.'<sup>4</sup>

In order to avoid the dangers of comparing institution with institution, the object of the gaze of the comparative investigator is instead the function of the institution: 'the point of departure of international comparison cannot be an *institution as such*, but must be the functions *it carries out*'.<sup>5</sup>

The safe procedure then, is as follows:

'In order to compare *what is in fact comparable* one needs to compare the functions institutions perform, rather than institutions themselves. Indeed similar institutions,

---

(footnote continued from previous page)

proves to be some of the essential moments in the iteration of the programme.

<sup>2</sup> 'To be a sound comparative lawyer, one needs maturity and a certain age' F H Lawson *The Comparison - Selected Essays Volume II European Studies in Law Vol 5* (1977), quoted in F Venter, A J van der Walt et al *Regsnavoring: Metode en Publikasie* (1990) at 206 note 5.

<sup>3</sup> J Schregle 'Comparative Industrial Relations: Pitfalls and Potential' (1981) 120 *International Labour Review* 15 at 18.

<sup>4</sup> Schregle *op cit* note 3 at 21. Emphasis added.

<sup>5</sup> Schregle *op cit* note 3 at 22. Emphasis added.

e.g. works councils, labour courts, union delegations, may perform different functions in different countries. One is interested in what is going on, thus in the functions rather than in institutions.<sup>6</sup>

Comparativism in labour law and industrial relations appears, from a reading of these excerpts, to be a study in dynamics: how functions (such as collective bargaining or dispute resolution) are carried out. The gaze is purposively shifted away from the architecture of the institution (the structure of the institution) to the functioning of the institution: the object of the comparativist's gaze is the *institution-in-action* or, more precisely, the *institution-as-function*.

The inelegant conjunction (institution-as-function) is necessary because these quoted excerpts do not demand an absolute negation of the institution. No doubt is raised that an institution exists, but its existence has been rendered incidental to the 'true' object of the gaze: the institution is recognised as being 'merely that which performs the function' -- it is not to be regarded as the whole, but merely part of the whole.

It is only the institution-as-function that is 'in fact' comparable: comparing institutions 'as such' would, according to the texts, be wrong -- it would be a mistake.

## **Concern #2: The context**

The canonical texts of comparativism rigidly insist on obeisance to the 'context'. Kahn-Freund wrote that the use of the comparative method 'requires a knowledge not only of the foreign law, but also of its social, and above all its political context'.<sup>7</sup>

Without the involvement (intercession) of the context, the enterprise of comparing labour law or industrial relations is, in terms of its own programmatical archival rules, doomed to sag in the middle, to burn, to turn out half-baked. For this is the sense in which the term 'context' is used: as medium of intercession, as a means of achieving access to 'reality'. It is in this sense that Kahn-Freund's seminal words become the beginning of a canonical text by Blanpain.<sup>8</sup>

Schregle, too, asserts that '[i]nstitutions must be considered within the *general context* of the industrial relations system of which they are an *integral part*'.<sup>9</sup>

---

<sup>6</sup> R Blanpain 'Comparativism in Labour Law and Industrial Relations' Chapter 1 in R Blanpain (ed) *Comparative Labour Law and Industrial Relations* 3 ed (1987) 3 at 13. Emphasis added.

<sup>7</sup> O Kahn-Freund 'On Uses and Misuses of Comparative Law' (1974) 37 *The Modern Law Review* 1 at 27. Kahn-Freund's gaze is focused upon comparative law as a method of legal reform: 'My concern is not with comparative law as a tool of research or as a tool of education, but with comparative law as a tool of law reform. What are the uses and what are the misuses of foreign models in the process of law making?' (at 1).

<sup>8</sup> Blanpain *op cit* note 6 at 3.

<sup>9</sup> Schregle *op cit* note 3 at 22. Emphasis added.

According to the programme of comparative labour relations, the institution-as-function should not be viewed in isolation: it is an 'integral part' of an industrial relations system. The institution-as-function occupies a certain position within this system; presumably, there are other institutional components at work within this system (the institution-as-function is an 'integral part' of a 'whole', namely the industrial relations system). There are not only collective bargaining functions, but also dispute resolution functions and functions related to the establishment of minimum employment standards. These functions are 'carried out' by institutions, and all institutions-as-function of a particular system provide the industrial relations context for every single institution-as-function; the institution-as-function is at the same time **itself** and the context for other institutions-as-function. But the context is more than other institutions-as-function: the context is the conduit for access to the 'reality' of the system:

'... the comparative scholar should try to find out what is "going on", look for "reality". It is therefore *not sufficient* to compare the text of the legislation of different countries, as they e.g. appear in the Legislative Series of the ILO; one should also look at collective agreements, works rules in the enterprise, tacit understanding, customs and past practice. It is above all important to find out whether and how laws are applied, how institutions function in practice. Is it not interesting to know whether the Belgian works councils do in fact get the abundant information they are by legislation entitled to? A recent investigation showed that the implementation of that legislation is far from adequate.'<sup>10</sup>

The comparativist should, according to the programme of the canonical texts, direct his or her gaze 'beyond' the text of the law, onto (into) *reality*, onto the context of day-to-day practice in the industrial relations system. The text (legislation) that creates the institution is insufficient: the intercession of the context of daily doings is required to bake a perfect comparativist cake.

### **Concern #3: Misleading terminology**

The text of the law is insufficient for the success of a comparative enterprise --- it is a weak whisper that has to be 'supplemented' into sense (*reality*) by conduct, actions, attitudes, feelings.

But perils attend, for language is pernicious ---

'One of the main *difficulties*, which presents a real *pitfall* for the comparative scholar, is the fact that the identical words in different languages may have different meanings, while the corresponding terms may embrace wholly different *realities*'.<sup>11</sup>

---

<sup>10</sup> Blanpain *op cit* note 6 at 14. Emphasis added.

<sup>11</sup> Blanpain *op cit* note 6 at 18. Emphasis added.

It is not merely a problem of translation, for apart from the 'meanings' of words, there are the burdening meta-juridical connotations that weigh so heavily upon the clear, transparent terms:

'Concepts, expressed in words, are *laden* [burdened?] with values, emotions, past experiences and future expectations. *Extracting* such words from their national *context* and *translating* them into what appears to be the equivalent in another language, i.e. another society is a very problematical exercise indeed.'<sup>12</sup>

The concept 'collective bargaining', for example, denotes a localised process for a reader using the industrial relations system of the United States as a frame of reference, while the same two words denote corporatist negotiations to a Swedish reader. Interpreting the terms within a German frame of reference would lead to an ambiguity: do they mean negotiations between union and employer, or negotiations between employer and the works council?<sup>13</sup> Terms, in their fullness, do not travel beyond the borders of a particular system and words have different meanings when used in another frame of reference, when used in another context.

### **2.1.2 Follow(ing) (in) these (foot)steps**

This analysis of these brief excerpts of the canonical texts of comparative labour law yields a number of procedural steps that have to be taken in order for the comparative enterprise to succeed:

1. The object of the investigation is not the institution as institution, but the function of the institution. The focus of comparativism in labour law and industrial relations is squarely upon the institution-as-function.
2. The functioning institution must be seen within the context of an industrial relations system, itself situated within a socio-political context.
3. The name of the institution may be misleading (but the name of the institution-as-function can never be misleading, for the functions are in fact comparable).
4. The text which creates the institution is insufficient; the 'reality' is 'outside' or 'beyond' the text of the law (legislation, usually), accessible only through the intercession of the context.

---

<sup>12</sup> Schregle *op cit* note 3 at 25. Emphasis added.

<sup>13</sup> See Schregle *loc cit* note 12.

The proof of the pudding, of course, is in the eating: how does this programme or recipe look when taken out of the oven?

It is the dogmatic insistence on the context in particular that structures the comparative discourse. Token genuflections in the general direction of compliance with the strict requirement of the context as intercession to reality are observed:

'Der Kontext der ökonomischen, sozialen, politischen und rechtlichen Verhältnisse ist wesentlich für die Einordnung und Bewertung des hier untersuchten Phänomens. Ein Blick ausschließlich auf einen isolierten Komplex, nämlich die Arbeitsbeziehungen, muß bei jeder Länderstudie zu verzerrten Ergebnissen führen . . .' [The context of the economic, social, political and legal relations is of vital importance when it comes to ordering and evaluating the phenomenon which is studied here. Viewing an isolated complex, namely labour relations, alone will invariably lead to distorted results in a study of a country . . .]<sup>14</sup>

Here it is clear how the active discourse orders the passive discourse: the procedure outlined in the active canonical texts is being applied (rigorously, rigidly, and without question). The demands made in the active discourse of order are met; the recipe is followed to the letter.

The passive discourse is about South Africa. Therefore, the economic, social, political and legal relationships have to be sketched as context.<sup>15</sup> The result may be schematically represented as follows:

#### Economic and social context

- structurally weak economy, dependent on mining and agriculture;
- low growth rate (figures cited);
- high unemployment among blacks;
- insufficient education among black school-leavers;
- lack of social improvement and ever increasing unemployment leads to poverty striking entire families, in turn leading to radicalization of township-dwellers;

---

<sup>14</sup> M Körner-Dammann *Bedeutung und faktische Wirkung von ILO-Standards* (1991) at 81-2. The footnote has been omitted, because it refers directly back to the canonical texts which have been the object of analysis above: Kahn-Freund, Blanpain and Schregle.

<sup>15</sup> A possibility that must not be discounted is that the text under consideration is spurious, that the procedures and information are aberrations. In order to counter this possibility, the structures of the one passive text will be correlated with another passive text: J Piron and P A K le Roux 'South Africa' in R Blanpain (ed) *International Encyclopedia of Laws* (date of chapter: 1993). The relevance of this passive text lies in the fact that it was written specifically for the purposes of international comparative law - it is a chapter in a comparative publication.

- virtual collapse of the black education system at the end of 1990, caused by the separate education systems for blacks and whites; exacerbated by school boycotts;
- few blacks have completed secondary education, significant numbers have no formal education whatsoever.<sup>16</sup>

#### Politico-legal context

- apartheid legislation fundamentally affected the South African legal order, as well as all spheres of society;
- relevant indications: no right to vote for blacks, moving blacks into formally independent homelands, linked to the problem of migrant labour and separation into group areas, the limitations on right of movement of blacks living in South Africa;
- the workplace was severely affected by these legal structures: skin-colour determined education and training;
- despite the limited loosening of the grip of the apartheid legislation since 1976, the system did not fundamentally change: classification and registration of population groups remained;
- most important features of apartheid system: no right to vote, the enforced citizenship of homelands and the limitation on the freedom to move;
- South African labour law is closely linked to the structures of apartheid, this link cannot be dissolved by abolishing the legal bases of apartheid;
- reason: security laws criminalise virtually any unwanted act, such as the 'promotion of communism', the 'promotion of the aims of a prohibited organisation' or 'intimidation'.<sup>17</sup>

There are a number of reasons for this relatively detailed schematic overview of a comparative text. It is clear that this is a passive text, the structures of discourse have been informed by (taken over from) the canonical texts on the procedures of comparative law. Furthermore, the information is presented in a relatively detailed manner --- footnotes offer indications of sources. The research is thorough, the information is correct and presented with few flourishes. Finally, it is patently an honest attempt to comply with the recipe for comparative labour law.

---

<sup>16</sup> Körner-Dammann *op cit* note 14 at 84-5. In Piron & le Roux *op cit* at 17, the authors outline only the original agricultural economy of South Africa and trace historical developments (the rise of the mining and other industries). Unlike Körner-Dammann, no attention is paid to education and the lack of training.

<sup>17</sup> Körner-Dammann *op cit* note 14 at 83-4. Piron & le Roux deal largely with the same issues: racial segregation, the homelands, influx control (i.e. freedom of movement). Written later than the Körner-Dammann text, the Piron & le Roux text reflects also political developments of the early 1990s.

The starting point of the passive comparative text is the importance of the context: the section summarized here is an attempt to provide a reader (as the book is in German, the reader will more than likely not be South African) with background information, to give her a glimpse of the realities of South Africa as it then was.

But the context is, of course, everywhere: the section on the socio-political and legal context of South African labour law has its own context in the book itself.

Körner-Dammann's book deals with the application of international labour standards of the International Labour Organisation. In the section immediately preceding the South African contextualization, she discusses the types of investigative procedures and complaint procedures of the International Labour Organisation, including past complaints against the Federal Republic of Germany, Poland, the Dominican Republic and Haiti. **But these complaints against these other countries are not placed in any context at all.** This could indicate that the choice of the context is *selective*: only the South African context needs brief introduction. It is presumed that the (European) reader is familiar with the socio-political, economic and legal contexts of these countries --- though this presumption in regard to Haiti and the Dominican Republic is probably unwarranted.

In view of the central theme of Körner-Dammann's work (the application of ILO standards in South Africa), one cannot help but wonder at the relevance of the socio-political and legal background information that is presented. This information is not directly relevant to the development of the central theme and appears to be virtually redundant.<sup>18</sup> The context is offered for its own sake --- the performance of the programme of comparative labour law has become an end in itself. There is no attempt to integrate the context into that which it contextualises. Like a high mountain, it is simply there.

This virtual non-relevance of that which is presented as the context implies that the procedures followed by Körner-Dammann are merely a rigid (but selective) application of the procedures of the programmes of the canonical texts --- an application of the demands of contextualization.

This is not a problem for a single author (Körner-Dammann) or anyone else following these comparative programmes contained in the canonical texts. The essential problem lies in the sleights of hand performed in the canonical texts themselves.

---

<sup>18</sup> In the Piron & le Roux text, the chapter starts off with some truly startling information, including exact geographic information on the location of the country (in these days of the global information village and media explosions, this information appears out of place - certainly those readers who open a book of this nature would either know more or less where South Africa is, or, alternatively, would have the means of establishing the location of the country themselves), the various types of climate, and information about population, including information about the numerical strength of the various population groups. Additional features of this passive text are high rates of population growth and urbanization of the population.

### 2.1.3 The limitations of the programmes of the canonical texts

For the canonical text, the mere fact of insistence on contextualization is **sufficient** --- this is the flourish with which an ingredient is presented by the programmatic demonstration of the active text. However, exactly as a sleight of hand was performed in the cooking demonstration, so a sleight of hand is performed in the canonical text. Once the active text has rigidly insisted on contextualization, the canonical text proceeds to withdraw into a silence from which it obstinately refuses to yield any additional illuminations. Finer details are left out, closer particulars are not given, the programme is not gapless.

No mention is made of some of the central difficulties inherent in the comparative recipe. There is no indication of how the process of contextualization has to take place --- once the process has begun, the canonical text assumes that **all that needs to be said has been said**. Additional steps need not be outlined, for it is assumed that these additional steps and normative operations (which context is to be presented, which section of the context) are known and that repeating these steps and operations is superfluous. The cooking demonstratrix does not take into account the nuisance of lumps appearing during the mixing process. The canonical texts of comparative labour law do not take into account the possibility of problems that may arise with the contextualizations performed in terms of their programmes.

What, then, does the process of contextualization involve? Substantively, the comparative programme fails to explain what type of information is relevant in the process. The programme fails to distinguish, in its own operation, between redundant and non-redundant information (the operation of this information would make possible a subsequent distinction between redundant contextual information and non-redundant contextual information). To illustrate: the historical development of a labour law and industrial relations system could be relevant, but the canonical programme, having *retreated into a silence*, yields no indication of time-frame, and the scope of the application of the programme becomes problematical (should a comparativist go back to the nineteenth century?).

This is not a spurious issue. The German labour court system, for instance, was introduced on the western bank of the Rhine river in the wake of the Napoleonic conquest. To what extent should this historical fact be considered? In dealing with the structures of the German labour courts, should not a rigid insistence on contextualization imply that the structures of the parent institutions in France also be investigated? The British system of industrial tribunals had their origins in the First World War. To what extent is this historical fact relevant? The canonical programme is silent in this regard.

This problem may be countered by stating that this historical information is simply not relevant. But stating that certain information is irrelevant or redundant means that other

normative operations are taking place --- operations that make possible a distinction between redundancy and non-redundancy. The canonical programme is content with a limited economy demanding contextualization. Claiming (ir)relevance would be supplementing the programme contained in the canonical text by virtue of the fact that the normative structures of the distinction are contained not in the canonical programme itself, but outside it.

This is the sleight of hand of the canonical programme: an insistence on the relevance of the context is also a failure to provide an additional normative programme for establishing the relevant context.

Accessing the context is another trick of the light. Apart from a total immersion in a foreign legal system, the comparativist can only rely on written reports, written by national experts. Again the canonical programme makes an additional demand: the comparativist should try to find out 'what is going on', the reality of industrial relations practice. Add to this the compounding difficulties of terminology and language, a comparativist is reduced to a shivering bundle of hope and faith: she can only hope that the written information about a given system contains sufficient information on 'what is going on' to ensure the success of the comparative enterprise. A comparativist working on a textual basis can only hope that texts contain sufficient information, that the text she is reading sufficiently reflects the 'reality' demanded by the programmes of comparativism.

The programmes outlined in the canonical text are a flourish, they are the beginning of a process. With this flourish, the canonical text then desists and withdraws into a silence, covering up the difficulties, practical implications involved in the application, the normative structures which are required for a full application of the programme. The recipe seems simple and straightforward, but what is left unsaid leaves a comparativist in the lurch: the batter forms clumps, the context becomes unmanageable, stretching into infinity. . . .

## **2.2           WHAT IS (REALLY) COOKING? (is there nothing outside the text?)**

Apart from the gaps in the programmes of the canonical texts of comparative labour law, the texts themselves contain a number of textual operations, structures, and metaphors. These textual operations in fact serve to undo another of the central concerns of the programme of the canonical texts, namely the explicitly stated disaffection with language, where language is perceived as potential danger, as pitfall, as that which stands between the comparativist and what is being compared.

For the sake of convenience, the relevant excerpts of the canonical texts are repeated here:

'In fact, one could argue that it is extremely problematical and dangerous to *extract* from a national industrial relations system a single institution or rule and to compare it with what *appears* to be the corresponding institution or rule in another country. Such comparison of isolated aspects of different industrial relations systems will in all probability lead to wrong conclusions - especially if made for the purpose of comparative evaluation. *Institutions must be considered within the context of the industrial relations system of which they are an integral part.* To come back to our thesis, *the point of departure of international comparison cannot be an institution as such, but must be the functions it carries out. And functions are a reflection of the operation of the industrial relations system in its entirety.*'<sup>19</sup>

Two of the three central concerns of comparativism in labour law and industrial relations are addressed in this passage: the importance of the system context and the institution-as-function.

A careful reading of this passage discloses a number of operations (the key words have been emphasised). The institution-as-function is an integral part of an industrial relations system. An institution-as-function occupies a certain position and performs certain functions within that system. The institution-as-function is not alone --- it functions within a context (all the institutions-as-functions together form the system). The system (the whole) is the context of the institution-as-function (the part); collectively the parts (institutions-as-function) are the whole (industrial relations system).

The institution-as-function is, however, stated to be more than just one part of many (part of the whole) --- it 'reflects' the operation of the entire industrial relations system. The institution-as-function mirrors the workings of the rest of the industrial relations system --- the 'context' (the industrial relations system) is mirrored, reflected by the functioning of a single institution (the whole is reflected in the part).

Through the institution-as-function, the whole system (the industrial relations context) is revealed (for a reflected image is, in the ordinary course of events, a relatively 'true' --- in the sense of faithful --- picture, even though spatial orientation such as left and right may be reversed), it is glimpsed. From viewing the institution-as-function (a part), it is the conceit of the text that the observer may see an image (reflection) of the whole system: the motion is from institution-as-function toward system, or

**institution-as-function -> system,**

or

**institution-as-function -> context.**

Other fragments of the canonical texts illuminate these processes of reflection even further:

---

<sup>19</sup> Schregle *op cit* note 3 at 21-22. Emphasis added.

'In order to compare what is in fact comparable one needs to compare the functions institutions perform, rather than institutions themselves. Indeed similar institutions, e.g. works councils, labour courts, union delegations, may perform different functions in different countries. One is interested in *what is going on*, thus in the functions rather than in institutions as such.'<sup>20</sup>

This may, at first glance, appear to be a repetition of the first passage. But once the phrase 'what is going on' is given the meaning ascribed to it later in the same text, the focus starts to shift. For this particular text defines 'what is going on' as 'reality':

'From what has been said this far concerning the comparison of functions, it follows self-evidently that the comparative scholar should try to find out *what is "going on"*, *look for "reality"*'.<sup>21</sup>

The 'reality' that is being referred to is the day-to-day industrial relations practice. The 'reality' is, in one sense, the context in terms of which institutions carry out their functions. This confirms the view that the text is operating on a motion of institution-as-function toward context ('reality', that which is 'going on'). But only once it is accepted that the objects of the comparison are functions that the comparative scholar can 'look to' (in the mirror?) to see the reality of the industrial relations context. A similar structure orders the relationship between the institution and the function --- this aspect is not quite as readily apparent from the passage quoted from the canonical text.<sup>22</sup>

A function, states the text, is 'carried out' by an institution, the function is performed by the institution. The function does not perform itself. In being carried out by an institution, the structure, organisation, view, opinion and, above all, the personnel of an institution inform (structure, determine) the carrying out of that function. This means that by viewing the function (as it has been performed), the observer may discern an image of the institution itself: its structures, politics, status. Again there is motion involved: from function to institution. It is by looking at the function that the institution can be glimpsed (not 'seen', for the gaze is directed at the function). In this way, the institution is the context of the function (the function must be seen in its institutional context)

---

<sup>20</sup> Blanpain *op cit* note 6 at 13. Emphasis added.

<sup>21</sup> Blanpain *op cit* note 6 at 14. Emphasis added.

<sup>22</sup> For the purposes of this section, I am conflating the Blanpain text and the Schregle texts into one canonical text. This appears farfetched only if the explicit conflation which is prevalent in the texts themselves (the Blanpain text is by and large derivate of the Schregle text) is ignored.

**function -> institution,**  
or  
**function -> context.**

The third concern of comparativism is the ostensible pitfall of language:

'In comparative industrial relations, problems of terminology go far beyond the difficulty of literal translation. Concepts, expressed in words, are laden with values, emotions, past experiences and future expectations. *Extracting* such words from their national context and translating them into what appears to be the equivalent in *another language i.e. another society*, is a very problematical exercise indeed.'<sup>23</sup>

Again, certain textual operations are structuring the discourse (note the similarities: 'extract', and 'context'): a term cannot be 'extracted' from a 'context' --- the word has meaning only if seen in a certain context, it may have different meanings if translated into another context, another language (which is equated to 'society'). In the case of the concern about language and terminology, however, the discursive motion is reversed (is this why language is a pitfall?): it is the context, the society, the values, emotions and experiences that structure or inform the meaning of a technical term such as collective bargaining. The motion is from context to term:

**context -> term,**  
or  
**context -> language.**

Placed together, the structure of the discourses appear as follows (and the reversal of the discursive motion in the last case becomes even clearer):

- |   |    |                                  |
|---|----|----------------------------------|
| 1. <b>institution-as-function(part)</b> | -> | <b>context (= system, whole)</b> |
| 2. <b>function</b>                      | -> | <b>context (= institution)</b>   |
| 3. <b>context (= system)</b>            | -> | <b>language (= society)</b>      |

In cases 1. and 2. the left hand term (which the discourses place in a privileged position) is a representation (in the sense of being a reflection) of the right hand term. That which appears on the left-hand side of the table is the signifier for that which appears on the right-hand side (the signified). Reading the texts makes it clear that that which appears on the left is preferred: the institution-as-function is 'in fact comparable', the function is preferred over the institution 'as such'.

---

<sup>23</sup> Schregle *op cit* note 6 at 25. Emphasis added.

In case 3., however, the (un-privileged --- right hand side) language is a reflection of the context (the privileged term).

These statements about the three statements are neither interesting nor particularly illuminating, but they do serve the purpose of illustrating the limitations of interpretation paradigm. Up to this point, the utterances contained in the canonical archival texts have been reduced to dynamic formulae. Ordering these dynamic formulae vertically (paradigmatically) made it possible to identify certain changes, certain shifts operating in the texts, but hardly enables one to grasp the full import of these discursive operations. It is only through restoring a more discursive paradigm (partially restoring the formulae to sentences) and ordering them **syntactically** (or syntagmatically) that their true import becomes clearer.

The texts equate language with society. Language (concepts expressed in words) carries with it values, emotions, and past and future experiences. These values, emotions, and experiences are the 'reality', another concern of the text: this is 'what is going on'. Language, therefore, represents or reflects the reality, the conduct of the system. And, finally, the text establishes a certain identity: language is society.

Read together, the structure of the present comparativist discourse is as follows:

**FUNCTION -> INSTITUTION (= institution-as-function) -> SYSTEM -> LANGUAGE = SOCIETY,**

or:

1.     ■     The function is a reflection of the institution  
         ■     the institution is the context of the function, which together form the institution-as-function.
2.     ■     The institution-as-function is a reflection of the entire industrial relations system and  
         ■     The industrial relations system is the context of the institution-as-function.
3.     ■     Language, with its connotations of value, emotions and experiences, is a reflection of the reality of the industrial relations system, and  
         ■     Language *is* society.

This sequence of reflections or representations, would then, if factored out, amount to the following: the function is a reflection of society, not only the industrial relations system, but the whole society. But because the text creates an *identity* between language and society (language = society, but also society = language), the order can be

reversed yet again: the function is a reflection of language. Subsumed back into an earlier equation (function/context), this would mean that language is the context, that which is signified (represented) by the function.

What are the consequences of these discursive operations for the discourse on comparativism? The archival structures of the discourse on comparative labour law and industrial relations are not only dependent upon the language it so explicitly reviles and warns against (this is stating the obvious --- all these texts contain sentences).

The discourse on comparativism is also, in the final analysis, about language, textuality, discourse. In spite of its radically expressed disaffection with language (it is, one should remember, a danger, a pitfall), the upshot of the discursive operations of the canonical texts is simply that **viewing the function provides a view of the system, where things are going on (values, emotions, experiences) which are reflected in language.**

So comparative labour law and industrial relations is forcibly returned to its own textuality and discursivity and the comparative enterprise is one of gazing upon that discourse gleaming in the mirror of the text. The desired 'reality' is absent, there is nothing going on except certain discursive operations.

There is nothing outside the text.

## **DISCOURSE OF ORDER (Series 2 Part 2)**

[. . . this very text relies for its own operations on a certain economy --- an economy which demands that a certain price be paid (such as the ordering of material) --- an economy of saying and of leaving-unsaid. . . . there is nothing outside the text, but the text is continually in the process of transgressing the 'self' of the 'itself' . . .

Is there an internal coherence at stake?

Here and now, at this very point, the internal coherence of the instant text breaks --- it is a point of *brisure*, which is both a break, a crack, and a joint in a piece of joinery. It is a hinge. *This is a hinge.*

What follows is not only fearfully symmetrical but the chapters now following (with the exception of chapter 6) employ totally different modalities of presentation --- marked (marred?) by changes in tone, different types of information presented. The nature of the text (and the discourse) undergoes a change from the reflexive and textual-analytical (in)to surface-overviews, legal structures, citations of legislation and judicial decisions . . . at once, the 'legal' reader is again on solid ground, as the law is taken at face value, as those zones of difficulty, of metaphysics, of juridification and juridification-as-discourse are (temporarily) occulted by a representation (summary) of the contents of the positive law.

In part (but only in part, not in whole) the following chapters attempt to comply with the programmes of the canonical texts on comparative labour law, namely **establishing a context**.

The context presented in what follows is twofold: first, the industrial relations and labour law systems in each of the three countries under consideration; second, institutional aspects of labour courts and other judicial bodies (the institution-as-context).

Throughout, the focus is upon collective industrial relations and the law regulating those relations --- there are at least two reasons for this focus. Procedurally, taking into consideration and comparing that which is normally classified as individual labour law would fall outside the scope of this work. Substantively, considerations of a discursive nature apply: the object of chapters 3, 4, and 5 is to transmit some impressions of the dominant discourses of collective labour law. This discursive foundation is erected, however, also with another object in mind, namely to be in a position to subsequently trace the transgression of the (established) archival discourses through the discourse of individuality, of single employees; to be able to see how courts break through the collective discursive archival structures which are traditionally seen as attaching to the dispute by obliterating that discourse with others, one of which may be the discourse of individuality . . .

The following chapters are brief; brief sometimes to the point of the commonplace, the banal or the superficial. At the risk of closing the text, it perhaps needs to be stated at this point that the true object of this text is still some way off, the real exercise, the actual investigation has yet to begin (the remainder of this part is, then, in a sense, introductory, pre-textual). The aim of this text is not to compare complete labour law systems, nor to compare labour courts and other judicial bodies qua institution, but to lay some of the conceptual groundwork for what is to follow.

The three chapters immediately following outline some of the structural aspects of each of the three labour law systems under consideration. Of vital importance in chapters 3, 4 and 5 are the conceptual foundations of these systems: those concepts that structure the comprehension of/in the system. These structures are often contained in canonical discourses, such as the *writings* of Kahn-Freund on collective laissez-faire in Great Britain in 1954 (who *re-wrote* Sinzheimer, who *re-wrote* {to an extent} von Gierke, in turn *re-writing* . . .). Again, these discourses are, in a certain sense, *discourses of order* (archival rules). . . They lay (or lay bare, reveal or disrupt or close or hide) the conceptual foundations (a type of *Urtext* --- the discourse of industrial relations and labour law) for what follows, comes after them (in the sense of being 'led by' these discourses), this (present?) text, other institutions-as-functions, such as labour courts, which seek to follow the programmes of the archive, conceptualizing their function, its performance, its structural impact in terms of these discursive foundations . . .

Foundations exceeded, transgressed, surpassed, silenced . . .]

# 3

## THE SYSTEM OF LABOUR LAW IN THE FEDERAL REPUBLIC OF GERMANY

### THE EVERPRESENT (BASIC) LAW

---

'Niemals werden deutsche Arbeitsgeber sich bereitfinden, mit den Vertretern von Arbeiterorganisationen auf dem Fuße der Gleichberechtigung zu verhandeln.' [German employers will never find themselves prepared to negotiate, on an equal footing, with the representatives of labour organisations]

-- H A Bueck (General Secretary of the 'Centralverband Deutscher Industrieller', the 'Central Association of German Industrialists'), 1890, quoted in W Däubler *Das Arbeitsrecht* Vol I (1990) 69.

'Arbeitgeber und Betriebsrat arbeiten unter Beachtung der geltenden Tarifverträge vertrauensvoll und im Zusammenwirken mit den im Betrieb vertretenen Gewerkschaften und Arbeitgebervereinigungen zum Wohl der Arbeitnehmer und des Betriebs zusammen.' [The employer and the works council are to work together in good faith taking into consideration the applicable collective agreements in cooperation with trade unions represented in the undertaking [Betrieb] and employers' organisations for the well-being of the employees and the undertaking.]

-- § 2(1) *Betriebsverfassungsgesetz* (BetrVG)

---

#### 3.1 CONCEPTUAL FOUNDATIONS

The German industrial relations system is characterised by extensive legal codification. Legislation creates a number of structures in terms of which relations between employers and employees are conducted, from plant-level works councils, through employee representation in management, to a legislative framework for collective bargaining.

By and large, though, this legislation still represents a type of negativity in structure:<sup>1</sup> essentially, the limited aims of the legislation is to institutionalise forums where conflict resolution and bargaining can take place. The result of this prevalence of industrial relations legislation in the Federal Republic of Germany is that relations between employers and employees unfold not only in various forums (each focusing on different relational aspects), but that the relations are conducted within a rigorously determined legal infrastructure, which, with few (but nevertheless notable) exceptions, provides

---

<sup>1</sup> See P Davies and M Freedland *Labour Legislation and Public Policy: A Contemporary History* (1993) at 11-15.

legal remedies for industrial behaviour seen as dysfunctional. The legal institutions serve both the function of dispute resolution and the establishment of standards at various levels: works councils on a factory-floor level, employee co-determination at enterprise level, and collective bargaining on a national level.

On factory-floor level, the interests of employees are represented by the works council, which has, in terms of the enabling legislation, exhaustively enumerated functions and duties. On an enterprise level, the interests of employees are represented by labour representatives in the managerial structures. Powerful trade unions and employers (sometimes employer organisations) collectively bargain issues falling outside the scope of competence of either the works councils or the labour representatives.

Individual disputes between employers and employees are processed either through the works council (if the works council has jurisdiction in the matter), or through the labour court structure.

Pervasive throughout the labour law system of the Federal Republic of Germany is the catalogue of fundamental rights contained in the Constitution, the 1949 Basic Law, so extremely powerful in the dissemination of conceptual structure throughout the legal system.<sup>2</sup> For collective labour law, the provisions of Article 9 of the Basic Law are of pivotal importance:

- '(1) All Germans shall have the right to form associations and societies.
- (2) Associations, the purposes or activities of which conflict with criminal laws or which are directed against the constitutional order or the concept of international understanding, are prohibited.
- (3) *The right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all trades, occupations and professions.*  
Agreements which restrict or seek to impair this right shall be null and void . . .<sup>3</sup>

This constitutional provision serves as the foundation for the concept of 'collective autonomy' (the original German term is '*Tarifautonomie*', but the concept of the

---

<sup>2</sup> The Basic Law does not merely provide a framework for the rest of the German legal system. Substantive constitutional law concepts, often the result of constitutional interpretation, seeps throughout the German legal system, thereby disseminating (distributing) the core 'content' of the Basic Law. In this way, a constitutional right to equal treatment before the law may serve as the basis for a labour court jurisprudence founded on a homological structure, namely that trade unions and employers should be treated equally by the law --- this in spite of the fact that the Article 3 right contains no reference to either trade unions or employers. For present purposes, the most important fundamental rights guaranteed in the Basic Law are the protection of human dignity (Article 1), equality before the law (Article 3), freedom of expression (Article 5) and freedom of assembly (Article 8).

<sup>3</sup> Translation: Press and Information Office of the Federal Government, Bonn. Emphasis added. This is the only constitutional provision in the German constitution with explicit horizontal effect.

'*Tarif(vertrag)*' has no equivalent in English).<sup>4</sup> The contents of Article 9(3) by implication also entail what is called the *Koalitionsbetätigungsgarantie* (the right of associations to take actions in order to safeguard and improve working and economic conditions). The Federal Constitutional Court has held that this *Betätigungsgarantie* requires the state to provide trade unions and employers (employers' organisations) with a system of collective agreements.<sup>5</sup> Within this system, the parties may bargain on terms and conditions of employment --- the concept of 'collective autonomy' means 'daß der Gesetzgeber den Tarifvertragsparteien immer ein ausreichend großes Feld von Arbeitsbedingungen überlassen muß, auf dem sie sich im Sinne eines Aushandelns von Leistung und Gegenleistung sinnvoll betätigen können' [that the legislature must always leave the parties to collective agreements a sufficiently large range of conditions of employment on which they can take meaningful action in the sense of a negotiation of performance and counter-performance].<sup>6</sup> The state, in other words, creates the frame within which trade unions and employers are to draw the lines of terms and conditions of employment:

'Die Verfassungsordnung überläßt es den Gewerkschaften auf der einen und den Arbeitgebern bzw. Arbeitgeberverbände auf der anderen Seite, die Arbeits- und Wirtschaftsbedingungen, vor allem die Mindestlöhne durch Tarifverträge kollektiv festzulegen.'<sup>7</sup>

The right of the collective bargaining parties may only be limited where absolutely necessary.<sup>8</sup> Where the state establishes minimum terms and conditions of employment, the role of the state is to protect the 'legal property' of employees: life, health, the development of personality, the freedom to exercise a given calling, and the guarantee of the minimum that is necessary for existence. As such, then, the establishment of

---

<sup>4</sup> It may appear strange that the origins and the development of the concept *Tarifautonomie* will be traced in some greater detail at the beginning of Chapter 4 below --- which is, after all, a chapter dealing with British industrial relations and labour law. The concept of *Tarifautonomie* looks back on precursors well within the nineteenth century --- it is not an invention of modern jurisprudence or merely the result of innovative constitutional interpretation.

<sup>5</sup> See BVerfG AP Nr 1 on Art 9 GG. In order to simplify the explanation, the complexities of the German 'Kernbereichslehre' (doctrine of the essential core) are glossed over.

<sup>6</sup> M Löwisch *Arbeitsrecht* 3 ed at 41.

<sup>7</sup> [The constitutional order leaves it to the trade unions on the one hand and the employers (or employer organisations) on the other hand to lay down the working and economic terms and conditions, especially the minimum wage, by means of collective agreements.] G Schwerdtfeger 'Die Koalitionsfreiheit des Arbeitnehmers in der Bundesrepublik Deutschland' in Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht *The Freedom of the Worker to Organize: Comparative Law and International Law* (1980) 149 at 164.

<sup>8</sup> See BVerfG AP Nr 1 on § 1 MitbestG.

minimum terms and conditions of employment is justified and determining this minimum does not fall within the collective autonomy of trade unions and employers. However, should the state try to establish maximum terms and conditions of employment, those economic policy considerations motivating the fixing of such terms would be eclipsed by the concept of collective autonomy.<sup>9</sup>

### **3.2 PLANT-LEVEL EMPLOYEE REPRESENTATION IN WORKS COUNCILS**

Unlike the German labour court system, worker representation by means of works councils at plant level or factory floor level is a truly German invention. It has a long history. The concept of worker representation first found expression in a 1848 draft industrial code which never became law. It was only in 1891 that this concept, the origin of which can be traced back to civil unrest in the nineteenth century, found its place in legislation. Various metamorphoses of the idea in 1905, 1909 and 1916 led to the Works Councils Act of 1920, which for the first time allowed employees to participate in decisions relating to social and personnel matters.

A new Works Constitution Act (*Betriebsverfassungsgesetz*) was passed in 1952, this in turn replaced by a wholly new Act in 1972.<sup>10</sup>

The Works Constitution Act, apart from regulating purely formal matters such as the technicalities of the election of the works council, consists largely of an exhaustive enumeration of participatory rights of the works council;<sup>11</sup> the effect of the Act is to

---

<sup>9</sup> Löwisch *loc cit* note 6.

<sup>10</sup> This brief historical overview is based in G von Hoyningen-Huene *Betriebsverfassungsrecht* (1990) 10f. See also V Hentzel *Geschichte der deutschen Sozialpolitik* (1983) 78-85 and 247-260 and W Däubler *Das Arbeitsrecht* Vol 1 at 371-386.

<sup>11</sup> Von Hoyningen-Huene *op cit* at 40-1. Von Hoyningen-Huene links the concept of worker participation and representation on the shop floor to the concept of democracy: 'Auf dem Grundgedanken der Demokratie aufbauend, will Mitbestimmung die Beteiligung der Betroffenen an der jeweiligen Entscheidungen durch *Information* und *Mitwirkung* ermöglichen. Auf diese Weise soll gleichzeitig die *Kontrolle* der betrieblichen evtl. unternehmerischen Maßnahmen erreicht werden. Diese Beteiligungsmöglichkeit beruht letztlich auf der Würde der Person und ihrer freien Entfaltung . . . Erst durch Mitbestimmung seid die Berücksichtigung sozialer Umstände, also eine soziale Entscheidungspolitik möglich . . .' [Building on the basic idea of democracy, participation is intended to enable those that are affected by decisions to take part in those decisions by means of *information* and *co-operation*. At the same time, this also establishes *control* over plant-related as well as entrepreneurial measures. These participatory rights rest in the final analysis on personal dignity and the free development thereof . . . Only by means of participation is it possible to take social conditions into consideration, thereby making a socially orientated decision-making policy possible]. Von Hoyningen-Huene *op cit* note 10 at 3-4, emphasis in original.

promote peace and order in the plant, thereby promoting willingness to work and job satisfaction.<sup>12</sup>

The starting point of the entire Works Constitution Act is the explicit emphases placed on peaceful cooperation in the Act itself.<sup>13</sup>

A works council is established in every plant or undertaking with more than five employees. The council is elected on a proportional basis by the entire workforce (even though white-collar and blue-collar elect their representatives separately).<sup>14</sup> Works councils are not union organisations (the role of the union in the formation of a works council is clearly set out in the Act).<sup>15</sup>

Once elected, the works council represents the collective interests of the entire workforce, but as a creature of statute, it has no inherent powers - the powers of the council are exhaustively enumerated in the Act. These rights and powers include the right to information,<sup>16</sup> the right to be heard by the employer,<sup>17</sup> and, under certain circumstances, a right to veto some managerial decisions, such as decisions relating to transfers and appointment of employees.<sup>18</sup>

Of even greater importance are the true rights of participation (the employer may not take one step without the approval of the works council) -- this includes decisions regarding the ordering of the workplace, working hours, overtime, the place, manner and time of payment of remuneration.<sup>19</sup>

---

<sup>12</sup> Federal Labour Court BAG AP Nr 2 on § 56 BetrVG (1956) at 3R. See von Hoyningen-Huene *op cit* note 10 at 5.

<sup>13</sup> § 74(1) BetrVG provides that employers and works councils are to meet at least once a month, that they are to negotiate with the serious intention of reaching agreement and that they are to make suggestions with a view to resolve any dispute that may arise. § 74(2) BetrVG prohibits industrial action relating to disputes between the works council and the employer. These relational duties between employer and works council are further underscored by § 2(1) BetrVG, which imposes a duty of cooperation on the employer, the works council, any trade unions enjoying representation in the plant, as well as any employers' organisation.

<sup>14</sup> §§ 1, 10, 7-20 and 14(2) BetrVG.

<sup>15</sup> In terms of § 77(2) BetrVG, collective agreements between employers (or employers' organisations) and trade unions enjoy precedence over agreements concluded between employers and works councils. The constitutionally protected rights of a trade union to recruit members and to distribute information in the plant are not affected by the Act, while union rights of access are reiterated in § 2(2) BetrVG.

<sup>16</sup> In terms of § 80(2) 1 BetrVG, the council has a general right to demand information required to fulfil its functions.

<sup>17</sup> In terms of § 102(1) 1 BetrVG, for example, the works council must be heard before an employee is dismissed. The employer may, of course, proceed with the dismissal despite opposition from the works council, but this is rare. See von Hoyningen-Huene *op cit* at 292.

<sup>18</sup> § 99(2) BetrVG.

<sup>19</sup> See § 87 (1) BetrVG.

Disputes between employers and works council are usually referred to arbitration - the referral of a dispute to a labour court is the exception rather than the rule.<sup>20</sup>

### **3.3 EMPLOYEE PARTICIPATION IN MANAGERIAL STRUCTURES (CO-DETERMINATION OR *MITBESTIMMUNG*)**

Apart from the detailed system of plant-level representation and participation, the interests of employees are also represented in the management of the undertaking. A number of statutes<sup>21</sup> create a role for employee representatives on the supervisory boards of large companies.<sup>22</sup>

§§ 1 and 7 of the Codetermination Act provide that half the members of the supervisory board of share-capital companies with a workforce exceeding 2 000 employees shall be employee representatives. The other half consists of members representing the interests of shareholders and the size of the board is determined by the size of the undertaking (the size of the workforce being the relevant factor). At least one of the employee representatives must represent the relevant trade union. Employee representatives are elected by the workforce, again white-collar and blue-collar workers separately.

The parity of representation on the supervisory board does not mean that control over the enterprise has left the hands of the shareholders, for they retain the upper hand in the election of the chairperson. The chairperson is a powerful figure, for he or she has two votes.<sup>23</sup> In mining and steel industries, however, the chairperson and the executive director for labour affairs (who is a member of the executive committee of the company) cannot be elected against the wishes of the employee representatives.

As an institution, co-determination signifies a node of three basic structural principles of the German legal system (some of which have constitutional status): The property right(s) of the owner(s) of the company (Article 14 of the Basic Law) intersects with the freedom of association of Article 9 of the Basic Law (in order for freedom of association to be effective, employers and trade unions must be independent of each other),

---

<sup>20</sup> In terms of § 23 BetrVG, for example, the employer (or a trade union or a quarter of the workforce) may apply to a labour court to have a member of a council removed or to have the entire council dissolved, while a works council may apply for an interdict or order of the court.

<sup>21</sup> The basic piece of legislation is the Codetermination Act or the *Gesetz über die Mitbestimmung der Arbeitnehmer* of 1976 (MitbestG), supplemented by two other pieces of legislation specifically for the mining industry and all steel-producing industries.

<sup>22</sup> This co-determination has its origins in the same history that gave rise to worker participation on plant level. The first legislative provision to provide for co-determination was § 70 of the 1920 Works Councils Act.

<sup>23</sup> § 27 MitbestG.

in turn intersected by the ideals of representation, joint decision-making and participation in management.<sup>24</sup>

### **3.4 COLLECTIVE BARGAINING**

Issues such as remuneration structures or working hours (generally, all issues relevant to an industry as a whole) falling beyond the scope of factory-floor level or enterprise-level representation are dealt with by means of collective bargaining. This should not create the impression that bargaining takes place on a national level, for it is a long-standing practice that initial negotiations in a specific industry take place in a certain geographical bargaining area (for the metal industry, this is often *Nord-Württemberg/Nord-Baden*), and that other bargaining areas then follow the example set by the agreement reached in the first area.

German trade unions are unitary in structure: there is, for example, one union (the Industriegewerkschaft Metall) representing all employees working in steel or related industries, and there is one single union for all employees working in printing. Unions are further organised in a three-tier structure: federal executives, state executives and local union offices.<sup>25</sup> Nationally, unions are grouped together under the umbrella of the Deutsche Gewerkschaftsbund (Federation of German Trade Unions). Employers in the Federal Republic of Germany are grouped along similar lines: employer organisations, such as the General Federation of Metal Industries Employers' Associations (Gesamtmetall, like the IG Metall the most powerful employers' organisation) shelter under the umbrella of the Bundesvereinigung deutschen Arbeitgeberverbände (Federal Confederation of German Employers' Associations). While the Deutschen Gewerkschaftsbund would not dare presume to coordinate the collective bargaining policies of its members, the Bundesvereinigung deutschen Arbeitgeberverbände has a committee which drew up a list of taboos -- issues over which the employers were not to negotiate, such as (until 1990) the 40 hour work week.

Collective bargaining in Germany takes place in terms of the Collective Agreements Act (Tarifvertragsgesetz) of 1969. This Act regulates the nature of collective agree-

---

<sup>24</sup> See BVerfG AP Nr 1 on § 1 MitbestG 1976.

<sup>25</sup> German trade unions have no legal personality. The reason for this lack of personality was an original version of the Civil Code, in terms of which incorporated societies (which do have legal personality) could be required to provide a lower court with a list of its members. German trade unions feared state victimisation of individual members, and therefore refused to incorporate. In terms of § 57 of the Civil Procedure Code, unincorporated societies do enjoy passive standing in the civil courts.

ments,<sup>26</sup> the capacity of parties to conclude collective agreements (and, by extension, capacity to bargain)<sup>27</sup> and the applicability of agreements.<sup>28</sup>

German labour law does not impose a duty to bargain, the view of the Federal Labour Court being that an imposition of such a duty could lead to an investigation of the demands made at the bargaining table and that this would amount to involving itself with the substance of collective bargaining.<sup>29</sup> One of the fundamental leitmotivs of German law on industrial relations appears from this decision, namely the policy of the courts not to involve itself in the substantive collective bargaining process.<sup>30</sup>

---

<sup>26</sup> In German law, collective agreements are both contracts between the signatories to the agreements, and a form of private legislation (their normative aspect), creating rules applicable to all employment contracts falling under the scope of applicability of the agreement. In relation to the normative aspect of collective agreements, the Act lists a number of topics that the parties may agree to, including the contents of employment contracts, formalities of employment contracts, and formalities for the termination of contracts. See § 1 TVG.

<sup>27</sup> In terms of § 2 TVG, the parties to collective agreements are trade unions, single employers and employers' organisations. Umbrella bodies, such as the Deutscher Gewerkschaftsbund, may conclude collective agreements if properly mandated to do so, or the umbrella body has the authority to conclude collective agreements in terms of its constitution. An additional requirement is that a collective bargaining party must be capable of exerting pressure on its counterpart. On this point see C Mischke 'The inseparability of powers: judge-made law in the German legal system' (1992) 7 *SA Publiekreg/Public Law* 253 at 258.

<sup>28</sup> In terms of § 5 TVG, for example, the scope of a collective agreement may be extended by the Ministry of Labour (both federal or Land) if at least half of all employees within the bargaining unit are in the service of employers who are parties to the agreement and if the extension would be 'in the public interest'.

<sup>29</sup> 'Das BAG steht in ständiger Rechtsprechung auf dem Standpunkt, daß eine Gewerkschaft oder ein Arbeitgeberverband keinen Anspruch gegen den tariflichen Gegenspieler auf Aufnahme und Führung von Tarifverhandlungen hat, sondern darauf beschränkt ist, die Ablehnung von Verhandlungen durch Kampfmaßnahmen zu überwinden. Das überrascht auf den ersten Blick, weil dadurch Chancen für eine freiliche Konfliktlösung vertan zu werden scheinen. Indessen muß beachtet werden, daß ein solcher Verhandlungsanspruch letzten Endes zu einer gerichtlichen Kontrolle von Tarifforderungen führen müßte, weil jeweils festzustellen wäre, ob die strikte Ablehnung einer bestimmten Forderung Ausdruck der Verhandlungsunwilligkeit oder aber sachlich begründet ist. Eine solche Inhaltskontrolle würde der Tarifautonomie widersprechen.' [The Federal Labour Court is of the opinion that a trade union or an employer association does not have a right to demand that the opposite party take up and continue with negotiations. Such a party would be limited to overcome the refusal to negotiate by means of industrial action. This may, at first glance, appear surprising, because it appears to waste a chance for the peaceful resolution of conflict. However one must remember that a right to negotiate would in the end lead to an evaluation of collective bargaining demands by the court, because it would have to be established in every case whether the refusal of a certain demand amounts to an unwillingness to bargain or whether it has a substantive ground. This type of substantive evaluation would contradict collective autonomy.] Löwisch *op cit* note 6 at 95.

<sup>30</sup> See BAG AP Nr 5 on Art 9 GG (1963).

### **3.5 MEDIATION**

German law recognises both state mediation and private mediation. State mediation takes place in terms of the 1946 *Kontrollratsgesetz* Nr 35 (legislation inherited from the Allied controlling body set up after World War II). This Act provides for the establishment of mediation commissions as part of the state Ministries of Labour (*Länderarbeitsbehörde*). The chairperson of the mediation commission is selected by the Ministry from a list, subject to approval by the parties to the dispute. A dispute may be referred to state mediation by one party, provided the other party agrees. The mediation commission attempts to achieve a settlement between the parties; should this fail, the nature of the proceedings changes to arbitration. The decision made by the mediation commission is only binding on the parties if they agreed to be bound by the decision beforehand or indicate their subsequent acceptance of the decision.

Private mediation agreements (collective agreements in terms of the Collective Agreements Act) are of greater practical significance. For the most part, these mediation procedures are resorted to only after bargaining has failed.<sup>31</sup>

---

<sup>31</sup> Löwisch *op cit* note 6 at 112-116.

# 4

## THE SYSTEM OF LABOUR LAW IN GREAT BRITAIN KEEPING OUT OF THE WAY: THE ABSENCE OF LAW IN BRITISH INDUSTRIAL RELATIONS

---

'Traditionally, industrial relations in the United Kingdom has been firmly rooted in its own culture and has operated largely separate from the legal system. This feeling of separateness has been so strong that in 1970, as the battle raged around the Industrial Relations Bill which was to move collective relations firmly into the area of legalism, the slogan "keep the law out of industrial relations" was much to be seen.'

-- Sir John Wood 'Dispute Resolution - Conciliation, Mediation and Arbitration' Chapter 7 in W McCarthy (ed) *Legal Intervention in Industrial Relations: Gains and Losses* (1992) 241.

---

### 4.1 CONCEPTUAL FOUNDATIONS

Strange as it may appear at first blush, the conceptual foundations of modern British labour law and industrial relations were imported from Germany, courtesy of the writings of the late Otto Kahn-Freund.

Kahn-Freund was not the progenitor of the concept of collective autonomy or its British sibling collective laissez faire<sup>1</sup> - at most, he can be described (with a fair amount of accuracy) as populariser and extender of the concepts which stem, in fact, from a rich German legal and legal-sociological tradition.<sup>2</sup>

---

<sup>1</sup> As to the origins and context of the term see W McCarthy 'The Rise and Fall of Collective Laissez Faire' Chapter 1 in W McCarthy (ed) *Legal Intervention in Industrial Relations: Gains and Losses* (1992) 1 at 4f.

<sup>2</sup> One of the most important contributors to the idea of collective autonomy was Hugo Sinzheimer: as early as 1915, in his essay 'Der Tarifgedanke in Deutschland', ideas and concepts orbiting the nature of collective agreements in general, how they differed from ordinary contracts of employment and how they were enforced, appear (see H Sinzheimer 'Der Tarifgedanke in Deutschland' (1915) in H Sinzheimer *Arbeitsrecht und Rechtssoziologie: Gesammelte Aufsätze und Reden* O Kahn-Freund and T Ramm (eds) Vol I (1976) 150 at 157f). See also H Sinzheimer 'Die Neuordnung des Arbeitsrechts' (1919) in O Kahn-Freund and T Ramm (eds) op cit 62 at 67f. Kahn-Freund himself provides a useful overview of Sinzheimer's work and the works of inter alia Otto von Gierke which served as the basis of Sinzheimer's research: O Kahn-Freund 'Hugo Sinzheimer 1875-1945' Chapter 2 in O Kahn-Freund *Labour Law and Politics in the Weimar Republic* R Lewis and J Clark (eds) (1981) 73 at 82f. See also J Clark 'Towards a Sociology of Labour Law: An Analysis of the German Writings of Otto Kahn-Freund' Chapter 4 in Wedderburn, Lewis and Clark (eds) *Labour Law and Industrial Relations: Building on Kahn-Freund* (1983) 81 at 82f.

British labour law theory and industrial relations theory have been incapable of re-conceptualizing labour law and its role in industrial society - the concept of collective laissez faire still serves as the conceptual foundation of British labour law at the dusk of the twentieth century.<sup>3</sup>

Describing the concept collective laissez-faire as 'the theory dominant in the early post-war period', Davies and Freedland start off an impressive historical analysis of, essentially, the rise and fall of this structural principle, the origins of which they trace back no further than Otto Kahn-Freund.<sup>4</sup>

Using the conceptual machinery found and improved by his patron, Sinzheimer, Kahn-Freund finds fertile ground in the British labour law system of the 1950s:

'There is, perhaps, no major country in the world in which the law has played a less significant role in the shaping of [labour management] relations than [sic] in Great Britain and in which today the law and the legal profession have less to do with labour relations.'<sup>5</sup>

The state appeared to leave the regulation of industrial relations to the parties involved: to trade unions and employers -- the parties could autonomously create (and, for that matter, enforce) rules and structures of industrial relations:

'British industrial relations have, in the main, developed by way of *industrial autonomy*. This notion of autonomy is *fundamental* and it is . . . reflected in legislation and in administrative practice. It means that *employers and employees have formulated their own codes of conduct and devised their own machinery for enforcing them . . . within the sphere of autonomy, obligations and agreements, rights and duties are, generally speaking, not of a legal character.*'<sup>6</sup>

To this day, collective laissez faire is the dominant discourse of British labour law: the law is interpreted in order to see to what extent it has fallen from this state of grace.<sup>7</sup> In view of the absence of a British constitutional *Urtext*, which could structure a mainte-

---

<sup>3</sup> As to the rise of the concept of collective laissez faire and its gradual eclipse, see the historical analysis of W McCarthy 'The Rise and Fall of Collective Laissez Faire' *op cit* note 1 at 4f.

<sup>4</sup> P Davies and M Freedland *Labour Legislation and Public Policy: A Contemporary History* (1993) 8f.

<sup>5</sup> O Kahn-Freund 'Legal Framework' Chapter 2 in A Flanders and H Clegg (eds) *The System of Industrial Relations in Great Britain* (1954) quoted in Davies and Freedland *op cit* note 4 at 9.

<sup>6</sup> Kahn-Freund *loc cit* note 5, cited in Davies and Freedland *op cit* note 4 at 9. Emphasis added.

<sup>7</sup> From a methodological point of view, the basic texts of Kahn-Freund contributed to the empiricism which marks British industrial relations research: 'Students were to be despatched into the field like botanists, returning with over-full notebooks crammed with significant facts.' W McCarthy *op cit* note 1 at 2.

nance of<sup>8</sup> or even a return to laissez faire collective (absent) labour law, the eclipse of this structuring concept presents a significant challenge to the continued dominance of collective laissez faire as dominant discourse.

The concept of collective laissez faire relegated the law to a position of subsidiarity: the function of the law was reduced to creating a framework within which the industrial relations system could function unimpeded, this in turn necessitating over-writing (obliterating) aspects of the common law which failed to adapt sufficiently to accommodate modern industrial relations.<sup>9</sup>

Collective laissez faire was the absence of the law -- the law did not involve itself with the conduct of collective industrial relations. But the Fall (the death of collective laissez-faire) and its consequences is a return of the law; the absence becomes a presence. And this, of course, is nothing other than 'juridification'.

British legislation does not provide for institutionalized plant-level forums such as the system of works councils in Germany, nor does it provide for employee participation in management structures in terms of a co-determination concept.

#### **4.2 HANDS OFF: COLLECTIVE BARGAINING AND THE LAW**

Extensive and autonomous collective bargaining has always been the key feature of British industrial relations, and before 1968 the law paid relatively scant attention to the institution --- even the Donovan Commission felt that '[p]roperly conducted, collective bargaining is the most effective means of giving workers the right to representation in decisions affecting their working lives, a right which is or should be the prerogative of every worker in a democratic society.'<sup>10</sup> As far as the Commission was concerned, however, 'the system of multi-employer, industry-wide agreements' prevalent in the private sector 'were treated with little respect by employers who in practice bargain extensively over pay at the place of work.' Informally, plant-level bargaining was on the increase, but these informal bargaining situations were 'inflationary, strike-ridden and prevented the efficient organization of work.'<sup>11</sup>

---

<sup>8</sup> The German constitutional protection of the freedom of association in Article 9 of the Basic Law enables a maintenance of a (albeit limited) collective autonomy - the structural principle of this collective autonomy could not be done away with except in terms of a radical re-interpretation (re-writing) of the constitutional *Urtext*.

<sup>9</sup> See Davies and Freedland *op cit* note 4 at 11-12. See also chapter 12 below.

<sup>10</sup> Royal Commission on Trade Unions and Employer Associations (Donovan Commission) *Report* Cmnd 3623 (1968) par 212. The Donovan Commission appeared to be of the view that the institution of collective bargaining could accommodate worker participation (which in Germany is institutionalized in the system of works councils) in employer decision-making.

<sup>11</sup> W Brown 'Bargaining Structure and the Impact of the Law' Chapter 9 in W McCarthy (ed) *op cit* note 1 296 at 300.

In keeping with the great British tradition of collective laissez faire, the Report of the Donovan Commission did not bear fundamentally significant changes to the law on collective bargaining in its wake. Nor, as such, did the 1971 Industrial Relations Act and its replacement by the 1975 Employment Protection Act do much to change the collective bargaining landscape.<sup>12</sup> But the increasing legal intervention in the sphere of industrial relations generally represented by these Acts added momentum to a pre-existing trend towards single employer collective bargaining.<sup>13</sup>

Things changed totally in the 1980s, because the conservative government that came to power under Mrs Thatcher 'was hostile not only to industry-wide agreements but to all collective institutions in the labour market.'<sup>14</sup> Targets of the ire of the conservative government were the trade unions and their power, perceived as being one of the causes of British industrial decline. Throughout the 1980s and early 1990s, several Employment Acts found their way into the statute books which affected the power relationships between trade unions and employers.<sup>15</sup> Even so, the import of the legislation, focusing largely on the internal powers of trade unions and prescribing rules that unions had to comply with, did not establish a legislative system for the conduct of industrial relations in Great Britain.

By 1992 the system of collective bargaining had auto-transformed (brought about a change without the assistance of the law):

'With accelerating pace over the past twenty years a new pattern of largely single-employer bargaining has emerged from the remnants of once dominant industrial agreements. *Very little of this transformation can be attributed to government action and none directly to legislation.* It has been driven by the need for employers to gain tighter controls over pay and productivity within their companies. Bargaining structures are employer driven and are peculiarly immune to direct legislative intervention.'<sup>16</sup>

Governmental policy (i.e. the hands-off approach to collective bargaining) continued, and, as economic factors continued to play a role,<sup>17</sup> those in power were of the opinion that

---

<sup>12</sup> The 1971 Act did, however, provide for a statutory procedure whereby employers could formally recognise trade unions; it also contained some provisions relating to freedom of association. See Davies and Freedland *op cit* note 4 at 655.

<sup>13</sup> See Brown *op cit* note 11 at 301-2.

<sup>14</sup> Brown *loc cit* note 13. See also Davies and Freedland *op cit* note 4 at 425f.

<sup>15</sup> For an schematic overview of the changes wrought by the legislation in the period 1980-1990 see McCarthy *op cit* note 1 at 43-54.

<sup>16</sup> Brown *op cit* note 11 at 306. Emphasis added.

<sup>17</sup> See McCarthy *op cit* note 1 at 58.

'... traditional patterns of industrial relations, based on collective bargaining and collective agreements, seem increasingly inappropriate and are in decline ... [Individual workers] want the opportunity to influence, in some cases negotiate, their own terms and conditions of employment, rather than leaving them to the outcome of some distant negotiations between employers and trade unions.'<sup>18</sup>

The inescapable impression is of an informal and fragmented system of collective bargaining, usually taking the form of single employer bargaining with trade unions. There can also be no doubt that the law has not directly intervened in collective bargaining: there are no formal institutions where bargaining takes place on a regular basis, no works councils with which the employer has to meet at least once a month. Whereas the labour legislation of especially the 1980s may have had an indirect influence on bargaining practice and the change in bargaining patterns, legislation such as the German Tarifvertragsgesetz (Collective Agreements Act) in the context of British industrial relation remains inconceivable.

#### **4.3 CONFLICT RESOLUTION AND THE LAW**

Conceptually, industrial conflict resolution in Great Britain appears to be structured by the same absence of the law: relationships between employers, trade unions and their members, between employers and employees 'were felt to be so personal that interference, either by legislation or recourse to the courts, was resented as unwarranted and felt likely to be destructive of understandings painfully built up over the years.'<sup>19</sup>

Legal non-intervention did not as such concern the 1968 Donovan Commission, even though the Commission did praise efforts towards more conciliation.<sup>20</sup> The topic of increasingly institutionalized conciliation contributed no slight voice to the controversy surrounding the government's response to the Donovan Commission Report.<sup>21</sup> Although the controversy expired, 1975 saw the establishment (in the Employment Protection Act) of the tripartite Advisory, Conciliation and Arbitration Service (ACAS), the object of this body being

---

<sup>18</sup> *People, Jobs and Opportunity* Cmnd 1810 (1992) par 1.15 and 1.18, quoted in Davies and Freedland *op cit* note 4 at 656.

<sup>19</sup> J Wood 'Dispute Resolution - Conciliation, Mediation and Arbitration' Chapter 7 in W McCarthy (ed) *op cit* note 1 at 240. Similarly W Brown 'Industrial Conflict Resolution in Great Britain' Chapter 1 Part II in T Hanami and R Blanpain (eds) *Industrial Conflict Resolution in Market Economies* (1987) 103 at 107: 'Conflict resolution in Britain is typically part of a continuing and complex process of negotiation, often conducted at or close to the place of work, and whether or not the protagonists are satisfied with the outcome, they are usually equally hostile to any involvement of outsiders.'

<sup>20</sup> Donovan Commission Report par 434.

<sup>21</sup> See the Labour Government's White Paper *In Place of Strife* Cmnd 3888 at 93.

' . . . to provide conciliation and mediation as a means of avoiding and resolving disputes, to make facilities available for arbitration, to provide advisory services to industry on industrial relations and related matters and to undertake investigations as a means of promoting the improvement and extension of collective bargaining.'<sup>22</sup>

As suggested by its name, one of the functions of ACAS was to be conciliation. As regards collective conciliation, ACAS appears to have played a significant role in supporting collective bargaining: the service has 'maintained an untarnished and almost universal reputation both for independence and for professionalism of the highest quality'.<sup>23</sup>

The Central Arbitration Committee (CAC), which traces its origins back to a so-called Industrial Court of 1919, provides additional facilities for use in arbitration.<sup>24</sup> The process of arbitration of disputes appears to have enjoyed no great popularity in British industrial relations.<sup>25</sup>

Generally, third-party intervention in industrial disputes in Britain has not departed from the conceptual underpinnings of non-intervention; essentially, the activities of ACAS and the CAC are

' . . . concerned with helping to keep the peace. It has not had a reforming purpose . . . The main reason for this is the government's alleged policy of non-intervention in industrial matters - it should all be left to the parties.'<sup>26</sup>

---

<sup>22</sup> Letter from the Secretary of State to the first Chairman of ACAS, quoted in Wood *op cit* note 20 at 249. One of the motivations for the establishment of ACAS was the fact that the industrial relations players no longer felt comfortable with the state Department of Employment offering conciliation and arbitration services (at stake were perceptions of impartiality or the lack thereof). See Davies and Freedland *op cit* note 4 at 409 and also s 1(2) of the original enabling legislation (The Employment Protection Act 1975): 'The Service [ACAS] shall be charged with the general duty of promoting the improvement of industrial relations, and in particular of encouraging the extension of collective bargaining and the development and, where necessary, reform of collective bargaining machinery.'

<sup>23</sup> Wood *op cit* note 20 252. Also: 'Traditional industrial relations dispute settlement is universally recognized to have at its heart professional conciliation. ACAS cannot be praised too highly for the clear and consistent way it has demonstrated the value of this process and has maintained respect through its skill and impartiality in its use' (at 268-9).

<sup>24</sup> The functions of the CAC were set out in the 1975 Employment Protection Act: see s 3(1)(b) of that Act (in terms of which a dispute could be referred by ACAS to either an arbitrator appointed by ACAS or to the CAC). See also ss 17-19 of the Act.

<sup>25</sup> See generally Wood *op cit* note 20 at 258-62.

<sup>26</sup> S Kessler and F Bayliss *Contemporary British Industrial Relations* (1992) at 187.

# 5

## THE SYSTEM OF LABOUR LAW IN SOUTH AFRICA FIGHTING FOR FAIRNESS

---

'Die Nasionale Party is ook nie te vinde vir die beleid van sy opponente om die Nywerheidsversoeningswet van toepassing te maak op naturellewerkers, en hulle dus op 'n gelyke voet met blanke werkers te plaas nie. Afsonderlike masjinerie sal vir naturellewerkers geskep word om hulle belangte behartig. Ook sal die kleurslagboom in die nywerheid gehandhaaf word en die blanke werker se loonstandarde beskerm word teen ondermyning deur goedkoop naturellearbeid.' [The National party does not propose following the policy of its opponents, namely to make the Industrial Conciliation Act applicable to black workers and thereby to place them on equal footing with white workers. Separate machinery will be established for black workers to deal with their interests. The colour bar in industry will be maintained and the wage standards of white workers will be protected from being undermined by cheap black labour.]

-- B J Schoeman (Minister of Labour) in *Dagbreek en Sondagnuus*, 12 April 1953

'... fairness is now the overriding consideration in labour relations in South Africa ...'  
-- Fabricius AM in *Food & Allied Workers Union v Spekenham Supreme* (2) (1988) 9 ILJ 628 (IC) at 637A.

---

### 5.1 CONCEPTUAL FOUNDATIONS

Whereas the concepts of *Tarifautonomie* and its derivative, collective laissez faire, can be seen as fundamental structuring principles or dominant discourses in the labour law systems of Germany and Great Britain respectively, South African labour law, trapped in yet another British tradition (empiricism) has yet to succeed in authoritatively identifying the dominant discourse of South African labour law.

This is not the place in which to attempt such a full-scale identification. In view of the paucity of theoretical and conceptual research and writing in South Africa, an account of the dominant discourse of labour law is a daunting and virtually impossible task.

However, the single most pervasive concept in South African labour law during the 1980s and early 1990s was one of fairness. The Labour Relations Act 66 of 1995, which repealed the 1956 Act, is structured not on the basis of fairness, but rather on a framework of rights and duties.

Fairness was introduced not through commentary by a South African equivalent of Kahn-Freund; instead, the concept is statutory in origin, having found its place in the

Industrial Conciliation Act 28 of 1956 for the first time by way of an amendment in 1979 (the name of the legislation was changed to the Labour Relations Act in 1980).<sup>1</sup> The first statutory definition of an unfair labour practice was 'any labour practice which in the opinion of the industrial court is an unfair labour practice', a definition introduced in the wake of the recommendations of the Commission of Enquiry into Labour Legislation (the Wiehahn Commission).<sup>2</sup> The function of the industrial court, introduced at the same time (and an institution considered in more detail in chapter 9 below), was, according to some commentaries of the time, legislative in nature: the Government White Paper on Part 1 of the Wiehahn Commission Report envisaged that 'the Industrial Court [will] develop a body of case law which would by judicial precedent contribute to the formulating of fair employment guidelines'.<sup>3</sup> The structural function of the unfair labour practice definition changed in 1980, with the introduction of the following definition:

' "Unfair labour practice" means ---

---

<sup>1</sup> This study will concentrate largely on the legal position as it was prior to the passing of the Labour Relations Act 66 of 1995. At the time of writing in 1997, the dispute resolution functions and institutions envisaged by the new legislation has not yet produced a corpus of decisions amenable to the type of analysis done in chapter 13. It is therefore not possible to trace any judicial reaction in terms of the new legislation, as the necessary texts have yet to be written. In spite of this historical focus, many of the concerns which remain to be excavated in the course of chapter 13 below may retain some relevance even in the dispensation brought about by the Labour Relations Act 1995. Any reference to the 'Labour Relations Act' (or its abbreviation 'LRA') must be understood to be a reference to Act 28 of 1956 as amended, unless otherwise indicated.

<sup>2</sup> See *The Complete Wiehahn Report* (1982) Part 5, par 4.127. The Commission itself already indicated the vagueness of the concept of the unfair labour practice, and some of the inherent difficulties in interpretation. Referring to the concept 'fair', the Commission states: 'The use of this wide and *conveniently vague* term is of course not always fortunate, enabling as it does the adjudicator to give an *interpretation in a particular case which could be totally unrelated to logic or principle*. . . . Today's sources equate the word to others such as: equitable, equity, unbiased, reasonable, impartial, balanced, just, honest, free from irregularities, or according [sic] to the rules. It would seem that in the context of labour, the concept should be seen as relating to practices which are in line with the tenets of justice - not in the strictly legal sense but in a rather broader sense, as an expression of the natural sense of justice in the community. The task of adjudication in a particular instance would therefore be to measure the facts of the case against the yardstick of the adjudicator's subjective interpretation of what the community's sense of justice would be in a particular case. Few if any objective criteria would be available to the adjudicator.' *Wiehahn Commission Report* par 4.127.3. Emphasis added.

<sup>3</sup> White Paper on Part 1 of the Wiehahn Commission Report par 7.3 (iv). The view of the function of the industrial court as legislative was not limited to the government of the time as commentators thought along similar lines: 'When the court determines unfair labour practice disputes, it is performing a judicial function, but when it defines unfair labour practices, it is making rules. *The latter function is legislative; the court, it seems, is enacting delegated legislation.*' A Reichman and E Mureinik 'Unfair Labour Practices' (1980) 1 *Industrial Law Journal* 1 at 22. Emphasis added.

- (a) any labour practice or any change in any labour practice, other than a strike or a lock-out or any action contemplated in s 66(1), 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 jeopardized 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 effect which is similar or related to any effect mentioned in paragraph (a).'

As the unfair labour practice concept was now defined in the legislation, the industrial court lost its function of legislating; instead, the function of the court was now the determination of unfair labour practice disputes.<sup>4</sup>

A totally new (and controversial)<sup>5</sup> definition was introduced by the Labour Relations Amendment Act 83 of 1988, a definition that, apart from purporting to codify some of the guidelines developed by the industrial court acting in terms of the 1980 definition of an unfair labour practice, also brought strikes and lock-outs within the ambit of the unfair labour practice definition.<sup>6</sup>

The Labour Relations Amendment Act 9 of 1991 reintroduced what amounted to essentially the same vague and open statutory definition of an unfair labour practice:

- "Unfair labour practice" means any act or omission, other than a strike or a 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 or work security is or may be prejudiced or jeopardized thereby;

---

<sup>4</sup> See E Mureinik 'Unfair Labour Practices: Update' (1980) 1 *Industrial Law Journal* 113 at 116-7. The reference (in paragraph (a) of the statutory definition) to s 66(1) of the Labour Relations Act was removed in 1982, bringing employer victimization of employees under the ambit of the unfair labour practice jurisdiction of the industrial court.

<sup>5</sup> See P Benjamin 'Making Amends: The 1991 Labour Relations Amendment Act' (1991) 12 *Industrial Law Journal* 239.

<sup>6</sup> The complete definition is reprinted in A Rycroft and B Jordaan *A Guide to South African Labour Law* 2 ed (1992) 159-61.

- (ii) the business of any employer or class of employer is or may be unfairly affected or disrupted thereby;
- (iii) labour unrest is or may be created or promoted thereby;
- (iv) the labour relationship between employer and employee is or may be detrimentally affected thereby.'

Apart from serving as a foundation for the development of a complex and technical jurisprudence on unfair termination of employment, the concept of the unfair labour practice had also invaded the discourse of collective labour law.<sup>7</sup> Because the unfair labour practice jurisdiction of the industrial court amounted to a cause of action *sui generis* (the cause of action need, in other words, not amount to delictual liability, nor need a breach of contract be alleged for the industrial court to have jurisdiction), the concept was not only flexible and adaptable, but almost perniciously capable of pervading, of spreading into and through the institutions and system of industrial relations in South Africa. Fairness seeped through the fabric of the entire industrial relations system: even into areas, situations and relations privately arranged between the parties, even where the Labour Relations Act (the *fons et origo* of fairness) has been excluded.

## 5.2 COLLECTIVE BARGAINING

In order to ensure peace in the arena of industrial relations, the Labour Relations Act was interpreted as promoting collective bargaining:

'The principal purpose of the Act is to combat industrial unrest. . . . It is to achieve this end that it promotes collective bargaining between employers and trade unions and for this purpose provides for the establishment and registration of permanent collective bargaining fora, namely industrial councils . . . and for the establishment of ad hoc fora, namely, conciliation boards . . . provides for mediation and voluntary and compulsory arbitration of industrial disputes . . .'.<sup>8</sup>

---

<sup>7</sup> See now also s 27(1) of the Constitution Act 200 of 1993, in terms of which every person has the right not to have an unfair labour practice committed against him or her and similarly s 23(1) of the 1996 Constitution.

<sup>8</sup> *Trident Steel (Pty) Ltd v John NO & others* (1987) 8 ILJ 27 (W) at 32B-D, per Ackermann J. Even the Appellate Division of the South African Supreme Court has recognised this interpretation of the Labour Relations Act: 'The fundamental philosophy of the Act is that collective bargaining is the means preferred by the legislature for the maintenance of good labour relations and for the resolution of labour disputes.' *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 ILJ 1221 (A) at 1236J-1237A, per Goldstone JA.

This passage indicates the operation of an duality: in it the emphasis is on collective bargaining as a mechanism for the resolution of labour disputes,<sup>9</sup> while several other sections of the Labour Relations Act of 1956 clearly related to collective bargaining as a means for establishing minimum terms and conditions of employment.<sup>10</sup> Industrial councils have dotted the South African industrial relations landscape for a long time, and by 1989, one commentator could state the following:

'One must not forget that, for the larger part of their existence, industrial councils were extraordinarily undemocratic in the way that most institutions in this country are, in that they allowed for the majority of employers coupled with a minority and racially exclusive trade union grouping to set wages and working conditions for entire industries.'<sup>11</sup>

In spite of their (at times) controversial position in South African labour law generally, referral of a dispute to an industrial council having jurisdiction geographically and substantively was a procedural requirement preceding recourse to strikes, lock-outs,<sup>12</sup> or referral of an alleged unfair labour practice dispute to the industrial court.<sup>13</sup> Conciliation boards, established only in the absence of an industrial council having geographical or substantive jurisdiction over the dispute,<sup>14</sup> differed from industrial councils in that they were ad hoc, temporary bodies. In spite of this fact, they shared a conflict resolution function.<sup>15</sup> In much the same way as industrial councils, referral of a

---

<sup>9</sup> See ss 21(1)(f) and 27A LRA.

<sup>10</sup> See for example s 24(1)(a)-(z) and s 48 LRA.

<sup>11</sup> P Benjamin in 'Panel Discussion on the Role of the State in the Regulation of Industrial Agreements' in A Rycroft (ed) *The Private Regulation of Industrial Conflict: Proceedings of the Labour Law Conference 1989* (1990) 77 at 84.

<sup>12</sup> See s 65(1)(d)(i) LRA.

<sup>13</sup> See s 43(2)(a) and s 46(9)(a) and (b) LRA.

<sup>14</sup> See s 35(3)(d) LRA.

<sup>15</sup> Section 36 of the Labour Relations Act reads in part as follows: '(1)(a) A conciliation board shall endeavour to settle the dispute referred to it within 30 days from the date on which the application was lodged or within such further period or periods as may be agreed upon by the parties involved in the conciliation board.' Section 35 LRA, which contains provisions relating to the establishment of conciliation boards, reads, in part: '(1) Whenever a dispute exists in any undertaking, industry, trade or occupation in any area . . .' In terms of ss 42(1) and (2) LRA, a conciliation board ceases to exist either on settlement of the dispute, on failure to settle the dispute or on the expiry of certain time periods. In view of these legislative provisions, it is clear that 'a conciliation board has no permanent status and also no regulatory or peace-keeping function'. Rycroft & Jordaan *op cit* note 6 at 152. It therefore appears strange that the court in the *Trident Steel* decision quoted above mentions a conciliation board as a forum of collective bargaining, whereas the legislation seems to envisage these boards solely as dispute resolution mechanisms. The court in the *Trident Steel* case appears to have conflated collective bargaining and dispute resolution.

dispute to a conciliation board was a procedural prerequisite for the use of other conflict resolution mechanisms or the exercise of collective power.<sup>16</sup>

But the concept of the unfair labour practice made possible a legal invasion into collective bargaining --- in the form of the imposition of a general duty to bargain. Initially, the industrial court was of the opinion that 'negotiations should always assume a voluntary character in order to be effective'.<sup>17</sup> In essence, the concept of voluntarism (i.e. that negotiations should be entered into voluntarily by the parties and that the court should refrain from imposing a duty on trade unions and employers to enter into negotiations), signifying an absence of the law, bore distinct similarities to the German concept of *Tarifautonomie*.

The dissemination of the concept of fairness through collective labour law enabled and structured a *brisure* in the jurisprudence of the industrial court:

'I do not believe that voluntarism has any further right of existence in a system which is principally intended to combat industrial unrest. . . . In my view, and having regard to the fact that fairness is now the overriding consideration in labour relations in South Africa, it is time for the court to find firmly and unequivocally that in general terms it is unfair for an employer not to negotiate with a representative trade union.'<sup>18</sup>

Collective bargaining in South Africa took place and still takes place outside the scope of the labour legislation and the machinery established by that legislation. Due to the fact that unions representing black employees were excluded from participation in the mechanisms of the Labour Relations Act until 1979, a system of informal bargaining relationships, formalised in recognition agreements developed. Even though these recognition agreements and the relationships they formalised were concluded and conducted outside the Labour Relations Act, the concept of fairness invaded even these relationships -- after its introduction the concept of the unfair labour practice 'was harnessed in an effort to harmonize the official system with the unofficial one. The process is by no means complete'.<sup>19</sup> Departure from procedures agreed to in terms of a recognition agreement would constitute an unfair labour practice.<sup>20</sup> There is, of course, a

---

<sup>16</sup> See ss 43(2)(b), 46(9)(a) and (b) and 65(1)(d)(ii).

<sup>17</sup> *Metal and Allied Workers Union v Hart Ltd* (1985) 6 ILJ 478 (IC) at 489A, per Bulbulia AM.

<sup>18</sup> *Food and Allied Workers v Spekenham Supreme* (2) (1988) 9 ILJ 628 (IC) at 636J-637A.

<sup>19</sup> Rycroft & Jordaan *op cit* note 6 at 115.

<sup>20</sup> In *National Union of Mineworkers v Gold Fields of SA Ltd & others* (1989) 10 ILJ 86 (IC), for example, unilateral action taken by an employer who had concluded a recognition agreement was held to be an unfair labour practice. The industrial court (per Bulbulia M) relied on the duty to negotiate in good faith, noting that 'trade union recognition and the obligation to negotiate are closely linked. In principle the recognition of a trade union implies the obligation to negotiate with it, even if this is not explicitly stated in any legal text or collective agreement' (at 99J-100A). As fairness was the principle structuring the imposition of the duty to bargain, and as the duty to bargain is imported, almost to the extent of it being an implied clause to a recognition agreement, fairness has also colonised the private (contractually based)

certain irony in this: while the parties elect to formalise a bargaining relationship outside the Labour Relations Act, recourse is still had to the unfair labour practice remedies contained in that act -- an irony proving the pervasiveness of fairness.

### 5.3 THE RESOLUTION OF DISPUTES

There are a number of ways in which (collective) industrial conflict is resolved in South Africa. The exercise of collective force is the object of investigation in Part 3 of this text, and care must be taken not to pre-empt the contents of subsequent chapters.

Industrial councils had both regulatory functions and conflict resolution functions, while in the case of conciliation boards, as has been pointed out above, the functional emphasis was upon conflict resolution.<sup>21</sup>

Another dispute resolution mechanism was the industrial court, with subsequent appeals to the Supreme Court and finally to the Appellate Division of the Supreme Court. These judicial (and quasi-judicial) bodies will be discussed in some detail in chapter 9 below.

South African industrial relations does not boast an institution performing functions similar to the British Advisory, Conciliation and Arbitration Service or the mediation committees established at Land-level in German ministries of labour.<sup>22</sup>

But the Labour Relations Act did provide for both mediation and arbitration. The Minister of Manpower (now Labour) may, on application by an industrial council or on his/her own motion or after consultation with the parties to a dispute, appoint a mediator to try and settle the dispute.<sup>23</sup> Of greater importance, however, is private mediation, taking place outside the scope of the Labour Relations Act, and often under the auspices of the Independent Mediation Service of South Africa (IMSSA).<sup>24</sup> Private mediation has proved popular in South Africa:

'... I think there is probably no success story which glows quite so brightly in our labour firmament as that which has been enjoyed by the process of mediation in recent

---

(footnote continued from previous page)

relationship between employer and trade union in terms of a recognition agreement.

<sup>21</sup> See above note 14.

<sup>22</sup> This does not, however, mean that a similar institution has never been canvassed in South Africa. See Wiehahn Commission *Report* par 4.132f.

<sup>23</sup> See s 44 LRA.

<sup>24</sup> As is the case with arbitration outside the scope of the Labour Relations Act, resorting to private mediation is often linked to relationships between unions and employers being formalized in terms of recognition agreements. See Appendices B and C in A Rycroft (ed) *op cit* note 11 at 163-5, and 177-181.

years. . . . There can be no doubt that the process of private mediation would seem to lend itself to the South African labour situation in some very unique ways. Firstly, its informality is important in a community where formalities are often regarded with deep suspicion. It is also perhaps most successful because in an emotionally charged environment the downsizes of failure are small and the parties can emerge from a failure of the process, dissatisfied but seldom shattered or broken. Failure of the process also does not exclude a positive purpose having been served because in many cases the position of the parties have moved closer during mediation or at least new insights have been revealed to the parties about their respective positions - which may facilitate a subsequent face-to-face settlement. Costs are often minimal in relation to the issues in dispute and providing one is not too fussy about nominations, the process can be very speedy.<sup>25</sup>

Fairness seeped into this private mediation process, too (albeit in a negative way). In *Metal & Allied Workers Union & others v Siemens Ltd*,<sup>26</sup> a large number of employees went on an illegal strike. All but 36 of these employees were reinstated, and the trade union and the employer agreed to refer the cases of these 36 employees to mediation. Agreement could not be reached on the position of 13 employees. The industrial court was of the opinion that the employer's dismissal of the 13 employees amounted to an unfair labour practice because of the employer's failure to comply with its disciplinary code:

'Mediation proceedings per se cannot be a substitute for a disciplinary enquiry the object of which is to establish the guilt or innocence of a worker and to afford such worker a fair and adequate opportunity of stating his case either in mitigation of the charges facing him or in defence thereof. The object of the mediation exercise, on the other hand, is altogether different. . . .

It is evident that the crux of the grievance of the individual applicants is based upon the fact that they were not accorded the benefit of a disciplinary enquiry following the inability of the mediators to resolve their cases on 9 August 1985. The court, in the exercise of its discretion, intends to apply the necessary corrective action in this regard with the object of dispensing material justice in the delicate field of sound labour relations, and more so because *the respondent's disciplinary code does not sanction any form of instant dismissal without a proper investigation and a level 3 full disciplinary enquiry.*'<sup>27</sup>

The implications of this judgment appear to be that fairness (especially procedural fairness) is stronger in nature than private mediation --- that mediation cannot take the place of procedural fairness, and that the industrial court calibrates (and, where necessary, corrects) the delicate scales of fairness.

---

<sup>25</sup> G Brown 'Cheap and Expeditious Dispute Resolution' in A Rycroft (ed) *op cit* note 11, 90 at 93-4.

<sup>26</sup> (1986) 7 *ILJ* 547 (IC).

<sup>27</sup> At 557H-I and 558I-559A. Emphasis added.

Furthermore, the Labour Relations Act provides for both voluntary and compulsory arbitration. In terms of s 45 LRA, an industrial council or a conciliation board *may* refer a dispute to arbitration. Compulsory arbitration, in terms of s 46 LRA, applies to essential services, and takes place when an industrial council or conciliation board fails to settle a dispute.

Private arbitration, taking place outside the scope of the Labour Relations Act, was also popular. This private resolution of conflict was often linked to collective relationships themselves being formalised outside the Labour Relations Act in recognition agreements.<sup>28</sup>

Again, even private arbitration has been viewed through the unfair labour practice jurisdiction of the industrial court. Acting in terms of the definition of an unfair labour practice in force from 1988 to 1991 (a definition which included strikes and lock-outs), the industrial court granted an employer relief when a trade union threatened strike action in order to compel the employer to agree to voluntary arbitration.<sup>29</sup>

---

<sup>28</sup> See Appendices B, C and D in A Rycroft (ed) *The Private Regulation of Industrial Conflict* (1990) at 162-3 and 186-189.

<sup>29</sup> *BTR Dunlop Ltd v National Union of Metalworkers of SA* (1989) 10 ILJ 181 (IC).

# 6

## DISCOURSE OF ORDER (SERIES 1 PART 2) AN ANTI-PHENOMENOLOGY OF THE LABOUR JUDICIARY

### DEFINITION, DESCRIPTION, RECOGNITION AND OTHER ELEPHANTS

---

'It is sometimes said that the law is open to all -- like the Ritz Hotel. What was wanted for the new legal rights being given to workers in the 1960s and 1970s, however, was something with the accessibility of a MacDonalds [sic] hamburger bar.'

-- Linda Dickens 'Industrial Tribunals -- The People's Courts' (1985) 7 *Employee Relations* 27.

'It is largely a matter of impression.'

-- Lord Edmund-Davies in *Attorney General v British Broadcasting Corporation* [1980] 3 All E R (HL) 161 at 175j.

'When you have got an elephant by the hind leg, and he is trying to run away, it's best to let him run.'

-- Abraham Lincoln *Remark* 1865.

---

### [THIRD PARABLE: MRS PLESS AND THE ELEPHANT

One sunny afternoon, circa 4050 BC, while stalking some innocent prey, Mrs A G Pless chanced upon a particularly large animal with a trunk and two tusks. 'What,' she (being, in this account, fictional, and therefore capable of English) asked 'are you?' 'I don't know,' the creature (being, in this account, fictional, and therefore capable of English) replied, 'but if you don't get out of the way, I shall stomp you.' Mrs Pless complied with this instruction and returned to her cave-dwelling where she related the encounter to her mate. 'What,' her mate (being, in this account fictional, and therefore capable of English) asked, 'was it?' 'I don't know,' replied Mrs Pless, 'but it threatened to stomp me.' 'Oh, good grief,' said her mate, and turned away to watch the daily entertainment, consisting largely of watching several particularly large animals each with a trunk and two tusks chase prehistoric men, women, and children across the savannah. Mrs Pless returned to her cooking utensils, and thought to herself: 'I shall call it a tyger.'

Today, of course, these animals are commonly referred to as elephants.]<sup>1</sup>

If the following discourse (a discourse attached to a name and a number: 6) is to succeed in being what it is *stated* as being, namely an *anti-phenomenology*, what is it not-about, what is there to-be-against?

A phenomenology is dictionary-defined as being, in the first place, 'a description or study of appearances'.<sup>2</sup> In this sense, a phenomenology of 'the labour court' or 'the labour judiciary' would be 'a description or study' of the appearance of the labour court; it would be an investigation of the various 'appearances' of a phenomenon named 'the labour judiciary'.

But within the traditions of philosophy, 'phenomenology' refers to a movement associated with the philosophers Franz Brentano (1839-1917) and Edmund Husserl (1859-1938), a movement which

'... at first emphasized the description of human experience as directed onto objects, in the sense in which thoughts or wishes have objects, even if unreal ones. ... In Husserl the emphasis shifted away from the mere description of experience towards a description of the objects of experience, which he called phenomena. Phenomena are things which appear. He saw them in fact as *essences* which the mind *intuited*, and the task of phenomenology was to *describe* them. This, however, was not an empirical task, but an a priori one. It resembled in fact what was later called conceptual analysis, though it insisted that the *essences* were real things, *not, for example, ways in which words were used*. (We can think of unreal things like unicorns; the essence of unicorn is real). ... Husserl thought that studying essences as they were intuited involved laying aside various preconceptions derived from science; this laying aside was called *reduction, epoché* or *bracketing* the world.'<sup>3</sup>

In another, operationally similar, definition it is stated that 'Husserl insisted that it [phenomenology] was an a priori investigation of the *essences* or meanings *common* to the thought of different minds.'<sup>4</sup>

---

<sup>1</sup> Discourse of order series 3 part 2. The origin of this second parable lies in a name given to a test used to establish whether or not a contractual relationship between two persons is a contract of employment or not. Lord Wedderburn refers to the test formulated by the British courts in the following way: 'Most courts now appear to use this "elephant-test" for the employee -- an animal too difficult to define but easy to recognize when you see it' (Wedderburn *The Worker and the Law* 3 ed (1986) at 116). The concerns of this parable are a distinction between recognition and definition, the separability of definition and recognition and the intermediary nature of writing ('de-description'), as well as the stated self-authenticating processes in the process of 'recognition'. These are issues which will be pursued throughout this chapter. Also of concern will be the name, the giving of the name, and the consequences that flow from a naming or an unnaming.

<sup>2</sup> A R Lacey *A Dictionary of Philosophy* 2 ed (1986) 175.

<sup>3</sup> Lacey, *op cit* note 2 at 175-6. Emphasis added.

<sup>4</sup> A Flew *A Dictionary of Philosophy* (1979) 247-8.

For present purposes, phenomenology is not the end: it is merely a point a departure --- it therefore suffices to list some of the central moments of the phenomenological tradition. Distilled from the above-quoted layperson's dictionary definitions (which no doubt oversimplify) of a rich philosophical tradition, the concerns of phenomenology include: the **intuition** of the **essence** (what is a labour court, that without which the labour court would not be a labour court, that which makes a labour court a labour court), the **bracketing** of preconceptions, and one of the fundamental concerns of the present chapter, the '**description**'.

Should this chapter have attempted a 'phenomenological' approach, it would, conceivably, have attempted to 'describe' the 'intuited' 'essence' of the labour judiciary as an object of experience (as something that may be thought about). This chapter is anti-phenomenological in approach in that it attempts, perhaps (probably) unsuccessfully, to problematize these very issues, the self-authenticating nature of the essence which can be intuited, the thoughts common to the many minds, the virtual impossibility of the reduction . . .

## 6.1 THE DEVELOPMENT OF LABOUR JUDICIARIES

The development of the labour judiciary as a phenomenon can be explained logically. There are reasons and motivations for the establishment of a labour court --- the labour judiciary does not spring from the ever-fertile soil of human conflict without reason:

'Social institutions are *not* the *product of chance*. Their voluntary appearance or their legal establishment at a particular moment of history is a *response* to the *emergence* of *certain specific needs*. As these needs differ greatly among different countries --- as do the possibility of meeting them --- it is not surprising that social institutions throughout the world should show a very great variety.'

Yet, despite this variety, a number of social institutions have become a *necessary pattern of industrialized societies*. Among them, the various institutions for settling or helping to settle labour disputes hold a prominent place. Here again, a very wide spectrum of institutions is to be seen. Joint voluntary bodies established through collective bargaining, conciliation or mediation facilities placed at the disposal of the parties by the public authorities, courts of inquiry or fact-finding boards entrusted with the investigation of facts, arbitration commissions or boards of various kinds and, finally, those bodies which may conveniently be referred to as *industrial tribunals*, *industrial courts*, or *labour courts*.<sup>5</sup>

---

<sup>5</sup> J de Givry 'Labour Courts as Channels for the Settlement of Labour disputes: An International Review' (1968) 6 *British Journal of Industrial Relations* 346. Emphasis added. This is a canonical text -- for affirmation of the canonical status of the text see the unproblematic application in a passive text: P le Roux 'Substantive Competence of Industrial Courts' (1987) 8 *Industrial Law Journal* 183. Note also the unproblematic grouping together of 'tribunals' and 'courts'.

This lucid, auto-authenticating (it states, after all, what is seen as obvious, natural) and utterly logical passage makes a number of claims which can only be approached using the same obvious logic it itself employs (a logic to which it is oblivious).

The first claim made in this canonical text is that social institutions are 'not the *product* of chance'. There is a process of production, and this process can be reduced to a certain logic or rationality: the 'appearance' of a social institution can be situated in a logical chain.

This logical (non-arbitrary) process of production (which may take the form of voluntary appearance or legal establishment) is a *response* to the *emergence* of *certain specific needs*'. This is a conditional logic: the as yet unnamed social institution is a response to a need. There is no indication in the text as to the nature of the needs, but it is claimed that the conditional logic of the production of the social institution takes place at a certain moment --- a point in time.

The logic of production employed here is both conditional and *prepositional*. Phrased in terms of prepositional logic, the formula is simply that **IF** a specific (unnamed) need emerges (or has emerged) **THEN** the social institution is produced (in one of two forms, namely voluntary appearance or legal establishment): **NEED --> PRODUCTION**. The social institution is the **response** to the need. Additionally, a *conditional* logic is operating here, a logic closely related to prepositional logic: the import of the statement is that once certain conditions have been met, the social institution is produced.

The question is now whether the specific need is a sufficient or a necessary condition for the production of the social institution.<sup>6</sup> If the 'specific need' were a necessary condition, the social institution could not be (could not be produced) without the 'specific need'. Should the 'specific need' be a sufficient condition, the 'specific need' would itself be enough to guarantee the production of the social institution. These prepositional and conditional logical chains are reiterated ('As these needs differ greatly among different countries --- as do the possibility of meeting them --- it is not surprising that social institutions throughout the world should show a very great variety'). As needs differ, so do the responses (the production of the institution) to that need.<sup>7</sup>

---

<sup>6</sup> A necessary condition may be summarised as follows: X is a necessary condition for Y if, and only if, X cannot be without Y. A sufficient condition, in similar terms, would be: X is a sufficient condition for Y if, and only if, X is itself enough to guarantee Y. In this way, oxygen is a necessary condition for life, but oxygen itself does not guarantee life (the mere presence of oxygen does not produce life). Oxygen is therefore not a sufficient condition for life.

<sup>7</sup> This sense of variety is echoed by the variety of names (signifying a variety of 'responses' to the 'needs'): 'Joint voluntary bodies established through collective bargaining, conciliation or mediation facilities placed at the disposal of the parties by the public authorities, courts of inquiry or fact-finding boards entrusted with the investigation of facts, arbitration commissions or boards of various kinds and, finally, those bodies which may conveniently be referred to as *industrial tribunals*, *industrial courts*, or labour courts.'

The De Givry text also maintains that 'Yet, despite this variety, a number of social institutions have become a *necessary pattern* of *industrialized societies*.' The construction of this sentence depends, firstly, on its being 'despite'. It is a claim made 'in spite of' the variety (where Need X calls forth Response X and Need Y leads to the production of Y). At first blush, this would appear to be a simple generalisation following on a disclaimer (despite variety, there is something general that can be said about social institutions --- even though the generalisation is being made, the variety, or difference, is affirmed, but the variety and differences do not affect the truth claim that follows). But the construction of the sentence also hinges on 'necessary pattern' and its strange link to 'industrialized societies'. The generalisation is achieved through the use of 'pattern' --- all industrialised societies share a certain pattern, it is what they have in common.

But what is to be made of the 'necessary' and the link to 'industrialised societies'? Is it again a case of conditional and prepositional logic? A logic where a 'number' (are they countable?) of social institutions has become a necessary pattern of industrialised societies --- where the logic in prepositional terms would appear as: **IF** none of the number of social institutions are present, **THEN** there is no industrialised society? Would this mean that if none of the social institutions are present, the society could not be seen as an 'industrialised' society? In short: is it the logic of the text that the social institution (produced by specific, but unnamed, needs) is a necessary condition for an industrialised society or for speaking of an 'industrialised society'?

What would be the implications of linking the two logical structures (this relates to applying the logic of the text to the logic of the text): what are the implications of linking

*Chain 1:* need --> production of institution  
and the less clear chain

*Chain 2:* institution --> industrialised society?

Throughout these considerations, a silence is constantly present. This silence is that of the 'certain specific needs' --- the text obstinately refuses to disclose what those needs are, whether they are of an economic, social policy, or political nature.

But, should the chains of reasoning be linked, the result would be something as follows:

**IF need --> institution; IF institution --> industrialised society.**

It is clear that the need, the social institution which it produces, and the industrialised society of which it is a 'necessary' feature (or pattern) are locked in an uncomfortable

embrace of logic where both the discomfort and the embrace depend on the silence of the 'certain specific needs'.<sup>8</sup>

It is also this very silence, so central to the logic of the text, that makes it impossible to determine whether the existence of 'certain specific needs' is either a necessary condition for the production of the social institution<sup>9</sup> where the need is a *sine qua non*, a precondition for the production of the labour judiciary, or whether the need is, in itself, sufficient to account for the production of the labour judiciary. Through the silence at the fundamental point of departure, the specific needs, the text renders itself undecidable, indecipherable -- no matter how many logical operations are performed.

The above section has focused exclusively on the text, the logic of the text, and the silence which is central to the text. No attention has been paid to empirical data: the argument up to this point has been linked to the text and the logic of the text -- relying on the rules of the text and the procedures of the logic in the discourse.

The next question, then, is the 'fit' between the stated theory of the development of the labour judiciary and the empirical evidence.

The literature traditionally attributes the establishment of the German labour court system to Napoleon's conquest and colonization of the western bank of the Rhine river.<sup>10</sup> British industrial tribunals are said to descend from the munitions tribunals established during the First World War.<sup>11</sup> Needless to say, the modern system of industrial tribunals bears little or no resemblance to its precursors. The South African industrial court traces its origin back to 1924 with the passing of the Industrial Conciliation Act (itself a result of the Rand revolt in 1922), but it is only after 1979, in the wake of the sweeping changes wrought on South African labour law by the recommendations of

---

<sup>8</sup> The contentlessness of the 'certain specific needs' is related to the lack of meaning of 'a particular moment of history' --- there is no indication of when that moment (understood here in a temporal sense) took place or takes place. A particular moment of history can be anything: there may be a clock of history, but one has no means of knowing whether the particular moment of its striking has come.

<sup>9</sup> The text makes it clear that the social institutions being referred to encompass the labour judiciary: 'those bodies which may conveniently be referred to as *industrial tribunals*, *industrial courts*, or labour courts.'

<sup>10</sup> See below, 7.1.

<sup>11</sup> The war made necessary dramatic increases in production. Failure to secure production by agreement between employers, unions and the state led to the Munitions of War Act of 1915. The munitions tribunal established in terms of this Act was charged with the task of resolving disputes between employers and employees. Even though the munitions tribunals ceased operation in 1920, the idea of a specialised institution for the resolution of disputes was revived in 1964 with the passing of the Industrial Training Act. See generally G R Rubin *War, Law, and Labour: The Munitions Acts, State Regulation and the Unions* (1987), G R Rubin 'The Origins of Industrial Tribunals: Munitions Tribunals during the First World War' (1977) 6 *Industrial Law Journal (UK)* 149 and G R Rubin 'Labour Courts and the Proposals of 1917-19' (1985) 14 *Industrial Law Journal (UK)* 33.

the Wiehahn Commission, that the extremely limited functions of the court were extended and the industrial court came to play such a pivotal role in the development of modern South African labour law.<sup>12</sup>

It would be stating the obvious to say that in all three societies certain needs were present at the given time. But problems of application remain: was Napoleon's conquest of the West Bank of the Rhine a sufficient condition or a necessary condition for the establishment of the German labour court system? Would the needs of German society (no matter what these needs were) have led to an autochthonous production of a labour judiciary even without the aid of Napoleon? Can the production of the German labour court system be accounted for only in terms of a necessary condition (assuming that Napoleon's conquest is a *sine qua non* for the establishment of the German labour court system)? Was Napoleon's conquest of German territory both necessary and sufficient to produce the precursors of the German labour court system?

What were the sufficient and necessary conditions for the establishment of the British industrial tribunals system? Was the First World War a sufficient condition (its presence being itself sufficient to bring about the establishment of industrial tribunals)? Or what were the necessary conditions that had to be present before the War could act as sufficient condition? Would the necessary conditions (conceivably existing before the War) have transmogrified into sufficient conditions for the establishment of the tribunals?

Finally, can the specifically political needs of South African society at the end of the 1970s be seen as only a necessary condition for the establishment of the industrial court, or did these political needs serve as the sufficient condition for the production of a South African labour judiciary?

## **6.2 WE HOLD THESE COURTS TO BE SELF-EVIDENT (Describing the Elephant)**

The point of these convoluted considerations of conditionality and the logic of creation lies not in a self-indulgent attempt to prove that an ostensibly logical text conceals certain zones of uncertainty and undecidability. Nor is the intention to be merely aporetic and to pose questions without proferring a resolution.

The import of the discourse so forensically analysed above lies in the fact that it is the dark and silent zones of the discourse that prove to be its undoing. For the De Givry

---

<sup>12</sup> See 9.1 below.

text, even though it is implicitly offered as such,<sup>13</sup> does not present a clear account for the logical structures of the creation of the labour judiciary. It is in spite of the logicality of the text that **all claims** --- including those claims still to be made in subsequent chapters --- as to the conditional logic of social institutions (be they labour courts or other courts) must be regarded with suspicion.

There are two silences in the De Givry text: the silence of the 'certain specific needs' and the silence 'particular moment in time'. Both are without content. These silences occur at the very nodes of the logic of the text: without knowing what the 'certain specific needs' are or when the 'particular moment of history' is, the text leaves blank what **cannot** be said: the very point of origin of the labour judiciary.<sup>14</sup>

It is also these same two silences that make it possible to account for the entire order of social institutions and, by implication, for virtually the entire life-world: the labour judiciary is not the only response to, or the product of, a certain need. Nor is a labour court the only court which has its origin in a mythical 'particular moment of history'.

So, for example, the need for centralized decision-making, as well as the sheer inconvenience of tagging along in the wake of the regent, could be seen as the need which produced the permanent spatial establishment of centralised British courts.<sup>15</sup> The development of certain needs also explains the development of (ordinary civil and criminal) courts, of central legislatures, of a centralised state administration. The entire phenomenon of the modern legal system can be reduced to responses to 'certain specific needs', each need, presumably, motivating another institution (the labour judiciary as a response to labour conflict, for example, or civil courts being a response to a rise in civil claims, and criminal jurisdiction arising the moment that the state feels the need to preserve its own fabric by prosecuting its citizens).

Accounting for the establishment of the labour judiciary in terms of a causal logic (with a silence at its core) which also accounts for the establishment of other social institutions means that this causal logic hardly distinguishes between labour courts and other courts<sup>16</sup> --- a distinction that, according to the literature, appears to be desirable:

---

<sup>13</sup> This is clear from the title: '**Labour Courts** as Channels for the Settlement of Labour Disputes'. Emphasis added. The implication of this title is that, even though some general remarks are made at the very beginning, the social institution which forms the focus of the text under consideration is the labour court or the labour judiciary.

<sup>14</sup> It is, of course, very tempting to dismiss the 'problem' as one of historical research: the way out would then be to thoroughly investigate the historical data in order to determine which needs directly or indirectly gave rise to the labour judiciary, and at what point in time. This, to an extent, is the aim of the subsequent chapters.

<sup>15</sup> See below, chapter 8.

<sup>16</sup> This is not a claim made by the De Givry text itself. The excerpt of the De Givry text analysed above is, in terms of its generality, offered as a causal model for not only the labour court, but for all social institutions.

'In the traditional morphology of procedures for the settlement of labour disputes adjudication is distinguished from arbitration *but one searches in vain for a clear modern account of the features of labour courts which differentiate them from ordinary courts.* In this context, by "ordinary" courts I mean those which exercise general jurisdiction in civil disputes under a particular legal system.'<sup>17</sup>

The concerns of this passage are those of description. The futile search (it is stated as such --- it is in vain) is for an 'account' --- therefore a search for a reckoning, enumeration, a computation, list, statement (also of things bought and sold), an explanatory statement of particulars or of facts or of events, narrative, relation, or, finally, **description**.<sup>18</sup> The passage also indicates a failure to find a description of the labour court, a description that would clearly set apart (distinguish) the labour court from the ordinary courts (the description of which could be restated to read: 'An ordinary court is a court which exercises general jurisdiction in civil disputes under a particular legal system').

The text from which the above passage has been taken discusses the policy and appropriateness of introducing a system of 'labour courts' in Great Britain. In order to introduce something, however, the assumption of this text is that one has to know what it is that is going to be introduced.<sup>19</sup>

But in true phenomenological spirit, the essence of 'the labour court' or 'the labour judiciary' is, in a text of comparative labour law, easy to intuit:

'Although the organisation, jurisdiction, composition, and procedures of labour disputes-settlement mechanisms vary widely in minor details throughout the world, they can be subsumed under a relatively few systems of disputes settlement: labour courts; industrial tribunals; administrative agencies; organs of arbitration; and ordinary courts. Each has been developed to a relatively advanced degree in one or more countries. *The distinction between ordinary courts and labour courts is, of course, self-evident.* The distinction between labour courts and organs of arbitration is more complex.'<sup>20</sup>

---

<sup>17</sup> B Hepple 'Labour Courts: Some Comparative Perspectives' (1988) 41 *Current Legal Problems* 169 at 171. Emphasis added.

<sup>18</sup> This account of the term 'account' is based on the entry in the Webster's dictionary.

<sup>19</sup> 'An argument for labour courts must, therefore, define an appropriate species. After all, if you want to adopt a dog and would like to have a Corgi, you do not want to end up with a Rotweiler.' Lord Wedderburn of Charlton 'The Social Charter in Britain - Labour Law and Labour Courts' (1991) 54 *Modern Law Review* 1 at 27.

<sup>20</sup> B Aaron 'Settlement of Disputes over Rights' Chapter 16 in R Blanpain (ed) *Comparative Labour Law and Industrial Relations* 3 ed (1987) 337.

Here the labour court has been made into an elephant: an animal that the discourse of comparative labour law assumes will be recognizable, thereby un-writing all the conceptual difficulties.<sup>21</sup>

This passage deserves more detailed attention, for apart from presenting the description (definition, in the sense of differentiating) of the labour court as self-authenticating and as axiomatic as an elephant (the essence is easy to intuit), the passage also seems to draw a distinction between 'labour courts' and 'industrial tribunals'. Were one in the position to enter into a dialogue with this text, and if one were to ask what the difference is between the 'labour court' and an 'industrial tribunal', the text may reply that the distinction is self-evident.

The implications of this passage are that the 'search', the concern of the first-quoted passage is not vain (as that passage explicitly admits), but it is entirely superfluous, for the 'account' (or description) through which the labour court is to be identified or distinguished from the ordinary court, is 'self-evident'. The essence of the labour judiciary, as such, can be intuited.

Yet another text, with the imperturbability of a fully-rigged ship with a steady wind astern, contains an actual description of a 'labour court':

'The term "Labour Court" *has* been widely used to describe separate and "independent" forms of jurisdiction which interpret and enforce aspects of labour law that would otherwise be decided within the existing legal system. Those who desire to establish or extend this alternative type of jurisdiction wish it to take a non-conventional form -- usually "tripartism" in which legally qualified chairpersons sit alongside "lay-members" drawn from both sides of industry.'<sup>22</sup>

The most striking aspect of this passage, on a first reading, is its own absence. Through the use of the passive voice, the text is saying that 'other persons' (not footnoted) **have already, at some past moment** used the term 'labour court' to mean (when restated) a separate and 'independent'<sup>23</sup> form of jurisdiction which interprets and enforces aspects of labour law (one is not told what labour law is; it is assumed that one knows this,

---

<sup>21</sup> 'But what is a labour court? . . . Although there is some descriptive literature about them, these questions have been less discussed. *A labour court is largely what you make it.*' Lord Wedderburn *op cit* note 19 at 26.

<sup>22</sup> W McCarthy 'The case for labour courts' (1990) 21 *Industrial Relations Journal* 98.

<sup>23</sup> The use of the quotation marks is vital, for the quotation marks would, in this case, not refer to reported speech, but to the fact that the text attempts to indicate that which is other than 'independent' --- so-called independent? quasi-independent? Is the text really trying to indicate that labour courts are the exact opposite of independent --- that they depend on, and are part of a legal system. By implication, it would appear as if the word 'separate' should also appear in quotation marks.

perhaps that dealing with the elephant of the 'Labour Court' -- note the reported speech and the capitalization -- should not be confused by trying to deal with an elephant as easily recognizable as Labour Law at the same time).

But then the text proceeds to undermine the very foundation it purports to posit, as it admits that were there no labour court, these issues would not go undecided. If there is no labour court, the issues would simply be decided by another court.<sup>24</sup>

How do these texts throw light on the phenomenon of the labour judiciary? For here again are essential moments: the labour court is 'independent' and 'separate'. This court then stands outside the legal system. Could it be that at least one of 'certain specific needs' mentioned above relates to the need for 'being separate' or 'being "independent"'? Is it through these constructions that the labour judiciary becomes obvious, 'self-evident'?

It is also important to note that the labour judiciary is not, strictly, necessary at all, for the disputes which are resolved in a labour court would, in the absence of this institution, be resolved elsewhere. This could mean that the phenomenon of the labour judiciary is not a logical consequent of a need (a need such as having industrial conflicts resolved), but that the labour judiciary is merely **contingent**, it is something that may or may not occur; the creation of the labour judiciary is fortuitous, it occurs by chance. This would in turn imply that the creation of the labour judiciary cannot be reduced to a (prepositional and conditional) logic of causation, but that the appearance of the phenomenon is not **logically** necessary -- other institutions would, in the absence of the labour court, perform the function.

The present position may be summarized as follows: The Labour Court is a phenomenon whose existence cannot adequately be accounted for by historical determinism based upon stated logical chains; the Labour Court may be distinguished from the ordinary civil courts by the fact that it is unconventional or non-conventional,<sup>25</sup> but the existence (establishment) of the Labour Court is contingent. In spite of an initial claim that social institutions (of which the labour judiciary is but one) is not produced by chance, a definition of the institution in question renders that very production contingent, the result of operations of chance.

How is it then, that the phenomenon of the Labour Court is so self-evident, intuitively recognizable as an elephant, if one is neither in a position to say with any certainty how and when the Labour Court comes into being (*de facto*), and in no position to explain

---

<sup>24</sup> In Italy, labour disputes are processed through the ordinary civil courts. This is because article 102 of the Constitution forbids special courts. See Hepple *op cit* note 17 at 192.

<sup>25</sup> The 'convention' here refers to the ordinary civil courts -- it is by referring to the archetype of the ordinary civil courts that a normative distinction such as 'conventional' and 'unconventional' can be drawn.

de jure the necessity (except as a matter of convenience) of the existence of the Labour Court as a separate jurisdiction?

### 6.3 BEFORE THE LAW: KAFKA, DERRIDA, AND AT LEAST TWO NON-COURTS (no elephants allowed)

One potential route out of the impasse presented above could be to argue that the labour judiciary is characterised by the fact that (in terms of the definition quoted above) it is set apart from the ordinary civil courts: the labour judiciary appears as (intuitively) separate and 'independent' institutions which decides certain matters; they take a 'non-conventional' form.

The labour court is not a 'court' as we normally regard a 'court', labour courts have the uncomfortable status of being a 'non-court'. The implication of this argument would be that it is possible to distinguish between that which is a 'court' in the received sense of the term, and that which is 'not a court'.

In Kafka's short narration, entitled *Before the Law*,<sup>26</sup> a countryman approaches the temple of the Law and seeks admittance. He is refused. In circling the Kafka text, Derrida asks the following:

'It is . . . not as narrative that we define *Before the Law* as a literary phenomenon, nor is it as fictional, allegorical, mythical, symbolic, parabolic narrative, and so on. There are fictions, allegories, myths, symbols, or parables that are not specifically literary. What then decides that *Before the Law* belongs to what we think we understand under the name of literature? And who decides? Who judges? . . . The double question, then, would be as follows: "Who decides, who judges, and according to what criteria, that this relation belongs to literature?" . . .

I shall say without further delay that I cannot give nor am I withholding an answer to such a question.'<sup>27</sup>

Similar questions arise in gazing upon the phenomenon of the labour judiciary, questions that relate pertinently to the 'conventional' / 'unconventional' divide identified earlier, questions vexingly made difficult by the persistence of the name. In two situations, a 'court' has had occasion to decide whether or not another institution is in fact a 'court'. Consider an institution requesting entrance to the Law, entrance to the status of 'court': before the Law stands a doorkeeper. To this doorkeeper there comes an institution and prays for admittance to the Law. How is this institution to be received? According to what criteria would an institution be refused entry into the shrine of the Law?

---

<sup>26</sup> Quoted in full above Chapter 1 note 44.

<sup>27</sup> J Derrida, 'Before the Law' in J Derrida *Acts of Literature* (ed D Attridge) (1992) 181 at 186-7.

In *Attorney-General v British Broadcasting Corporation*,<sup>28</sup> the status of a local tax-valuation court was at issue. The BBC planned to broadcast a television programme critical of a certain religious sect, including the fact that the sect was not exempt from liability for their municipal taxes because the exclusivity of the sect meant that the meetings rooms were not places of religious worship. Proceedings were scheduled at a local rates valuation court (the sect had applied for exemption).

The House of Lords had to decide whether or not the valuation court was a 'court' for the BBC to be held in contempt of court by broadcasting the programme.

What makes this decision of the House of Lords interesting and relevant are the procedures by which the House of Lords had to answer a relative of Derrida's question: 'What is a court, and according to which criteria is an institution a court?'<sup>29</sup>

In charting the question of what makes a court a court (the House of Lords did not share Derrida's trepidation in finding and presenting an answer), one Law Lord foundered upon the rocky conceptual shore of the name: the 'court' and the 'tribunal':

'There is a wide variety of courts; so there is of tribunals as the long list in the appendix to the report of the Council on Tribunals for 1978-79 shows. While every court is a tribunal, the converse is not true. There are many tribunals which are not courts despite the fact that they are charged with dealing with certain matters and have features in common with courts. A distinction is drawn in this country between tribunals which are courts and those which are not. . . . Generally I would say that just because a tribunal has features resembling those of a court it should not be held to be a court.'<sup>30</sup>

The name keeps getting in the way, however: the local valuation courts were included in the Tribunals and Inquiries Act 1971 (the only court included in the list).<sup>31</sup> At this

---

<sup>28</sup> [1980] 3 All ER (HL) 161.

<sup>29</sup> Another pertinent question here would be, of course, the question of "Who judges?". For in essence, a court has to decide whether something else is a court. In other words, the subject has to determine whether or not something is of-itself, it has to determine itself, the extent and scope of itself, and, the nature of legal reasoning being what it is, the court making the pronunciation will have to explain the reasoning (the archival discourses) which structures the decision that a certain institution is of-itself (a court) or not of-itself (a non-court).

<sup>30</sup> Per Viscount Dilhorne at 166c-e. Emphasis added.

<sup>31</sup> The importance of the name is illustrated by the following passage: ' . . . the inclusion of the local valuation courts in the list does not in my opinion suffice to establish that an Act stating that courts are to be constituted can properly be interpreted as creating something which is not a court.' (at 166h of the judgment). This means that the status of a legal institution would depend on the legislative language used: if the legislature uses the term 'court', the institution is, without more ado, a court. The fact that a 'court' has been included in a list of 'tribunals' does not affect the status of that court, the legal institution does not lose its court-status by virtue of the context within which its name appears. The fact that the local valuation 'courts' are included in the list contained in the Tribunals and Inquiries Act can be, and is, explained away (' . . . the more likely explanation is that Parliament thought them to be courts of such a character (and as I have said, all courts are tribunals) as to make it desirable that they should be subject to the supervision of the council' (at 166g). Perhaps some of the problems lie in the fact that the House of Lords is here using the word 'court' in a narrow sense, and the word 'tribunal' in a much wider sense,

point in the judgment, then, the House of Lords places reliance upon what proves to be a dangerous distinction between a 'court' and a 'tribunal',<sup>32</sup> even though there is no clear dividing line between the two names --- as the House of Lords establishes.<sup>33</sup> The House of Lords is then forced to rely on a species of elephant test:

'At the end of the day it has unfortunately to be said that there emerges no sure guide, no unmistakable hallmark by which a "court" or "inferior court" may unerringly be identified. *It is largely a matter of impression.*'<sup>34</sup>

Here the concept of 'court' has become an elephant, something that is easy enough to recognise, but impossible to describe, to give an account of. Whether or not a given institution is accorded the status of a 'conventional' 'court' is a matter of impression; the status of the institution is to be intuited. The phenomenon of the labour court leaves with the person gazing upon it an 'impression', there are traces left by the phenomenon in the process of investigation.

What is then to be made of the 'conventional' / 'unconventional' divide discussed above (where the labour court is seen to be the 'unconventional'), for now that which is the convention, that which is the norm (the conventional court) cannot be established, it cannot be described (written), but it is, somehow, recognisable. Is it knowable through intuition only?<sup>35</sup>

---

(footnote continued from previous page)

a sense wide enough to refer almost to an archetype, where the term 'tribunal' is used in its dictionary sense of 'a place of judgment' (encompassing all courts and other institutions of judgments), and not in its technical sense (as being one of the institutions listed in the legislation, for example). This would be the only way to make sense of this part of the judgment; all courts are tribunals (in a wide and archetypal sense, they belong to a species of institutions of judgments or tribunals), while not all tribunals (here used in a narrow and technical sense) are courts (even though they may pertain to the same 'species', namely institutions of judgment). The name serves different purposes.

<sup>32</sup> The *Oxford English Dictionary* defines a 'tribunal' as being 'a court of justice', 'a seat or bench for the judges', or a 'place of judgment'.

<sup>33</sup> See at 172j-175h of the judgment (per Lord Edmund-Davies). Here the court painstakingly works through a number of tests which have been proposed to distinguish between courts and tribunals, only to remark: 'It is comparatively easy to identify and discard those tests which are *not* sure guides to the true meanings of "court" . . .' (at 172j). Emphasis in original.

<sup>34</sup> At 175j (per Lord Edmund-Davies). Emphasis added.

<sup>35</sup> It is interesting to note the dynamics of intuition: the phenomenon leaves an 'impression' (but only once all false guides and paradigms have been bracketed) upon that which perceives it. The process is marked by a certain passivity -- in normal conversation one would say that 'she *left* the impression' or 'he *gave*' or 'it *made*' a certain impression. It is the object under investigation that **produces** the impression: this impression is a trace (the *presence* of an absence) of the phenomenon. The word impression contains all the essential moments of the process of judging: an impression is not only 'a notion or belief (esp. a *vague* or *mistaken* one)', but it is also an 'imitation' (see the definition of 'impression' in the *Oxford English Dictionary*). The phenomenon being judged cannot *itself* be judged -- it is only the 'imita-

The Appellate Division of the Supreme Court of South Africa, in *SA Technical Officials' Association v President of the Industrial Court & Others*<sup>36</sup> also refused the South African industrial court the status of a court, in spite of the fact that the legislation as it was at the time of the decision explicitly clothed the industrial court with the powers of a court:

'The functions of the industrial court shall be . . . 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 provisions of the laws administered by the Department of Manpower Utilization.'<sup>37</sup>

In coming to the conclusion that the industrial court is not, in spite of its name, a court, the Appellate Division structured its 'impression' on a variety of factors, including the close relationship between the executive (the Minister of Manpower as the Minister was called at the time)<sup>38</sup> and the qualifications and experience of the persons serving on the industrial court.<sup>39</sup> The judicial nature of the proceedings before the industrial court were not regarded as a relevant factor -- the Appellate Division disregarded the function performed by the industrial court, stating it to be irrelevant:

'. . . [the function exercised by the court does not] justify the further conclusion that the industrial court, when it makes such a determination, *does not sit as a court of law at all*, even when it discharges functions of a judicial nature. . .'<sup>40</sup>

---

(footnote continued from previous page)

tion' (the trace) of the phenomenon that leads to a decision, to a judgment, to a finding that the phenomenon under investigation is a non-court. The phenomenon eludes the decision; judgment is delivered on the trail of an absence.

<sup>36</sup> (1985) 6 *ILJ* 186 (A).

<sup>37</sup> Section 17(11)(a) (since repealed) of the Labour Relations Act 28 of 1956.

<sup>38</sup> See at 191G-I and 192C.

<sup>39</sup> See at 191E-G of the judgment. It has to be borne in mind, however, that the officials of the industrial court, including the President and the Deputy-President were appointed to their position 'by reason of their knowledge of the law' (section 17(1)(b) of the Labour Relations Act 38 of 1956) and additional members of the industrial court were 'any person who has knowledge of the law' (section 17(1)(bA) of the Labour Relations Act 28 of 1956) -- the presiding officers were de jure required to have a legal background; de facto all the presiding officers (including the additional members) were legally trained.

<sup>40</sup> At 192F. Emphasis added.

In *Consolidated Frame Cotton Corporation v President of the Industrial Court and Others*<sup>41</sup> the industrial court is accorded the status of a *quasi-judicial* body. From this point on, it was accepted that the industrial court was not a court of law at all, but merely an administrative body with *quasi-judicial* functions.

In this decision the South African Appellate Division was not formulating a test of general validity for the purposes of distinguishing between courts and non-courts; the Appellate Division (a court) was simply processing a number of factors in order to gain an impression of the institution appearing before it, in order to base its decision upon the impression so gained. Much as the House of Lords processed various factors and tests (only to have to reject them), the Appellate Division processed the features of the institution standing before it and seeking entrance into the Law.

At this point it is clear that there is no generally valid test in either South African law or in English law for distinguishing between what is a court and what is not a court.<sup>42</sup> Through what strange lens do the doorkeepers of the Law gaze upon that which seeks admittance to the law, and decide that what stands before them deserves no admittance? What determines the 'impression' upon which hinges the status of court or non-court? Ultimately, this gaze is determined by that which lies beyond the law, namely law of the law, that which makes law of the law. The present operations of the law are characterised by the reluctance of the law to appear, the operations take place in silence, this silence making possible the being-law:

'What remains concealed and invisible in each law is thus presumably the law itself, that which makes laws of these laws, the being-law of these laws. The question and the quest are ineluctable, rendering irresistible the journey toward the place and the origin of the law. *The law yields by withholding itself, without imparting its provenance and its site.* This silence and discontinuity constitute the phenomenon of the law.'<sup>43</sup>

The distinction between that which is a court and that which is not a court, then, is yielded through invisible and intangible operations which take place behind the walls of the funhouse, impressions of which the provenance and actual site are withheld.

Making a distinction between that which is a 'court' and that which is a 'non-court' is an act of naming. While one social institution may be accorded the name of 'court',

---

<sup>41</sup> 1986 (3) SA 786 (A) at 799C. See also *Medupe & others v Golden Spur* (1987) 8 ILJ 376 (IC) at 378A.

<sup>42</sup> This problem does not arise in German law, by virtue of the fact that courts (the highest Federal courts) are exhaustively enumerated in the Basic Law: 'For the purposes of ordinary, administrative, fiscal, labour, and social jurisdiction, the Federation shall establish as highest courts of justice the Federal Court of Justice, the Federal Administrative Court, the Federal Fiscal Court, the Federal Labour Court, and the Federal Social Court.' Art 95(1) of the Basic Law.

<sup>43</sup> Derrida *op cit* note 27 at 192. Emphasis added.

that very name is denied another. This act of naming has profound power-implications: on the name hinges various powers (for example, the power related to contempt of 'court') or the denial of powers. The name also makes it possible to situate that-which-is-named within a system and an epistemic structure: it is in terms of the name that the named object is known and related to other structures. It is the name that is iterable, it is that by which the named phenomenon is known --- even though that very act of naming is performed in terms of a withholding, in terms of a silence . . .

#### 6.4 ELEPHANTINE EXPECTATIONS

It may not be possible to say what the labour judiciary is. It may also not be possible to give an account (a description) of the origins of the labour judiciary. Nor is it possible to trap the processes by which a labour judiciary, 'unconventional' in nature, is distinguished from a 'conventional' court, for it is not possible to identify the processes whereby that-which-is-a-court is distinguished from that-which-is-not-a-court.

It is, however, entirely possible to say what is expected of the labour judiciary. But the status as 'expectation' is important, for the fact that a labour court fails to meet an expectation does not render it a non-labour court. Nor do these expectations amount to a normative paradigm: they do not contain a list with which the labour court must comply in order to function properly. The proper function of the labour court may amount to a disappointment of the expectations attached to that institution.

The two main expectations accompanying the labour court are that the **procedures** before the labour court will be speedy and cheaper, and that the applicant, when appearing before a labour court, will know that those persons he or she is facing have some **expertise** in the field of labour law and industrial relations.

##### 6.4.1 Cheap, quick, no fuss, no lawyers

'There can be no doubt that *one of the principal motives* for setting up special courts to deal with labour matters has been the *belief* that these will be more accessible, informal, cheap and expeditious than ordinary courts.'<sup>44</sup>

In spite of the fact that the labour court may not be a court of law in status, such a court will, however, have to apply the law (the labour court has this feature in common with ordinary civil courts),<sup>45</sup> and the law so applied may be technical and complex. Referring to the task facing British industrial relations, it has been remarked that there

---

<sup>44</sup> Hepple *op cit* note 17 at 177. Emphasis added.

<sup>45</sup> See Hepple *op cit* note 17 at 171-173.

is an assumption that the legislation to be applied in the tribunals 'consists of straightforward provisions whose application can safely be left to the tribunals employing their own robust common sense'.<sup>46</sup> This is not the case:

'Although this description of the legislation would suggest that Parliament has made every effort to reduce legal technicalities to a minimum, it is notable that the courts have repeatedly remarked that these enactments often exhibit the opposite qualities. . . . [I]f many of those who today accuse the tribunals of undue "legalism" are influenced by the *belief* that industrial law is fundamentally layman's law, much of their criticism is mistaken for it is founded upon a misapprehension about the nature of language, about the nature of lawyers and about the nature of litigants.'<sup>47</sup>

Proceedings before the labour court may become just as bogged down in legal detail and argument, procedural niceties and delays, as proceedings before an ordinary court,<sup>48</sup> and sooner or later a point is reached where 'labour courts differ in procedural respects from ordinary courts only in degree rather than in kind'.<sup>49</sup> Some persist in seeing a difference in procedure, efficiency, and informality as a decisive factor,<sup>50</sup> but

'. . . although the establishment of labour courts may provide the occasion for an improvement in judicial proceedings there is nothing inherent in specialisation which leads to this improvement. One has but to read the current consultation papers in the Lord Chancellor's Civil Justice Review to see that an inquisitorial, informal, speedy and efficient system can be proposed within the context of the ordinary courts.'<sup>51</sup>

The charge of legalism may be linked to the fact that the judgments of labour courts (including the British industrial tribunals) are reported, leading to the gradual accumulation of precedents.<sup>52</sup>

---

<sup>46</sup> R Munday 'Tribunal Lore: Legalism and the Industrial Tribunals' (1981) 10 *Industrial Law Journal (UK)* 146 at 147.

<sup>47</sup> Munday *op cit* note 46 at 148, 149. Emphasis added.

<sup>48</sup> Contributing factors in the rise of legalism is identified by Munday as being the increased involvement of legal personnel and litigants and the increase in the volume of reported cases.

<sup>49</sup> Hepple *op cit* note 17 at 177.

<sup>50</sup> 'There is no place for "legalism" in Industrial Tribunals. All those involved working in these tribunals must be on their guard to prevent it. "Legalism" properly so called, is contrary to the principles on which Industrial Tribunals were set up. *There may be a place for it in a court of law but, especially in this respect, Industrial Tribunals are to be distinguished from courts of law. . . . To conduct . . . a hearing according to the dictates of strict law may be inappropriate.*' His Honour Judge McKee 'Legalism in Industrial Tribunals' (1986) 15 *Industrial Law Journal (UK)* 110. Emphasis added.

<sup>51</sup> Hepple *op cit* note 17 at 178.

<sup>52</sup> See Munday *op cit* note 46 at 154-158.

In spite of efficiency and informality being some of the motivations for the establishment of labour courts, these advantages soon give way to time-consuming, technical, and formal proceedings, in fact, proceedings much like those before the ordinary civil courts.

#### **6.4.2      Expecting experienced experts**

'Apart from their procedures, the other main justification for specialist industrial tribunals is their expertise in industrial relations and the handling of employee grievances. This is supposed to follow from their unique constitution. The legally-qualified chairman may be outvoted on questions of law and fact by the two industrial members who are appointed because of their knowledge and practical experience.'<sup>53</sup>

The expectation here is that labour matters are to be heard by persons who have not merely a knowledge of the law, but also have experience in industrial relations. The dispute before the tribunal (used here in the wide sense) can then be evaluated from various perspectives, not only the legal perspective. Usually this is associated with tripartism, where a legally qualified chairperson is assisted by persons who have little or no knowledge of the law, but practical experience.

Depending on the composition of the tribunal, however, it may in some jurisdictions happen that 'a school teacher and the director of an engineering company may sit on a case about the dismissal of a farm labourer, shop assistant or construction worker'.<sup>54</sup> But considerations of expertise do not serve to explain why a labour court, 'independent' from the ordinary civil court, comes into being: 'Why, then, have some countries chosen to develop such expertise and specialisation in special courts while others have been content to leave this to ordinary courts.'<sup>55</sup>

---

<sup>53</sup> *Industrial Tribunals* (1987) at 45.

<sup>54</sup> Hepple *op cit* note 17 at 183.

<sup>55</sup> Hepple *op cit* note 17 at 179.

#### **6.4.3 A normative paradigm for the functioning of the labour court**

The principles of expeditiousness and the availability of expertise amount, however, merely to two themes of a set of rules that determine whether or not a labour court is functioning properly:<sup>56</sup>

- (1) Labour Courts should be established on a permanent basis and should be completely independent of the executive authorities.<sup>57</sup>
- (2) Labour judges should be selected from persons who have special experience and knowledge of labour questions.<sup>58</sup>
- (3) Labour courts should be exclusively competent to take cognizance of *disputes* relating to the interpretation or application of individual labour *contracts*, collective agreements and social legislation.<sup>59</sup>
- (4) Labour courts should seek the *settlement* of labour disputes of a legal character by agreement or conciliation of the parties before judicial awards or decisions are rendered.<sup>60</sup>
- (5) The formalities of labour court procedure should be simplified to a maximum degree and all possible measures should be taken to expedite the *procedure* as far as possible.<sup>61</sup>
- (6) The services of the labour court should be available to the parties concerned free of charge.<sup>62</sup>

---

<sup>56</sup> 'Without entering into too many details I should like now to stress a few principles which appear to be of particular significance for *the proper functioning of labour courts*.' De Givry *op cit* note 5 at 371.

<sup>57</sup> De Givry *op cit* note 5 at 371. See also the Resolution adopted by the Fourth Conference of American States Members of the ILO in 1949, article 3.

<sup>58</sup> De Givry *op cit* note 5 at 372, Resolution *cit* note 57 article 8. Emphasis added.

<sup>59</sup> De Givry *op cit* note 5 at 372, Resolution *cit* note 57 article 10. Emphasis added.

<sup>60</sup> De Givry *op cit* note 5 at 373, Resolution *cit* note 57 article 12. Emphasis added.

<sup>61</sup> De Givry *op cit* note 5 at 373. Emphasis added.

<sup>62</sup> De Givry *op cit* note 5 at 373, Resolution *cit* note 57 article 17.

- (7) Workers should enjoy adequate legal protection against any act of discrimination in respect of their employment likely to prevent them from having recourse to the labour courts, from giving evidence as *witnesses* or experts or, in the relevant cases, from acting as members of labour courts.<sup>63</sup>

#### **6.4.4      The disappointment of categorical expectations**

What is one to make of this set of normative first principles? Certainly a potential project of comparative labour law could be to evaluate various actual labour courts and other institutions of judgment against these ideals, and determine the extent to which these ideals are realised in practice.

Certainly none of these ideals, taken either individually or even collectively, serves to distinguish the labour judiciary from other institutions of judgment: the South African Appellate Division, for example, regarded the potential link between the industrial court and the executive branch of government as a relevant factor in coming to the conclusion that the industrial court was not a court -- implying that independence in respect of the executive is a key feature of **all courts**. It is also possible to think of other specialised courts, such as the Federal Social Court and the Federal Fiscal Court established in terms of the German Basic Law -- implying that specialisation is not the province of the labour court only.

Read together, however, this ideal of a labour court is significant in one respect only: the expectations attached to the phenomenon of the labour court.

These expectations show that, in the institution of the labour court, an island of user-friendliness and efficiency is expected -- the labour court is intended to 'fence-in' an area of layperson's law, where the law is easy to find, easy to understand, and even easier to apply. The language to be used is to be the language spoken, if not on the street, then at least a language understood by the (unrepresented?) applicant.

Labour courts are meant to be 'people's courts' -- not courts for lawyers, nor for complex litigation and the application of detailed legislative provisions. In terms of these expectations, almost any worker, after having been pointed in the right direction, and without incurring any great cost, can take his/her case to an institution where he or she will be able to tell experts (who in turn will provide the necessary guidance) his/her story.<sup>64</sup>

---

<sup>63</sup> De Givry *op cit* note 5 at 373, Resolution *cit* note 57 article 21.

<sup>64</sup> This expectation explains an interesting side-phenomenon in British industrial relations, namely the plethora of do-it-yourself guides to the industrial tribunals, including, for instance, J McIlroy *Industrial Tribunals -- How to Take a Case, How to Win It* (1983) and B Egan *The Industrial Tribunals Handbook -- Fighting your case at the Industrial Tribunals* (1978).

But there is also an expectation that, after having told the story, the applicant will be allowed into the temple of the Law, that the applicant will receive recompense (where appropriate), and that, in the end, Justice will be served.

The problematic is complex, for there are a number of 'contradictory tendencies' that demand reconciliation: the labour courts must --

'... both administer a clear set of rules and maintain a high measure of flexibility in their decisions so that justice in individual cases prevails over mere consistency.'<sup>65</sup>

The Justice sought in the labour court is a strange goddess indeed, for not only must she be willing to sacrifice her rites, her procedures, her way of doing things, but she must also be prepared to change her mind at short notice, or she may even be required to forget that which was done the day before, as the clear set of rules are prevailed over by other considerations, good practice, sound industrial relations.

At this point, it may be argued that Lady Justice may well have to change her colours if labour law is to become 'autonomous';<sup>66</sup> if labour law is freed from the contract of service, Justice may be chain-ganged into thinking along different lines altogether.

This tension between user-friendly and 'layperson's law' on the one hand and 'prevailing justice' on the other hand signals a return to a central dilemma, a dilemma which up till now bore the name 'court' and 'non-court'.

#### **Structure 1 'Court' 'Justice' 'Law'**

Under this discursive structure, all the elements within the zone circumscribed by 'court' 'justice' and 'law' can be grouped.

If we return to the ideals outlined above, it is noticeable how legal and proto-legal terminology pervades the discourse:

- the labour judiciary is to 'settle' disputes;
- by paying regard to (*inter alia*) the contract of employment;
- the labour court is presided over by a 'judge';
- there are set (and presumably rigid) 'procedures';
- there is to be independence from the executive (a typical concern relating to the law and the concept 'court' as the South African Appellate Division has pointed out);
- there may be 'witnesses'.

---

<sup>65</sup> Munday, *op cit* note 46 at 146.

<sup>66</sup> See, for example, Wedderburn 'Labour Law Now -- A Hold and a Nudge' (1984) 13 *Industrial Law Journal (UK)* 73, Wedderburn 'Labour Law: From Here to Autonomy?' (1987) 16 *Industrial Law Journal (UK)* 1.

What is then the expected result of the proceedings before the labour court? Is it not that which is expected in any proceedings before an institution of judgment (no matter what form it takes, and no matter what it is called) --- Justice?

**Structure 2 'Non-court' 'flexibility' 'informality' 'efficiency' 'experience'**

This discursive structure encompasses the 'ideals' associated with the phenomenon of the 'Labour Court': efficiency, cost, informality, flexibility (in other words, disregarding the 'strict' law for the sake of other considerations), and the experience (and tripartite points of view) of the presiding officers.

In spite of the apparent differences between these two structures, the expected end-result (Justice) is the same. In the first case, Justice is reached through legal procedures, through the strict application of a clear rule to a given set of facts, while in the second case, the strict letter of the law may be disregarded in favour of other considerations and the procedures used in the settlement of the dispute is the opposite of what one has come to expect of legal proceedings.

The difference between the labour court and the ordinary civil courts does not necessarily lie in structures of competence or composition, or in procedures nor complexity, for the difference may be merely one of degree, and that turning point beyond which an institution has reached a degree sufficiently high or low enough to pass muster, unfathomable.

But is it not possible that the difference between the Labour Court and the ordinary court lies precisely in those expectations which attach to the Labour Court, expectations which have long since been relinquished in the case of the ordinary courts? Could it be that it is the expectations which so anxiously cluster around the concept of 'the Labour Court' which harden the heart of the doorkeeper of the Law, and makes them keep the door to the temple of Justice tightly shut --- refusing the labour court as one of themselves, while admitting that the Labour Court may be a realisation of a wider ideal, namely an institution for dispute settlement (all courts are tribunals), in the service of the same deity: Justice?

# 7

## THE GERMAN LABOUR COURT SYSTEM

---

'Wenn nach dem Anspruch der Arbeitsgerichtsbarkeit gefragt wird, so ist damit ihr gesetzlicher Auftrag gemeint, also das, was die Gesetze von ihr erwarten. In erster Linie ist das Gesetzestreue. Aber darin erschöpft sich der spezifische Auftrag der Arbeitsgerichtsbarkeit nach verbreiteter, schon von *Sinzheimer* geteilter Auffassung nicht. Das allgemeine Postulat der richterlichen Gesetzestreue ist danach im spezielle Aufträge zu ergänzen, die den Gesetzgeber zur Schaffung der besonderen Arbeitsgerichtsbarkeit veranlaßt haben. Der damalige Bundesminister für Arbeit *Anton Storch* und der damalige SPD-Abgeordnete *Richter* haben bei der parlamentarischen Beratung des Arbeitsgerichtsgesetzes 1953 und *Storch* dann noch einmal bei der Eröffnung des *BAG* der Arbeitsgerichtsbarkeit die Aufgabe gestellt, im Rahmen der Gesetze schnell, billig und lebensnah für sozialen Frieden und sozialen Fortschritt zu wirken.'

[If one asks about the claim of the labour courts, one means the tasks imposed by legislation; in other words, that which the legislation expects of the labour courts. This task, in the first place, entails being true to the legislation. But being true to the legislation does not, according to a widely held view (held also by *Sinzheimer*), exhaust the specific function of the labour courts. The general principle of judges being true to the legislation has to be expanded by referring to the specific tasks which led the legislature to the creation of a special type of court. The then Federal Minister for Labour Anton Storch and the SPD-delegate Richter, during the parliamentary discussion of the Labour Courts Act in 1953, and Storch once again with the opening of the Federal Labour Court, charged the labour courts with the task of working for (aiming for) social peace and social progress, within the framework of the laws, efficiently, cheaply, and true-to-life.]

-- Peter Hanau '*Arbeitsgerichtsbarkeit -- Anspruch und Wirklichkeit*' (1986) 3 *Neue Zeitschrift für Arbeits- und Sozialrecht* 809 at 810. Italics in original.

---

### 7.1 DEVELOPMENT<sup>1</sup>

The German labour court system is not a German invention: its origins lie in the commercial courts which came into being in France by the middle of the 16th century. A

---

<sup>1</sup> This section is based on Germelmann/Matthes/Prütting *Arbeitsgerichtsgesetz* (1990), L Wenzel '75 Jahre deutsche Arbeitsgerichtsbarkeit' (1965) 20 *Juristenzeitung* 697, M Weiss 'Labour Dispute Settlement by Labour Courts in Germany' (1994) 15 *Industrial Law Journal* 1 at 3-4, and A Hueck *Lehrbuch des Arbeitsrechts* 6 ed (1959) at 809-815. See also S Leich and A Lundt 'Zur Geschichte der Berliner Arbeitsgerichte' in 60 *Jahre Berliner Arbeitsgerichtsbarkeit* (1987) 39-126, B Michel 'Der Kampf der Gewerkschaften um die einheitliche Arbeitsgerichtsbarkeit' in Feser et al (eds) *Arbeitsgerichtsprotokolle* (1982) 29-54 and generally V Hentschel *Geschichte der deutschen Sozialpolitik* (1983).

special court, the *Tribunal Commun* existed in Lyon until 1791.<sup>2</sup> Even though this institution disappeared in the chaos of the French Revolution, the idea of a special court resurfaced in Napoleonic times: It was Napoleon who created the first *Conseil des prud'hommes* in France on 18 March 1806.<sup>3</sup>

In 1808 and 1811, similar councils were established in the German cities of Aachen, Krefeld, and Cologne, at that time under French rule. The councils in Aachen and Cologne survived the war of liberation, and in 1840, further councils were established under Prussian influence, by that time taking the form of *Gewerbegerichte* or trade (or industrial) courts.

The founding of the First German Empire in 1870-1871 did not bring with it the establishment of a unified system of trade courts: it was only in 1890 that unified Germany saw the passing of a *Gewerbegerichtsgesetz* --- a Trade Courts Act. Many Trade Courts were established: by 1900, there were 316 of these courts.

Germelmann et al point out the most significant features of these courts:

'Zentrales Kennzeichen der nunmehr geschaffenen Gerichtsbarkeit war es einmal, daß sich eine umfassende Sondergerichtsbarkeit in arbeitsrechtlichen Streitigkeiten durchgesetzt hatte, die in erster Instanz vollständig an die Stelle der ordentlichen Gerichte trat. . . . Bemerkenswert ist ferner, daß sich mit den Gewerbegerichten der Gedanke durchgesetzt hat, die Richterbank mit einem unabhängigen Vorsitzenden und mit weiteren ehrenamtlichen Richtern zu besetzen, die zur Hälfte aus dem Bereich der Arbeitgeber und zur Hälfte aus dem Bereich der Arbeitnehmer entnommen werden.' [The essential feature of the newly established courts was the fact that an extensive separate court system was introduced for labour disputes, a system which, in the first instance, entirely displaced the ordinary courts. It is also noteworthy that with these trade courts, the idea of placing an independent chairman as well as further judges on the bench, honorary judges, half of whom were taken from employer circles, the other half from employee circles, was established.]<sup>4</sup>

The jurisdiction of the *Gewerbegericht* was limited to persons employed in crafts or trades, as defined in the Trades Code of 1845. The success of the *Gewerbegerichte* caused pressure on the government to establish courts also for labour disputes arising between employers and employees in commerce. This led to the passing of the *Kaufmannsgerichtsgesetz* in 1904, largely similar to the *Gewerbegerichtsgesetz*.<sup>5</sup>

This dual system of labour courts persisted until 1926, in spite of the confusion that reigned after the end of the First World War in 1919. As early as 1919, efforts were

---

<sup>2</sup> See Germelmann et al *op cit* note 1 at 44, Wenzel *op cit* note 1 at 697.

<sup>3</sup> 'Dieser erste Rat der Gewerbeverständigen von 1806 kann als die Keimzelle der modernen Arbeitsgerichtsbarkeit angesehen werden.' Germelmann et al *loc cit* note 2.

<sup>4</sup> Germelmann et al *op cit* note 1 at 45.

<sup>5</sup> See Germelmann et al *op cit* note 1 at 45.

underway to establish a unified labour court system. There were significant pressures to re-integrate the labour courts into the ordinary civil courts, these pressures leading to the 1926 compromise that the labour courts of first instance were independent courts, while new appellate and review instances were integrated into the ordinary civil court system.<sup>6</sup> The 1926 Labour Courts Act established, for the first time, a unified labour court system in Germany.

In the period 1933 to 1945, as Germany suffered at the hands of the National-socialist government, the labour court system was stripped of some of its jurisdiction as the Nazi government placed extensive limitations on labour. By the end of the Second World War in 1945, the entire German court system, including the labour court system, had ground to a halt.

In 1946, the Allied victors reinstated the labour courts of first instance, after having abolished all special courts in 1945. The political confusion that reigned in Germany after the end of the war, with four different occupied zones, led to a disintegration of the legal system.<sup>7</sup>

Based on the Basic Law of 1949 (which provides for a separation of the judiciary into separate branches), the new Labour Courts Act was passed in 1953, clearly based upon its predecessor of 1926.

1979 saw the passing of legislation aimed at speeding up proceedings before the labour courts.<sup>8</sup>

## 7.2 JURISDICTION

In terms of § 2 of the Labour Courts Act (ArbGG),<sup>9</sup> the labour courts have exclusive jurisdiction over:

- civil disputes between parties to collective agreements<sup>10</sup> relating to the validity or interpretation of a collective agreement,

---

<sup>6</sup> According to Germelmann et al, one of the most important features of the 1926 Labour Courts Act was that it provided for appellate and review jurisdictions: 'Von besonderem Gewicht für die Arbeitsgerichtsbarkeit war es, daß nunmehr erstmals auch ein eigener Instanzenzug und ein spezielles Revisionsgericht in Arbeitssachen vorhanden war.' Germelmann *et al op cit* note 1 at 46.

<sup>7</sup> See Germelmann *et al op cit* note 1 at 47-8.

<sup>8</sup> As to the nature of these amendments, see Germelmann *et al op cit* note 1 at 49.

<sup>9</sup> References to the Labour Courts Act or *Arbeitsgerichtsgesetz* (ArbGG) is to the amended 1979 version of the Act (BGBl. I S. 853).

<sup>10</sup> It is also possible, in terms of § 2 ArbGG, that a third party may bring an action in terms of the ArbGG.

- civil disputes between parties who may conclude collective agreements relating to delicts arising from industrial action, or questions relating to the freedom of association (including the right of the association to act),
- civil disputes between employers and employees arising from the employment relationship.

This is not a complete listing of the contents of § 2 ArbGG, which contains a detailed list of disputes over which the labour courts have exclusive jurisdiction. No distinction is drawn, for the purpose of determining jurisdiction, between individual and collective disputes.<sup>11</sup>

In terms of §2a ArbGG, the labour courts also have exclusive jurisdiction over disputes arising from the Works Constitution Act, the Co-determination Act, and the decision whether or not an association (*Vereinigung*) has the necessary capacity to enter into collective agreements (*Tariffähigkeit*).<sup>12</sup>

Generally speaking, the Labour Courts Act provides the labour courts with a very wide jurisdiction, encompassing both individual and collective disputes, but clearly, if regard is had to the wording of § 2 ArbGG, excluding disputes of interest.

There is no doubt, in German law, that the labour courts are courts of law --- authority for this statement may be found in Article 95(1) of the Basic Law:

'For the purposes of ordinary, administrative, fiscal, labour, and social jurisdiction, the Federation shall establish as *highest courts of justice* the Federal Court of Justice, the Federal Administrative Court, the Federal Fiscal Court, the Federal Labour Court, and the Federal Social Court.'<sup>13</sup>

Despite the fact that no practical significance attaches to the distinction, it is still disputed what type of jurisdiction the labour courts have.<sup>14</sup>

---

<sup>11</sup> See Weiss *op cit* note 1 at 4.

<sup>12</sup> See § 2a(4) ArbGG.

<sup>13</sup> 'Nach der in Art. 95 Abs. 1 GG getroffenen Bestimmung wird die Arbeitsgerichtsbarkeit verfassungsrechtlich als eigener Rechtsweg neben der ordentlicher Gerichtsbarkeit angesehen.' [In terms of the provisions of Article 95(1) of the Basic Law, the labour courts are constitutionally regarded as being a separate recourse to the law, alongside the ordinary courts] Germelmann *et al* *op cit* note 1 at 75.

<sup>14</sup> According to the view held by most commentators, the difference in jurisdiction between the ordinary civil courts and the labour courts is founded on the nature of the dispute. The question, crisply put, is whether the labour courts are part of the ordinary courts and that their jurisdiction is therefore founded on procedure (*Rechtswegzuständigkeit*), or whether they are totally separate courts, deriving their jurisdiction to hear a certain matter from the nature of the dispute (*sachliche Zuständigkeit*). Schaub, for example, sees in the fact that labour law has developed into a separate branch of the law, that collective labour law has surpassed the rules of the ordinary law, and that proceedings before the labour court require speed and simplicity, an argument that the labour courts are totally separate from the ordinary civil courts. See G Schaub *Arbeitsrechtliche Formularsammlung und Arbeitsgerichtsverfahren* 5 ed (1990) at 446. Bader, reviewing changes to the legislative language in 1992, states that no actual conclu-

## 7.3 STRUCTURE AND COMPOSITION

German labour courts have a three-tier structure: labour courts of first instance, appellate labour courts, and the Federal Labour Court.

### 7.3.1 Labour courts of first instance

The establishment of the labour courts of first instance is the responsibility of the *Länder* (who also finance these courts).<sup>15</sup> Labour courts are divided into panels, *Kammern*, each presided over by a judge<sup>16</sup> (who may, however, preside over other panels) assisted by two honorary judges. These *ehrenamtliche Richter* (honorary judges), who are not qualified judges in terms of the applicable legislation, are, however, fully independent and not subject to the control of the presiding judge. One of the honorary judges is taken from employer circles, and the other from employee circles.<sup>17</sup>

---

(footnote continued from previous page)

sion on this point can be reached: Bader, Friedrich, Leinemann, Stahlhake, Wenzel *Gemeinschaftskommentar zum Arbeitsgerichtsgesetz* (GK-ArbGG) at § 48 11-13. See also Germelmann et al op cit at 581 and Grunsky *Arbeitsgerichtsgesetz* 6 ed (1990) at 46.

<sup>15</sup> See § 14 ArbGG. In terms of § 15 ArbGG, the administration of the labour court and the supervision of the court is the responsibility of the state labour authorities acting in agreement with the state justice authorities. The fact that the labour courts do not fall under the justice authorities has led to some controversy. One of the arguments in favour of the labour authorities retaining the supervision of the labour courts is that the labour authorities enjoy the confidence of trade unions, employers, and employer organisations, a confidence which the justice authorities could never hope to attain. Arguments for returning the labour courts to the Department of Justice (both on a Federal and *Land* level) include the possibility of increasing isolation of the labour courts and considerations of personnel. It is also argued that the labour courts share a judicial function with all German courts, and that all institutions exercising judicial functions should be supervised by the same state department. See Germelmann et al op cit note 1 at 422.

<sup>16</sup> The presiding judge is appointed jointly by the state labour authorities and justice department after consultation with an advisory committee (§ 18(1) ArbGG). The committee is tripartite in structure, consisting of an equal number of representatives of employer organisations, trade unions, and the labour courts (§ 18(2) ArbGG). Normally these judges are appointed permanently. See Weiss op cit note 1 at 8.

<sup>17</sup> This is prescribed by § 16(1) ArbGG. § 20 ArbGG sets out the procedure for appointing these honorary judges. The labour authorities of the *Land* appoints the judges for a period of 4 years. The judges are selected from a list provided by the local trade unions, employer organisations, and other bodies. § 20 ArbGG adds the requirement that due consideration of minorities must be had before a honorary judge is appointed. Only persons who are active as employer or employee in the area over which the court has jurisdiction may be appointed as honorary judges, and they must be older than 25 (see § 21 ArbGG). See Weiss op cit note 1 at 9.

### **7.3.2 Appellate labour courts**

Many of the provisions applicable to labour courts of first instance apply also to the appellate labour courts (*Landesarbeitsgerichte*).<sup>18</sup>

These courts have only an appellate jurisdiction extending geographically throughout a state (*Land*).<sup>19</sup> As is the case with labour courts of first instance, a panel of the appellate labour court consists of a presiding judge<sup>20</sup> and two honorary judges.<sup>21</sup>

### **7.3.3 The Federal Labour Court**

The Federal Labour Court, with its seat in Kassel, falls under the supervision of the Federal Ministry for Labour acting in agreement with the Federal Justice Ministry.<sup>22</sup>

The nine panels of the Federal Labour Court (called 'Senates') are significantly larger: apart from the presiding judge, a Senate consists of two additional judges, together with the two honorary judges.<sup>23</sup>

The 'Big Senate', provided for in § 45 ArbGG consists of the President of the Federal Labour Court, the longest serving presiding judge, four other judges, as well as four honorary judges (two each representing employers and employees).<sup>24</sup> § 45(2) ArbGG provides for a special case where the Big Senate must be called upon:

'Will in einer Rechtsfrage ein Senat von der Entscheidung eines anderen Senates oder des Großen Senats abweichen, so ist über die streitige Rechtsfrage eine Entscheidung des Großen Senates herbeizuführen. Der erkennende Senat kann in einer Frage von grundsätzlicher Bedeutung die Entscheidung des Großen Senats herbeiführen, wenn nach seiner Auffassung die Fortbildung des Rechts oder die Sicherung einer einheit-

---

<sup>18</sup> In terms of § 33 ArbGG, appellate labour courts are established by the individual states, and § 34 ArbGG provides for similar supervision and control by the state labour authorities acting in agreement with the state judicial authorities.

<sup>19</sup> See Weiss *op cit* note 1 at 6-7.

<sup>20</sup> § 35 ArbGG. The presiding judges are appointed also by the labour authorities acting in agreement with the judicial authorities after hearing trade unions, employer organisations, and other interested bodies - § 36 ArbGG.

<sup>21</sup> In the case of honorary judges in the appellate labour court, the minimum age is 30 years - § 37 ArbGG.

<sup>22</sup> § 40 ArbGG.

<sup>23</sup> § 41 ArbGG.

<sup>24</sup> 'Since the Federal Labour Court focuses exclusively on questions of law and consequently does not decide on the facts of case, the professional element is given more weight than in the lower level courts where the decision on facts is also at stake.' Weiss *op cit* note 1 at 7.

lichen Rechtsprechung es erfordern.' [Should a Senate wish to depart from the decision of another Senate or of the Big Senate, a decision of the Big Senate *must* be obtained. A Senate *may*, in a question of fundamental importance, request the decision of the Big Senate, when it is of the opinion that the development of the law or the securing of a unified jurisprudence so requires.]<sup>25</sup>

## 7.4 ASPECTS OF PROCEDURE<sup>26</sup>

### 7.4.1 General

The Labour Courts Act is founded on two types of proceedings. The *Urteilsverfahren* (literally: judgment proceedings) is the standard type of proceedings before the labour courts, and, as such, it is similar in nature to ordinary civil proceedings. This fact means that the rules of civil procedure apply, though with modifications imposed by the Labour Courts Act.

The *Beschlußverfahren* (literally: decision proceedings) apply only in the case of disputes arising from the Works Constitution Act, the Co-Determination Act, or disputes relating to the power of a trade union or employer organisation to conclude collective agreements.<sup>27</sup>

Because the Labour Courts Act does not distinguish between individual and collective disputes, an individual employee may represent him- or herself before the court;<sup>28</sup> legal representation is, however, provided for.<sup>29</sup> Trade unions and employer organisations may be represented by their respective legal officers or by qualified attorneys.

---

<sup>25</sup> Emphasis added in translation.

<sup>26</sup> This section does not purport to be a complete overview of all aspects of proceedings before the labour courts. Emphasis is placed on aspects which may interest readers accustomed to accusatorial proceedings in civil courts.

<sup>27</sup> 'Matters concerning the works constitution in the private sector, the election procedure for workers' representatives on the supervisory board and the competence to be a party to a collective agreement are dealt with by a special procedure, the so-called "order procedure" [*Beschlußverfahren*]. The basic differences between the normal procedure and this procedure are: while normally the basis for the court's decision is the material introduced by the parties to the lawsuit, in these special cases it is up to the court to investigate and to find out the truth . . . .' Weiss *op cit* note 1 at 13.

<sup>28</sup> Personal representation is possible only in courts of first instance: in the appellate labour courts and in the Federal Labour Court, legal representation is required.

<sup>29</sup> 'Originally, the statute of 1926 excluded attorneys from representing parties in labour courts of first instance; only legal officers of the trade unions were allowed to act as counsel'. Weiss *op cit* note 1 at 10.

#### **7.4.2 Continual conciliation**

The Labour Courts Act prescribes that all proceedings in the first instance begin with a *Güteverfahren* or a conciliation session. In terms of § 54 ArbGG, the presiding judge has to discuss the dispute with the parties, taking into consideration all the facts leading to the dispute. In the conciliation session the presiding judge acts alone, but still exerts considerable influence over the parties by indicating to the parties 'his legal opinion, thereby substantially influencing the willingness of participants to compromise'.<sup>30</sup> There are three possible results of the pre-trial conciliation: 'either the action is withdrawn, a compromise is agreed upon or a date is set for litigious proceedings before the entire panel'.<sup>31</sup>

But conciliation is not only a pre-trial step: 'Die gütliche Erledigung des Rechtsstreits soll während des ganzen Verfahrens angestrebt werden.'<sup>32</sup>

#### **7.4.3 Expediitiousness**

In terms of § 9(1) ArbGG, all proceedings (in all instances) are to be expedited: this provision of the Labour Courts Act contains a clear instruction to all persons concerned with the application of justice in the labour courts. The provisions of the Courts Constitution Act relating to court recesses are expressly excluded.<sup>33</sup>

This principle of expeditiousness is a central theme of the Labour Courts Act: § 57(1) ArbGG provides that the proceedings should be completed, where possible, in one session. Should this be impossible, particularly as matters of evidence delay the proceedings, the date of the next session is to be made known immediately. In terms of § 46(2) ArbGG, many of the provisions of the Code of Civil Procedure relating to pre-trial procedures and exchange of documents are expressly excluded from operation in the Labour Courts.

---

<sup>30</sup> Weiss *op cit* note 1 at 11.

<sup>31</sup> Weiss *loc cit* note 30.

<sup>32</sup> § 57(2) ArbGG [An amicable settlement of the legal dispute should be strived for *throughout* the proceedings]. Emphasis added in translation.

<sup>33</sup> 'Das Verfahren ist in allen Rechtzügen zu beschleunigen. Die Vorschriften des Gerichtsverfassungsgesetz über Gerichtsferien sind nicht anzuwenden.' Legislation passed in 1976 (Gesetz zur Vereinfachung und Beschleunigung gerichtlicher Verfahren) makes this principle of expeditiousness a basic principle in all courts.

#### **7.4.4            The role of the presiding judge**

The presiding judge plays an important role in the proceedings. German civil procedure, as laid down in the Code of Civil Procedure, provides for a more active and inquisitorial role on the part of the judge.<sup>34</sup>

#### **7.4.5            Appeals**

A decision handed down by a labour court of first instance is appealable to an appellate labour court within a month (§ 87 ArbGG). Once leave to appeal has been granted, a further appeal is possible to the Federal Labour Court, but this appeal relates to matters of law only (see § 93 ArbGG).

---

<sup>34</sup> In terms of § 136(3) of the ZPO (*Zivilprozeßordnung*, or Civil Procedure Code), the judge has a duty to ensure that the matter before him or her is exhaustively discussed. § 139 ZPO states that the judge has to ensure that the parties state all relevant facts. In order to achieve this, the judge must discuss the matter and the relevant facts with the parties and must ask questions. These provisions must, however, be seen as constituting exceptions to the basic principle of German civil procedure, which is based on the *Verhandlungsmaxime*, in terms of which it is the duty of the parties to present the court with all the relevant factual information. This implies that the court may base its decision only on facts presented by a party: 'Es gibt also keine Aufklärung des Sachverhalts von Gerichts wegen.' [The court does not clear up the facts.] O Jauernig *Zivilprozeßrecht* 23 ed (1991) at 75. See also Schaub *Arbeitsrechtliche Formularsammlung und Arbeitsgerichtsverfahren* (1990) at 597.

# 8

## THE BRITISH COURT SYSTEM

---

'Only in England could the vocation of the judge be described as "something like a priesthood" or "analogous to the Royal Family", requiring practitioners to "seclude themselves" in various ways.'

-- David Pannick *Judges* (1987) 10. Footnote omitted.

'Imagine that Earth has been colonised by a civilisation from a distant solar system. These benevolent conquerors have set up a Commission of Inquiry ("The Inter-Stellar Law Commission") to discover the best national system of civil procedure. . . . If Earth had been invaded a few galactic time units earlier, as at first intended, the Commission would have found that the English civil court consisted of a professional judge, wearing an oddly adorned hat, and twelve ordinary citizens. . . . The Commission heard few lay-people speak positively in favour of these judges. However, there was no suggestion that these judges were corrupt or that they were coerced by powerful figures in society into distorting their decisions. It was this record of consistent rectitude which very much impressed the Commission. Its own judicial history has been a less happy one.'

-- Neil Andrews *Principles of Civil Procedure* (1994) 7-8, 9-10.

---

### 8.1 DEVELOPMENT<sup>1</sup>

In attempting to trace the development of the modern English court system,<sup>2</sup> the basic

---

<sup>1</sup> This section is based on J H Baker *An Introduction to English Legal History* 3 ed (1990), G J Hand & D J Bentley (eds) Radcliffe and Cross *The English Legal System* 6 ed (1977), R J Walker & R Ward *Walker & Walker's English Legal System* 7 ed (1994).

<sup>2</sup> It may come as some surprise to find here a discussion of the English court system and its development, concentrating on the High Court and the House of Lords. The reason for this is that the industrial tribunals do not have jurisdiction to decide disputes relating to industrial action. In terms of s 62 of the 1978 Employment Protection (Consolidation) Act, the industrial tribunal was deprived of jurisdiction to determine the fairness of a dismissal resulting from industrial action, unless the complainant could show that selective dismissal or selective re-employment occurred. Furthermore, all the decisions that are analysed in Chapter 12 originate in the various divisions of the High Court, the Court of Appeals, and the House of Lords. Whereas the German labour courts have a wide jurisdiction, and exercise the function of dispute resolution also in disputes of a collective nature, industrial councils do not exercise this function, a function instead exercised by the British High Court and the House of Lords. Operative here again is the distinction drawn in the canonical texts of the comparative labour law discourse, namely that it is the function that must be compared, and not the institution. A narrow and distorted approach, one comparing the British system of industrial tribunals with the German labour courts and the South African industrial tribunal would be inappropriate in the context of collective dispute resolution where those disputes have their origins in industrial action.

point of departure is the central historical role of the monarch: 'Historically the sovereign is the fountain of justice in England'.<sup>3</sup>

Central to the royal government was the *curia regis*, a 'body of advisers and courtiers who attended the king and supervised the administration of the realm'.<sup>4</sup> In the 13th century, this king's court split up, as certain administrative bodies became 'quasi-independent bureaux, no longer directly expressive of the king's immediate personal will'.<sup>5</sup>

The first institution to separate from the monarch's household was the Court of the Exchequer. By the reign of Henry I (1100-1135), the Exchequer had become a department of the *curia regis* dealing with the collection of revenue. By the time of Henry II (1154-1189), it had become a court, presided over by Exchequer Barons.<sup>6</sup>

During the reign of Henry II a certain class of 'judges' developed within the ranks of the royal councillors.<sup>7</sup> It was also Henry II who 'ordered that five judges from his household were to remain in *curia regis* and not to depart therefrom, and that they should refer only difficult cases to himself'.<sup>8</sup> This marks the founding of a stationary court structure, and a court began to sit regularly at Westminster during the reign of Henry II. Clause 17 of the Magna Carta entrenched this, by providing that common pleas (civil suits between ordinary subjects of the king) 'shall not follow our court but be heard in some fixed place'.<sup>9</sup> The judges of the Court of Common Pleas were full-time lawyers (appointed from the ranks of advocates, the serjeants-at-law). The proceedings before this court were extremely formal, causing significant delays.<sup>10</sup>

---

<sup>3</sup> Walker & Ward *op cit* note 1.

<sup>4</sup> Baker *op cit* note 1 at 20.

<sup>5</sup> Radcliffe & Cross *op cit* note 1 at 55. 'When we speak of the *curia regis* as the "centre" of royal administration, we should remember that the centre was not static. The king himself was given to peripatetic rule, for to stay in one place for too long was not sound policy, and the king's court followed the king. Nevertheless, even in the twelfth century there was a tendency for a corps of administrators to settle in one place, usually the palace of Westminster, while the king was away. The Exchequer was the first department to be deposited; the king's treasure and the elaborate revenue service which controlled it were too cumbrous to keep constantly on the move'. Baker *op cit* note 1 at 21.

<sup>6</sup> Walker & Ward *op cit* note 1 at 132.

<sup>7</sup> Radcliffe & Cross *op cit* note 1 at 56.

<sup>8</sup> Baker *op cit* note 1 at 21.

<sup>9</sup> Quoted in Radcliffe & Cross *loc cit* note 5.

<sup>10</sup> 'The jurisdiction of the court existed over disputes between subjects where the King's interest was not involved. Hence it tried all the real actions [actions relating to immovable property] and the personal actions of debt, covenant and tenure. . . . Thus the Common Pleas in the early period of the development of the common law exercised a far wider jurisdiction than the Exchequer or the King's Bench'. Walker & Walker *op cit* note 1 at 132-3.

The last court to break away from the *curia regis* was the Court of King's Bench. In this court the monarch continued to sit for some time, and continued to exert a significant influence. It appears that the Court of King's Bench and the Court of Common Pleas exercised 'parallel jurisdiction, amicably exercised by both courts'.<sup>11</sup>

These three medieval courts, the Court of the Exchequer, the Court of Common Pleas and the Court of King's (or Queen's) Bench served as the basis for, and the nucleus of, the English court system administering the common law until the passing of the Judicature Acts in 1873-1875.

The coming into force of the Judicature Acts in 1875 marks the beginning of the modern English legal system:

'The three chief results of the Judicature Acts 1873-1875, were the establishment of a single Supreme Court in which the jurisdiction of the various existing superior courts was concentrated; the concurrent administration in this new court of the rules of law and of equity; and lastly, the framing of a uniform code of procedure applicable to most civil proceedings in the new court.'<sup>12</sup>

The bases of the system introduced in 1875, with amendments and a significant consolidation in 1925, subsisted until the passing of the Courts Act (1971 c 23). Ten years later, the Supreme Court Act (1981 c 54) brought about significant changes to the constitution, composition, and jurisdiction of the Supreme Court.

## **8.2 STRUCTURE, JURISDICTION, AND COMPOSITION OF THE COURTS**

Because of the fragmented development of the English legal system, no unified system for the administration of justice in England developed in the form of a 'Ministry of Justice'. From the Supreme Court Act 1981 it is clear, however, that 'prime responsibility in many areas lies with the Lord Chancellor and the Lord Chancellor's Department'.<sup>13</sup> The appointment of the Lord Chancellor is a political appointment; the appointment is made by the Queen on the advice of the Prime Minister.

Traditionally, judges are regarded as 'servants of the Crown', because they are appointed by the Queen, even though the Queen or her Ministers cannot exercise any

---

<sup>11</sup> Radcliffe & Cross *op cit* note 1 at 59.

<sup>12</sup> Radcliffe & Cross *op cit* note 1 at 289.

<sup>13</sup> Walker & Ward *op cit* note 1 at 15. 'Given the wide-ranging responsibilities and powers vested in the Lord Chancellor it is perhaps surprising that, until recently, there has been no direct accountability to the elected House of Commons. This gap was filled in 1991, when it was announced that a Minister was to answer in the House of Commons for the work of the Lord Chancellor, and that a department was to be appointed.' Walker & Ward *op cit* note 1 at 16.

control over the judges.<sup>14</sup> The independence of the judiciary is fiercely guarded: 'Whether judges are or are not Crown servants there is no doubt that the judicial function is not under the control of the legislature or the executive. Judicial independence is a fundamental of English constitutional law'.<sup>15</sup>

### 8.2.1      The House of Lords

The House of Lords is the highest court in the United Kingdom and it exercises the judicial function of the British Parliament (this is why, technically speaking, an appeal to the House of Lords is an appeal to the entire House).<sup>16</sup>

The close link between the House of Lords, as a judicial body, and Parliament meant that until the nineteenth century, any member of the House of Lords could attend, and vote in, a judicial session.<sup>17</sup>

Any appeal to the House of Lords is heard by a panel of not less than three persons: the Lord Chancellor of Great Britain,<sup>18</sup> the Lords of Appeal in Ordinary (the 'law lords')

---

<sup>14</sup> Generally, judges in the various courts are appointed from the ranks of practitioners. See, for example, s 71(3) of the Courts and Legal Services Act (1990, c 41).

<sup>15</sup> Walker & Ward *op cit* note 1 at 183.

<sup>16</sup> By the fourteenth century, as the Court of King's Bench separated itself from the Royal Council, the power of appeal to Parliament developed; at the same time, Parliament was separating into commons and Lords. Since the fifteenth century, judicial power was exercised by the Lords alone: 'If we remember that the Commons were coming to spend more and more of their time during the sessions of Parliament in private deliberation in their own chamber, and only to appear in the Parliament Chamber on important occasions, to hear messages from the Crown and the like, it should not surprise us very much to find that the hearing of appeals in the Parliament Chamber fell into the hands of the Peers, who were always there' Radcliffe & Cross *op cit* note 1 at 218. The idea of Parliament as a whole being the highest court persisted: '... as late as the seventeenth century, analytical legal writers saw no fundamental difference between judicial and parliamentary law-making. For Hale, the supreme power of making laws and the supreme power of deciding cases had to reside in the same body'. Baker *op cit* note 1 at 238-9. The Judicature Act of 1873, as originally envisaged, would have done away with appeal to the House of Lords: 'Under the Judicature Acts as passed, the [appellate] jurisdiction [of the House of Lords] would indeed have disappeared; but, before the new legislation came into force, conservative opposition from members of Disraeli's government forced a reconsideration of the role of the House of Lords. At the last moment the original scheme was changed, the Lords were given a statutory appellate jurisdiction superior but akin to that of the Court of Appeal . . .' Baker *op cit* note 1 at 163.

<sup>17</sup> 'For the purpose of aiding the House of Lords in the hearing and determination of appeals, Her Majesty may by letters patent appoint qualified persons to be Lords of Appeal in Ordinary.' Section 6 of the Appellate Jurisdiction Act 1876 (39 & 40 Vict c 59). Since the passing of this Act, providing as it does for the creation of life peers for the purposes of hearing and determining appeals, a firm convention has arisen that lay peers do not participate in the judicial function of the House of Lords. See S H Bailey and M J Gunn *Smith and Bailey on the Modern English Legal System* (1991) at 92 for a brief discussion of the relevant case law.

<sup>18</sup> The Lord Chancellor is the president of the House of Lords.

and 'such Peers of Parliament as are for the time being holding or have held any of the offices in this Act described as high judicial offices'.<sup>19</sup>

The jurisdiction of the House of Lords is limited almost entirely to appellate jurisdiction.<sup>20</sup> In civil matters the House of Lords hears appeals from the Court of Appeal, but only once leave to appeal has been obtained.<sup>21</sup>

### **8.2.2            The Court of Appeal**

The Court of Appeal, a superior court of record,<sup>22</sup> was established for the first time in the Judicature Act 1873, and it forms, together with the High Court of Justice and the Crown Court, the Supreme Court of England and Wales.<sup>23</sup>

The Court of Appeal consists of a number of ex-officio judges<sup>24</sup> and not more than 29 ordinary judges (Lords Justices of Appeal).<sup>25</sup> There are two divisions: the criminal division is presided over by the Lord Chief Justice, and the civil division by the Master of the Rolls.<sup>26</sup> Typical panel-configurations of the Court of Appeal would be the Master

---

<sup>19</sup> Section 5 Appellate Jurisdiction Act 1876. Section 25 defines the term 'high judicial office' to mean the office of Lord Chancellor, or the office of Judge of one of Her Majesty's superior courts of Great Britain and Ireland.

<sup>20</sup> The few vestiges of original jurisdiction include impeachment proceedings, claims of peerage, and breaches of privilege.

<sup>21</sup> 'No appeal shall lie to the House of Lords from any order or judgment made or given by the Court of Appeal . . . except with the leave of that Court or of the House of Lords.' Administration of Justice (Appeals) Act 1934 (24 & 25 Geo 5 c 40). However, it is possible to skip over the appeal to the Court of Appeal and proceed directly after the trial to the House of Lords by virtue of the provisions of ss 12 and 13 of the Administration of Justice Act 1969 (1969 c 58). Before this 'leap-from' appeal is possible, the trial judge must grant a certificate, which is only possible if all the parties consent and 'a sufficient case for an appeal to the House of Lords . . . has been made out to justify an application for leave to bring such an appeal' (s 12).

<sup>22</sup> See section 15(1) Supreme Court Act 1981.

<sup>23</sup> Section 1(1) Supreme Court Act (1981 c 54). The Lord Chancellor, the *de facto* head of the British judiciary, is the President of the Supreme Court (s 1(2) Supreme Court Act). The House of Lords is not part of the Supreme Court; therefore, in spite of its name, the Supreme Court is not the highest court in England and Wales.

<sup>24</sup> Including the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, and any Lord of Appeal who consents to hear the appeal on the request of the Lord Chancellor. Section 2(2) Supreme Court Act 1981. The Lord Chancellor almost never sits in appeals: the most work of the Court of Appeal is done by the Master of the Rolls and the ordinary judges.

<sup>25</sup> Sections 2(1) and 2(3) Supreme Court Act 1981. In order to qualify for appointment as Lord Justice of Appeal, a judge must have a ten year High Court qualification (ie a right of audience in relation to all proceedings in the High Court - see s 71(3) of the Courts and Legal Services Act 1990) or be a judge of the High Court (s 10(3)(b) Supreme Court Act 1981).

<sup>26</sup> Section 3 Supreme Court Act 1981.

of the Rolls assisted by two Lords Justices of Appeal, or Lords Justices assisted by High Court judges.<sup>27</sup>

The Court of Appeal exercises only appellate jurisdiction, this being conferred by section 15 of the Supreme Court Act 1981. Jurisdiction is given to the Court of Appeal by the Act itself, but there is also a general provision (section 15(2)(b)), in terms of which the court retains any jurisdiction it could exercise before the commencement of this Act. Section 16 explicitly provides that the Court of Appeal has the jurisdiction to hear and determine appeals from any judgment or order of the High Court.

### **8.2.3            The High Court**

Established for the first time by the Judicature Acts, the High Court consists of the Chancery Division (presided over by the Lord Chancellor), the Queen's Bench Division (presided over by the Lord Chief Justice) and the Family Division (presided over by the President of the Family Division). Puisne judges are allocated to the various divisions by the Lord Chancellor.<sup>28</sup> For present purposes the most important division of the High Court is the Queen's Bench Division.

The Queen's Bench Division has a wide jurisdiction: both original and appellate, and both civil and criminal. The most significant jurisdiction of the Queen's Bench division is the original civil jurisdiction it has to hear matters arising from contracts or tort (delict). These matters are normally heard by a puisne judge sitting alone.

## **8.3            ASPECTS OF PROCEDURE**

### **8.3.1            General**

The procedure before English courts of law displays a high degree of complexity. Whereas the German Labour Courts Act expressly excludes a number of pre-trial proceedings, most notably the exchange of pleadings,<sup>29</sup> civil proceedings in England are characterised by extensive pre-trial procedures.<sup>30</sup>

---

<sup>27</sup> In terms of section 9 Supreme Court Act 1981, a puisne judge of the High Court may act in the Court of Appeal when 'requested' to do so (in terms of s9(3), a High Court judge must comply with such request).

<sup>28</sup> Section 5(1) and (2) Supreme Court Act 1981. 'Over half of the total number of puisne judges of the High Court are attached to the Queen's Bench Division. This judicial strength reflects . . . the volume of business in the division . . .' T Ingman *The English Legal Process* 4 ed (1992) 17.

<sup>29</sup> See 7.4.3 above on § 46 ArbGG.

<sup>30</sup> See N Andrews *Principles of Civil Procedure* (1994) at 18, discussing pre-trial disclosure and J O'Hare & R Hill *Civil Litigation* 5 ed (1990) at 147-163 on the service of documents.

Even though the procedural rules of the British courts do not contain the explicit directions of expeditiousness contained in German law's § 9 ArbGG, there is still a 'principle of accelerated justice', referring to default judgments, summary judgments, or decisions relating to points of law only.<sup>31</sup> But this principle relates to cases where attenuated proceedings are possible --- there is no general duty on the courts to expedite proceedings once they have reached trial.<sup>32</sup>

While proceedings before the German labour courts start off with a conciliation session, and attempts must be made throughout all proceedings (be they in the first instance or on appeal) to promote an amicable settlement between the parties, English law displays a certain hesitancy in judges trying to lead the parties to a settlement:

'... it is not the judges' function to coax parties into accepting settlement. There is Solomonic jurisdiction and no procedure for "knocking together heads"... Nor does English law recognise a generally applicable machinery for conciliation between parties to civil proceedings.'<sup>33</sup>

### **8.3.2 Adversarial proceedings and the passive role of the judge**

Adversarial proceedings places the form, conduct, content, and pace of the proceedings in the hands of the parties themselves. This has consequences for the relationship between the parties,<sup>34</sup> and also for the relationship between the parties and the court.<sup>35</sup> Whereas the German rules of civil procedure expect a judge to involve him- or herself in the process of adducing evidence by asking questions, and to ensure that the facts of the dispute are fully discussed, a judge in an English court who dared to ask questions

---

<sup>31</sup> See Andrews *op cit* note 30 at 21-2.

<sup>32</sup> Attempts have been made to expedite proceedings before some English courts; most notably the Court of Appeal: 'Procedural changes were introduced in an effort to reduce the length of oral hearings before the court. Although proposals to change to a system of written briefs and to impose time-limits on counsel's argument have been rejected, the judges are now expected to familiarise themselves before the hearing with the general background to the dispute, the judgment of the court below and the grounds of appeal. The Master of Rolls has given guidance on the preparation of "skeleton arguments", which counsel are expected to submit to the court at least fourteen days in advance of the hearing of all appeals other than those of exceptional urgency. . . .' Ingman *op cit* note 28 at 15.

<sup>33</sup> Andrews *op cit* note 30 at 27. Conciliation does take place on an official basis to claims brought before Industrial Tribunals.

<sup>34</sup> '[The adversarial system] introduces an element of sportsmanship or gamesmanship into the conduct of civil proceedings, and it develops the propensity on the part of lawyers to indulge in procedural manoeuvres.' Jacob *The Fabric of English Civil Justice* (1987) quoted in Andrews *op cit* note 30 at 35.

<sup>35</sup> 'The principle of party control ensures that the court remains detached and passive. This is considered to be beneficial in two main ways. First, the court can preserve its impartiality. Secondly, detachment during a hearing will save the court from falling into errors.' Andrews *op cit* note 30 at 34.

during the hearing was urged into retirement soon after the hearing.<sup>36</sup> All relevant evidence must be placed before the court by the parties or their representatives; the judge should avoid descending into the arena where the parties do battle.

The effectiveness of adversarial proceedings rests upon a number of assumptions regarding the representation of the parties: (1) both parties must have legal representation, and (2) the representation on both sides should be equally efficient and equally matched. The representatives must (3) serve the interests of their clients --- each client is intent upon winning, and through this conflict of intentions it is hoped that the truth will emerge.<sup>37</sup> Representation in all the British higher courts is the rule rather than the exception.

### **8.3.3 Appeals**

In civil matters, section 16(1) of the Supreme Court Act 1981 provides that appeals against any judgment or order of the High Court (including the Queen's Bench Division) is to be heard by the Court of Appeal. It is, however, possible to circumvent appeal to the Court of Appeal once the requirements of s 13 of the Administration of Justice Act 1969 have been complied with and to proceed directly to the House of Lords from the High Court.<sup>38</sup>

The House of Lords has jurisdiction to hear appeals against any order or judgment of the Court of Appeal.<sup>39</sup> Leave to appeal (from either the Court of Appeal or the House of Lords) is required.<sup>40</sup>

---

<sup>36</sup> See Andrews *op cit* note 30 42-43.

<sup>37</sup> See Andrews *op cit* note 30 at 34-5.

<sup>38</sup> See above, note 21.

<sup>39</sup> Section 3 of the Appellate Jurisdiction Act 1876 (39 & 40 Vict c 59). Section 4 of this Act, still in force, clearly shows the link between the House of Lords and Parliament and the still-present central position of the Crown: 'Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty the Queen in her Court of Parliament, on order that the said Court may determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal'.

<sup>40</sup> Section 1 Administration of Justice (Appeals) Act 1934 (24 & 25 Geo 5 c 40).

# 9

## THE SOUTH AFRICAN INDUSTRIAL COURT

---

'Yet the industrial court has remained an institution of anomalies. Successes have been matched by failures. Consistency has been followed by inconsistency. Courage in the assumption and exercise of jurisdiction has been met on other occasions with failure of nerve. And the overall impression one might get of industrial court jurisprudence from the judgments of its more sophisticated members is often matched by the bleak reality of appearance before uninformed and evasive - or perhaps simply incompetent - presiding officers.'

-- Edwin Cameron 'Overview of the Industrial Court' in Benjamin, Jacobus & Albertyn (eds) *Strikes, Lock-outs & Arbitration in South African Labour Law* (1989) 11.

' "Glad you're not charging any money for this. How can we win?"

"Get lucky with the right judge."

"Sounds like Vegas."

The lawyer shrugged. "That's because life is Vegas."

"Oboy," Zoyd groaned, "I've got worse trouble here than I've ever had, and I'm hearing 'Life is Vegas'?"

Elmhurst's eyes moistened, and his lips began to tremble. "Y-You mean . . . life isn't Vegas?"

-- Thomas Pynchon *Vineland* (1990) 360.

---

### 9.1 DEVELOPMENT

The South African industrial court, now having met its demise at the hands of labour legislation passed in 1995, is an institution of relatively recent origin.<sup>1</sup>

The predecessor of the industrial court, the Industrial Tribunal, was established in terms of section 17 of the Industrial Conciliation Act 28 of 1956. The coming into being of the Tribunal must be seen in the light of a report of a Commission of Enquiry into Industrial Legislation, which reported in 1951 that 'the commercial and industrial

---

<sup>1</sup> This should not create the impression that the idea of a labour judiciary is as recent in South Africa: 'The Industrial Court Bill of 1932 was the first attempt to establish a labour court in South Africa. It provided for the establishment of an industrial division of the Supreme Court of South Africa with country-wide jurisdiction. The court was to have had criminal appeal and review jurisdiction in all offences committed under the Industrial Conciliation Act, 1924 (Act 11 of 1924), and the Wage Act, 1925 (Act 27 of 1925). It was to be staffed by a judge of the Supreme Court, and provision was also made for assessors to sit with the judge in certain cases. The Bill was however withdrawn after its first reading.' *The Complete Wiehahn Report* Part 1 par 4.13.

development of the country up to that time had made the establishment of special judicial machinery to deal with labour disputes a necessity'.<sup>2</sup>

The functions of the Industrial Tribunals were limited and largely of a technical nature, including advising the Minister of Manpower (as he was then called), undertaking demarcations, and conducting both compulsory and voluntary arbitrations. In spite of its name, the Industrial Tribunal exercised no judicial function.<sup>3</sup>

The industrial court which was to leave such indelible traces on South African labour law was the result of recommendations of a Commission of Inquiry into Labour Legislation appointed in 1977, and acting under the chairmanship of Professor N Wiehahn.<sup>4</sup>

The Wiehahn Commission recommended that the existing Industrial Tribunal be renamed the industrial court, and outlined the main features of the institution it envisaged, including a country-wide jurisdiction, the appointment of a president and 'suitably qualified assessors' and that the industrial court was to follow a less formal procedure but still adhere to the principles of administrative justice (*audi alteram partem* and *nemo iudex in sua causa*).<sup>5</sup>

According to the architects of the industrial court,<sup>6</sup> that court would, through its decisions, develop a body of case law which would by 'judicial precedent contribute to the formulation and development of fair employment guidelines'.<sup>7</sup> With the passing of the

---

<sup>2</sup> Wiehahn report *op cit* note 1 par 4.15.

<sup>3</sup> Wiehahn Report *op cit* note 1 at par 4.20.

<sup>4</sup> The appointment of this commission should itself be seen within its historical context. 1972-3 saw significant waves of strikes shake especially Natal. The industrial action and the concomitant increase in worker-awareness was met by the government of the day passing the Black Labour Relations Regulation Act in 1973. By 1976, 'it had become obvious that the provisions of the Black Labour Relations Regulation Act of 1973 had not solved the problem of black worker militancy'. S Bendix *Industrial Relations in South Africa* 2 ed (1992) 341. Commenting on the rationale for the establishment of the Commission of Inquiry, the cited author continues (*loc cit*): 'The original brief of the Commission was to rationalise the then existent labour legislation, to seek possible means of adapting the industrial relations system to "changing needs" and to " . . . eliminate bottlenecks and other problems experienced in the labour sphere". This was the stated brief but, in retrospect, it appears highly probable that the Commission was specifically instructed to consider a method by which black trade unions could be controlled and incorporated into the industrial relations system without creating too great a disruption.'

<sup>5</sup> See par 4.28 of Part 1 of the Wiehahn Report *op cit* note 1.

<sup>6</sup> The non-court status of the industrial court was discussed in 6.3 above. It is interesting to note that, in terms of the response of the government to the first part of the Report of the Commission of Inquiry, the industrial court would occupy the same uneasy position orbiting between Ministries of Labour and Justice as the German labour courts occupy: 'Finally it is the Government's decision that the Industrial Court shall fall under the Department of Labour, but that the Court should maintain very close ties with the Department of Justice. The president of the Industrial Court will in fact only be appointed after consultation with the Minister of Justice.' White Paper on Part 1 of the Wiehahn Report, par 7.3.

<sup>7</sup> Wiehahn Report *op cit* note 1 par 4.25.5.

Industrial Conciliation Amendment Act 94 of 1979 in the wake of the recommendations of the Wiehahn Commission, the industrial court came into being.<sup>8</sup>

Once the wording of the legislation pertaining to the jurisdiction of the industrial court to strike down unfair labour practices had settled,<sup>9</sup> from about 1983 the court proceeded to exercise its powers with enthusiasm, creating, for example, an entirely new law of unfair dismissal.<sup>10</sup>

Controversial amendments to the Labour Relations Act (as the Industrial Conciliation Act had been re-named) included the establishment of a Labour Appeal Court, itself subject to some controversy.<sup>11</sup> The Labour Appeal Court survived significant amendments to the Labour Relations Act in 1991.

## 9.2 JURISDICTION

### 9.2.1 The industrial court

The industrial court, lacking an inherent jurisdiction, has a jurisdiction conferred by statute, more specifically in terms of the definition of an unfair labour practice.<sup>12</sup> It has the power to strike down unfair labour practices as defined.<sup>13</sup> In exercising its exhaustively enumerated functions,<sup>14</sup> the powers of the industrial court 'are in accord with a

---

<sup>8</sup> 'Already at the time of its inception some doubts were expressed as to whether the new institution would succeed in fulfilling all the expectations. See H Cheadle 'The New Industrial Court' (1980) 97 *South African Law Journal* 137 at 143.

<sup>9</sup> See chapter 5 above.

<sup>10</sup> '... the industrial court used its powers in terms of the unfair labour practice jurisdiction to bring about fundamental changes to everyday employment practices and collective bargaining structures in South Africa. Although this has been achieved under the guise of an interpretation of a statutory definition and by adopting judicial techniques and procedures, what cannot be concealed is that the decisions of the court were heavily influenced by what it regarded as policy considerations. It created what is, in effect, a "new labour law" in which common-law contractual principles play a lesser role and where emphasis is placed on fairness in the employment and industrial relations context'. PAK le Roux & A van Niekerk *The South African Law of Unfair Dismissal* (1994) 19.

<sup>11</sup> 'Since its inception the Labour Appeal Court has been the subject of continued controversy. Unions regard it as employer-biased and criticism has also been levelled at the attitude of judges and assessors, the latter more often than not being advocates whose usual work is to represent employers'. S Bendix *op cit* note 4 at 529.

<sup>12</sup> In terms of section 17(2)(b) Labour Relations Act, the industrial court has country-wide jurisdiction, in spite of the fact that section 17(2)(a) makes Pretoria the seat of the court.

<sup>13</sup> As to the definition, see above 5.1.

<sup>14</sup> See section 17(11) of the Labour Relations Act 28 of 1956 as amended.

court of equity rather than a court of law'.<sup>15</sup> The industrial court has itself repeatedly stated that considerations of 'fairness' play a significant role.<sup>16</sup> The legislation provides for a number of remedies for unfair labour practices, ranging from urgent interim relief,<sup>17</sup> a remedy restoring the position to the status quo before the alleged unfair labour practice was committed,<sup>18</sup> and final relief in the form of a final unfair labour practice determination.<sup>19</sup>

### **9.2.2      The Labour Appeal Court**

This Court, established in terms of section 17A of the Labour Relations Act, has no original jurisdiction, its functions being exclusively the hearing of appeals against industrial court decisions,<sup>20</sup> reviewing industrial court proceedings,<sup>21</sup> and deciding questions of law reserved for decision by the Labour Appeal Court by the industrial

---

<sup>15</sup> T Poolman *Equity, the Court, and Labour Relations* (1988) 8.

<sup>16</sup> See, for example, *Metal and Allied Workers Union & Others v Barlows Manufacturing Co Ltd* (1983) 4 *ILJ* 283 (IC) at 293G-H, *SA Laundry, Dry Cleaning, Dyeing & Allied Workers Union & Others v Advance Laundries Ltd t/a Stork Napkins* (1985) 6 *ILJ* 544 (IC) at 565H, and *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 *ILJ* 573 (LAC) at 589E-F. The fact that the industrial court has a jurisdiction based on fairness coupled with the fact that the industrial court is not a court of law meant that the industrial court did not always follow precedents, even though the establishment of a code of fair labour practices through precedent was the aim of the architects of the industrial court. In *TATU & others v Spoornet* (1993) 14 *ILJ* 1056 (IC), the industrial court dismissively found that a judgment of the Labour Appeal Court 'does not create a binding precedent, but constitutes, instead, a mere expression of opinion which opinion is one of the factors to be taken into account as a possible guide-line by this court in the exercise of its discretion' (at 1062B, per Van Niekerk, Senior Member). The president of the industrial court retaliated: '... this court [the industrial court] is committed to the observation of the rule of law. I comprehend this principle also to mean that an administrative body is enjoined to follow and apply the law as determined by the binding authority of a superior court or other judicial body. The Industrial Court has been classified as an administrative organ. The Industrial Court could probably be better classified as an administrative court. This does not however affect the principle. The consequence is that this court will follow and apply binding decisions of superior courts. The Labour Appeal Court is such a superior court. . . Any decision of this court which has indicated that, as a general rule, we will not follow a decision of the Labour Appeal Court is an aberration and does not constitute the considered approach of this court.' *Hlatswayo v Sub-Nigel Gold Mining Co Ltd* (1994) 15 *ILJ* 431 (IC) at 433G-H, 435D-E.

<sup>17</sup> See section 17(11)(a) of the Labour Relations Act. This type of relief was available pending relief in terms of section 43.

<sup>18</sup> See section 43 of the Labour Relations Act.

<sup>19</sup> See section 46(9) Labour Relations Act.

<sup>20</sup> See sections 17(21A)(a) and 17B(1)(b) of the Labour Relations Act as amended.

<sup>21</sup> Section 17B(2) Labour Relations Act.

court *mero motu* or acting on the request of a party to the proceedings before the industrial court.<sup>22</sup>

## **9.3 COMPOSITION AND STRUCTURE**

### **9.3.1 The industrial court**

The industrial court is presided over by the president and the deputy president, both appointed 'by reason of their knowledge of the law' and their competence to perform the designated functions of the industrial court.<sup>23</sup> The legislation also provides for the appointment of permanent members of the industrial court. All appointments are made by the Minister of Labour. Additional members may be appointed either by the Minister of Labour or by the president of the industrial court if he or she has been authorised to do so by the Minister. The appointment of an additional member can only be made with the concurrence of the Minister of Finance.<sup>24</sup>

### **9.3.2 The Labour Appeal Court**

Each division of the Labour Appeal Court consists of a judge of the Supreme Court of South Africa who acts as chairperson, aided by two assessors, selected by the chairperson.<sup>25</sup> The Judge President of each provincial division of the Supreme Court appoints

---

<sup>22</sup> See sections 17(21)(a) and 17B(1)(a) Labour Relations Act as amended.

<sup>23</sup> Section 17(1)(b) Labour Relations Act. These phrases relate to all appointments to the industrial court, including the appointment of additional members and the registrar (see section 17(1)(d) Labour Relations Act).

<sup>24</sup> See section 17(1)(bA) Labour Relations Act.

<sup>25</sup> See section 17A(3) Labour Relations Act. These assessors do not represent a tripartite structure to the Labour Appeal Court; the legislation provides that an assessor 'shall be a person who, in the opinion of the chairman of the court, has experience of the administration of justice or skill in any matter which may be considered by the court' Section 17A(3)(c). Section 17A(3)(e)(ii) provides that when a question of law has to be decided, the chairman sits alone. The wording of the definition of an unfair labour practice, however, rendered impossible a categorical distinction between questions of fact and questions of law: '... the wording and purpose of the [Labour Relations] Act lead to only one conclusion, namely that the ultimate question whether the facts found by the court constitute an unfair labour practice is neither a "question of law" within the meaning of s 17A(3)(e)(ii) of the Act nor a "question of fact" for the purposes of s 17C(1)(a). It falls within a third category of question which has its genesis in the extraordinary jurisdiction established by the Act. . . . [T]he learned judge a quo was not correct in holding that the assessors had no part to play in deciding the question as to whether or not the facts found constituted an unfair labour practice. The assessors are full members of the court for the purpose of deciding this question.' *Media Workers Association of SA & Others v The Press Corporation of SA Ltd* (1992) 13 ILJ 1391 (A) at 1404C-E, per Grosskopf JA.

judges to act as chairpersons in the Labour Appeal Court.<sup>26</sup>

The geographical jurisdiction of the Labour Appeal Court as described here was similar to that of the provincial divisions of the Supreme Court prior to the 1996 Constitution.

## **9.4 ASPECTS OF PROCEDURE**

### **9.4.1 General**

South African civil proceedings are in nature adversarial, implying that the conduct of the proceedings is largely in the hands of the parties or their representatives.<sup>27</sup>

Proceedings before the industrial court are therefore characterised by exchange of documents, the filing of documents with the registrar of the court, and discovery of documents. The Rules of the Industrial Court contain specific instructions relating to certain specific functions: detailed rules apply *inter alia* in the case of applications for urgent interim relief, status quo orders, appeals to the Labour Appeal Court, and final unfair labour practice determinations.

Significant delays developed in industrial court proceedings, caused in no small part by the cavalier manner in which some practitioners approached and dealt with industrial

---

<sup>26</sup> The status of the Labour Appeal Court changes with the specific function being exercised: 'For the purposes of appeal and not, it must be emphasized, as regards the reserved question of law or the review, the labour appeal court is deemed for certain purposes to be a division of the supreme court. These purposes include the adjournment of proceedings, the appearance of the parties, the accessibility of the court and any other matter not specifically governed by the LRA [Labour Relations Act] as amended' A A Landman 'The Industrial Court and the Labour Appeal Court: A Note on some Aspects of the Labour Relations Amendment Bill' (1988) 10 *Modern Business Law* 102 at 105. When, however, reviewing industrial court proceedings, the Labour Appeal Court itself appears to share the status of the industrial court as an administrative organ: ' . . . given the composition and functioning of the Labour Appeal Court there is a good case to be made out that when it performs certain functions including review functions the Labour Appeal Court is itself an administrative organ' per Landman, President, in *Hlatswayo v Sub-Nigel Gold Mining Co Ltd* (1994) 15 *ILJ* 431 (IC) at 433I.

<sup>27</sup> 'A court designed to be informal, and whose day-to-day business consists primarily of deciding the fairness of dismissal cases, has become a happy hunting ground for the legal profession. The court's approach is to a large extent attributable to the fact that proceedings in the Industrial Court are adversarial with parties assuming the responsibility of presenting their cases and the presiding officer playing a role similar to that of a judge or magistrate. The court has operated in this manner since its inception. However there are strong indications that the drafters of the 1979 amendments intended the court to take a more inquisitorial form' P Benjamin 'Legal Representation in Labour Courts' (1994) 15 *Industrial Law Journal* 250 at 255.

court proceedings.<sup>28</sup> In the final years of the industrial court, earnest attempts were made to introduce new courts and new members, to expedite proceedings in certain cases,<sup>29</sup> the proposed establishment of industrial council courts,<sup>30</sup> and the establishment of temporary circuit courts in the environs of Johannesburg.<sup>31</sup>

#### **9.4.2 Pre-hearing conferences**

Rule 9 of the Rules of the Industrial Court provide that upon request of the industrial court, the parties shall hold an informal conference outside the court before the matter is heard. The conference is presided over by a member of the court. This pre-hearing conference is directed, firstly, at attempting to bring the parties to an amicable settlement, and, secondly, at eliminating as much of the evidentiary complexities and factual disputes as possible.

The behaviour of the parties may have an impact on costs: failure to attend a pre-hearing conference or failure to agree may be taken into consideration by the court with respect to costs.<sup>32</sup>

#### **9.4.3 Appeals**

Appeals against decisions of the industrial court is to the Labour Appeal Court. A further possibility of appeal exists, in terms of section 17C Labour Relations Act, to the

---

<sup>28</sup> It is patent from a reading of the various Practice Notes appearing above the signature of the last president of the Industrial Court, Professor A Landman, that practitioners involved in industrial court proceedings often did not exercise the care and attention the proceedings required: In Practice Note 1/1993 (29 June 1993) the president of the court alludes to the fact that many cases are withdrawn because practitioners only lavish attention upon the matter at a late stage; there is also a reminder that headings and references should be correct. The president also found it necessary to remind practitioners to paginate the papers in opposed applications (Practice Note 4/1993 - 22 November 1993). All these Practice Notes are reproduced in Cheadle et al *Current Labour Law 1994* (1994) at 155-169.

<sup>29</sup> See Practice Note 2/1993.

<sup>30</sup> Practice Note 3/1993.

<sup>31</sup> See Practice Note 1/1994 and 2/1994 (the latter announcing the foundering of 'Operation Aegean' --- the attempt to establish five temporary courts in Johannesburg).

<sup>32</sup> 'The underlying rationale for this measure [possible order pertaining to cost] is that many cases are being withdrawn at the last moment because they only receive the earnest attention of the practitioners involved at a late stage. Every case on the roll should be a case which is ready for hearing. If it is not, it clogs the roll and disadvantages parties whose matters are ready. The holding of pre-trial conferences at the court's premises under the auspices of a member of the court has occasioned unnecessary cost and inconvenience for parties and practitioners. Consequently this practice will not be reintroduced. Every presiding member will, however, retain the discretion to insist on a further pre-trial conference, even under his or her auspices, should this be warranted.' Industrial Court Practice Note 1/1993.

Appellate Division of the Supreme Court (as that court was named prior to the Constitution of South Africa Act 108 of 1996). Leave to appeal from either the Labour Appeal Court or the Appellate Division (the latter now called the Supreme Court of Appeal in terms of section 168 of the Constitution Act 108 of 1996) is required.

## DISCOURSE OF ORDER (Series 2 Part 3) (Crisis of Versus )

[ . . . standing OUTside, but still being INside the text (OF the text --- is the genetive warranted?). . . reflecting upon what has happened up to this point in text-time . . .

What is to be made of these apparently unrelated, at worst, irrelevant chapters? What ARE these pieces of text, so meticulously footnoted? Why are they here in the first place, and what function do they serve?

In the beginning was the programme of comparative labour law, a programme characterised by its insistence on the context. A reading of **that chapter** (at the outset of this part of the text) investigating **that programme** may appear to be a rejection of **that programme** --- but that programme appears to find application in the very text (this text) that investigated it {pointing to this, to that, looking back, looking forward, at the self, ranging over the contours of the writing as it has unfolded up to this point} . . .

The import of chapter 2 lies not in an outright rejection of the programme of comparative labour law (does it lie instead only in an investigation of the *lacunae* of the programme?). Every text has a context, and what has occurred in the preceding chapters is an establishment of the context of that which remains to be read.

What is the dynamics of this process? By outlining the dominant discourses in collective labour law of the countries involved (in chapters 3, 4, and 5), these short and somewhat motley chapters outline, in briefest possible (is brevity a virtue?) form, the manner in which collective labour law is talked about and thought about in each of the three countries. They attempt to allude to the major strands in the discourses of order of collective labour law.

But what is to be made of the strange chapter 6, pretentiously (is its poetry desperation?) claiming to be an 'anti-phenomenology'? Is that chapter merely a prelude to the brief outlines of institutions-as-function which dog its footsteps (in chapters 7-9)? Or is the focus of that difficult and obtuse piece of text another series (stretching into infinity) of discourses of order: the way in which the labour judiciary is thought of and spoken about?

Note the strange dissonance between what is said in chapter 6 and in chapters 7-9, as those latter chapters simply ignore the implications of chapter 6 and proceed to silence the operations of the implications in the discourse of order by closing off and presenting, again (in symmetry to chapters 3, 4, and 5) what could be called 'hard law', filled with references to legislation, to paragraphs (in German economically: §), to historical sources. The issue of the limits of the discourse of order (which are *herausgearbeitet* in chapter 6) disappear behind the law closing off its own problematical nature, as the discourse of the law succeeds in (re)presenting itself as complete and full. It could go on forever.

If only it were all like that!

What, then, can be said of the preceding chapters? That they are, in a certain sense, introductory, is clear. That they are not the main focus of the instant text is also patent --- they do not contain sufficient detail in order to justify that status.

They point to those discourses that constitute the 'context': those chapters are mere indications of the archival rules which those texts which are soon to be investigated are to be read in terms of and to be read against (*versus*). For the context is at the same time that which supports the text and that which undermines the text.

Metaphorically --- if one were to think of an act of narration: various stories are to be told. These stories are to be told in terms of various archival rules (these rules enable the stories to make sense). But the stories may also (re)present a transgression of those rules. The purpose of these/those preceding chapters is, then, to vaguely point in the direction of those archival (discursive) rules, and, further, to usher in the *place* (the court, the tribunal: where things are *heard*) where the stories are to unfold.

The context/contratext is there. It has been written. The (protracted) introduction is over and done with.

This is a breach, a crack in the text, this is . . . ]

## ***LA BRISURE***

**brisure** [bri'zy:r], *n.f.* Break; crack, joint, folding point in a piece of joiner's work, small fragment; (*Her.*) rebate; difference.

# 10

## DISCOURSE OF ORDER (SERIES 1 PART 3) LAW(S) AGAINST STRIKES

### THE EMBRACE

---

'The most obvious function of group conflict is to make explicit the grounds that separate the groups in opposition. It is a venerable sociological proposition that the "we" group always characterizes its virtues explicitly in contrast to the equally concretely stated vices of the "they" group. In terms of the larger society, this concrete expression of the differing goals and objectives of competing groups is useful. It suggests that overt conflict cannot be carried out without each side's striving for some kind of public justification of its position. Now the significance of having to justify publicly a disputed position lies in the fact that elements underlying the dispute are given some kind of affirmative expression. Each side comes to know its own mind and that of its opponent. There is no guarantee that, because the grounds for conflict are made explicit, these will necessarily represent the "true" basis of conflict.'

-- Kornhauser, Dubin, & Ross 'Problems and Viewpoints' in Kornhauser, Dubin, & Ross (eds) *Industrial Conflict* (1954) 16.

'In the funhouse mirror-room you can't see yourself go on forever, because no matter how you stand, your head gets in the way. Even if you had a glass periscope, the image of your eye would cover up the thing you really wanted to see. The police will come; there'll be a story in the papers.'

-- J Barth 'Lost in the Funhouse' in *Lost in the Funhouse: Fiction for Print, Tape, Live Voice* (1969) 85.

---

### [FOURTH PARABLE: ARABIAN NIGHTS #1 --- #1001+]

This tale is not politically correct.

Having come under the impression (through a number of strangely symmetrical experiences) that women are ex natura faithless creatures, a male person in a position of power (a king) undertakes a programme consisting of 'marrying' a woman, spending a night with her, and, before she has the opportunity to betray his trust in her, having the poor girl executed at the crack of dawn the following day.

The supply of women within the force-field of the king being ex natura finite, it is soon the turn of the daughter of his most trusted adviser. This girl, an entirely fictional creature one could call Sheherezade, being quite a brazen hussy with her wits about her, devises a plan to escape the peril she faces. After having 'married' the king, she proceeds to tell the king a story (about a fisherman and a jinni) during the night. The king so enjoys the narration that he decides to stay the execution of Sheherezade until the

tale be told (it takes four nights to conclude the particular tale -- it is {ex natura?} followed by others). This pattern is repeated for some time, in fact, for one thousand and one nights. In spite of the fact that Sheherezade bears the king three sons during the course of these three years, she continues the narration.

At the crack of dawn of Night #1001, and upon her request, the king exempts Sheherezade from execution, and a large feast is held to celebrate the true union of the king and Sheherezade.

This being a fairy tale, they lived happily ever after.]<sup>1</sup>

'Laws against Strikes' is not the name of a problem: nor is it only the name of a pamphlet appearing above the names of Hepple and Kahn-Freund;<sup>2</sup> but it is also a description (a writing-down, a *de{down}* - *scription* {writing} of a name) of a relationship ('law **against** strikes') between two concepts ('law' and 'strike'), a relationship that changes from an initial *versus* into an embrace, a genitive ('the law *of* strikes', *Recht des Arbeitskampfes*).

It is also Night #1 of a three-stage narrative.

---

<sup>1</sup> Discourse of Order Series 3 Part 4: This re-telling of the fairy tale 'Arabian Nights' discloses three stadia: The initial stage (or Night #1: before the telling) of the relationship between Sheherezade and the king is one of *versus*, a relationship characterised by the fact that silence = death. Even her institutional position and therefore relative importance (being the daughter of the adviser) would not save her life. The 'marriage' which takes place during this stage, like those of Sheherezade's less fortunate predecessors, is a sham, a pretense for a killing, a silencing at dawn. The king is committed to his programme of execution, a programme that would inexorably include the death (silencing) of Sheherezade; she *opposes* that programme through a stratagem (narration, storytelling) --- she is able to stay her execution only by telling the king a story. The second stage (Nights #1 --- #1001) is taken up by the telling of the various tales. Stage 3 (Night #1001+) is characterised by the 'true' union of Sheherezade and the king, a true 'marriage' which takes place only after the completion of the telling of the last tale. This marriage is celebrated publicly. The narration changes or transforms the relationship from one of opposition (*versus*) where silence = death, where the ostensible union is a sham, to an ostensibly true union, itself celebrated in a strange silence: 'amid rejoicings which *no storyteller may describe*'. B Alderson and M Foreman *The Arabian Nights or Tales Told by Sheherezade During a Thousand Nights and One Night* (1992) 182 emphasis added. Situating the relationship between the law and the strike within the framework of a fiction is necessary in order to be able to excavate (in different, sometimes anthropomorphic terms) the implied metaphors operating within the texts under consideration in this chapter. See above, 1.3.3.

<sup>2</sup> B A Hepple and O Kahn-Freund *Laws against Strikes* (1972). All the sections dealt with in this part were written, according to the table of contents, by Kahn-Freund himself. It is also, strangely enough -- in view of the relative obscurity of the publication -- the most complete and lucid account of the reasons for permitting the strike within the oeuvre of this influential writer: the equivalent section of a text which is doubtlessly more canonical (P Davies and M Freedland (eds) *Kahn-Freund's Labour and the Law* (1983)) deals only with the equilibrium argument (see below) in any detail. In its own small way, this is a canonical text. For a reception, see PAK le Roux 'Strikes and Lockouts - a Reassessment' (1986) 8 *Modern Business Law* 99 at 100.

## 10.1           **LAW AGAINST STRIKES [NIGHT #1]**

Considering that the Kahn-Freund text directs its initial attention largely to the telling of four tales, it is somewhat difficult to seduce the text into disclosing an initial binary opposition.

'Why, then, should the law *permit* the use of the concerted stoppage of work as a means of enforcing rights or their improvement? What is the *justification*, the *rationale* of the right or the freedom to strike?'<sup>3</sup>

This brief passage provides an elusive glimpse of the functioning of an initial binary opposition of *versus*, even though this may not be immediately patent.

The 'law' (the legal system, any legal system --- in other words, law generally) 'permits' the strike, the strike is allowed, but before this can be done, it has to be 'justified', the strike is permitted only once a 'rationale' for the strike can be, and is in fact, offered.

A 'rationale' is a fundamental reason or basis, it is a reasoned exposition; a 'justification' is to adduce adequate grounds for conduct. Before the law will 'permit' the strike, then, there must be grounds or reasons given why the law should do so. The law, in other words, must be convinced, a tale must be told to the doorkeeper, to the king, before the law will be admitted into an embrace.

Law does not of its own motion allow or accept the strike (in other words, it does not accept without justification) --- not surprisingly, in view of the fact that the strike is 'an event which of necessity entails a waste of resources, and damage to the economy'.<sup>4</sup>

The very fact that reasons, grounds, justifications, and rationales must be presented to the law before the law will be prepared to overcome its opposition (its being-against, its being-*versus*), underscores the most essential moment of the text itself - that of its beginning, mapped out by its title: 'Laws against Strikes'.<sup>5</sup>

---

<sup>3</sup> Kahn-Freund *op cit* note 2 at 6. Emphasis added.

<sup>4</sup> Kahn-Freund *op cit* note 2 at 4. 'But the strike and lockout have in common that both are a waste of social resources. So is litigation in the courts.' P Davies and M Freedland *Kahn-Freund's Labour and the Law* (1983) 291.

<sup>5</sup> The title is not explained. It could be thought that the plural 'Laws' refers only to legislation, an impression strengthened by the fact that the booklet starts out by explicitly temporally linking itself to the controversial Industrial Relations Act 1971 (repealed in 1974). However, this narrow view is counteracted by the text itself, as it purports to be a text of comparison: it is part of a series entitled 'international comparisons in social policy', prefaced by the series editor. The general remarks which precede the comparative sections of the booklet also clearly refer to a general issue: the law generally, referring not specifically to legislation only, or specific legislation. The very first phrase of the booklet also refers to 'the law of labour relations'.

This, then, is the Night #1 of the relationship between the law and the strike: because of the polluting and damaging consequences of the strike, the law is pitted against it. The sanction for a failure to present the rationale or to justify (the strike must justify *itself* before the law; the law needs no justification in the gaze of the strike) is 'not to be permitted'. If no rationale or justification could be presented for the strike, the law would prohibit the strike, would name it as 'illegal' - an execution of the strike undertaken at the crack of dawn.

## **10.2 STRIKE('S) STORIES [NIGHT #1 -- NIGHT #1001]**

The text then proceeds to tell the four stories with which the strike seeks the embrace of the law.

### **10.2.1 The tale of the balanced scale**

The first story which is told (traditionally called the 'equilibrium argument') relates to balance, to equality in strength:

'In the context of the use of the strike as a sanction in industrial relations, the equilibrium argument is much the most important of the four. It is simple enough, and it was, in all its simplicity, stated as long ago as 1896 by Oliver Wendell Holmes . . . "Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. . . ."

The concentrated power of accumulated capital can only be matched by the concentrated power of the workers acting in solidarity. . . .

*All this is almost platitudinous, but the argument, based on the need for an equilibrium of forces in labour/management relations, derives its importance from the antithetic or polemical function it had to exercise in the history of labour law. It was this theory of countervailing power which was needed to overcome the mechanical individualism permeating the legal systems of continental countries such as France or West Germany no less than those of the United Kingdom or the United States.<sup>6</sup>*

This passage contains the outlines of the tale told to the law. In briefest form, the story goes that employees collectively need a sanction in industrial relations, and that the law should therefore permit the strike, because without it, the employee collective entities would have no power to match the power of accumulated capital.

But this tale tells more: it also tells how the very tale-telling changed the attitude of law. The rationale (the tale) changes the 'history of labour law' - whereas the law had persisted in 'mechanically' (programmatically?) re-casting all labour disputes into indi-

---

<sup>6</sup> Kahn-Freund *op cit* note 2 at 6. Emphasis added.

vidual disputes, into disputes between individual employers and individual employees, the telling of the balanced-scale-tale succeeded in 'overcoming' the programme of the law.

The mechanical individualism of the law would have entailed an inability to either perceive or to accommodate (accept) the aspects of collective power which characterise the strike. And it is precisely this collective-power aspect that the law would be *against*:

'It is clear that the concept of a strike contains two elements; one is the cessation of work, the other is the element of concerted action. . . .

Parallel actions of isolated individuals do not amount to a strike. A number of employees, annoyed by some act of the employer, all giving notice, may do as much damage to the employer as a strike, but unless they act in agreement it is not a strike. This is generally recognised, and indeed *the repressive principles which legislators and courts of law applied in the past against strikers usually fastened on this element of "collective" action, this element of "conspiracy" or coalition.*<sup>7</sup>

The telling of the tale of equilibrium (the balanced scale) was therefore needed to break through the antagonism of the law, an antagonism directed not against the cessation of work as such, but against the collective power aspect of the strike: the tale-telling succeeded in diverting the law from its programme of individualising disputes (which would have resulted in the death of the strike, as the strike is per definition --- as defined in the Kahn-Freund text --- a collective measure). It is only by insisting upon balance, on equilibrium in labour/management relations, that the strike can persuade the law to desist from individualising the dispute; it is only through an insistence upon a balance between labour/management that the strike can succeed in overcoming the law's resistance to its (strike's) collective nature, that the law can be persuaded not to prohibit the strike (containing as it does the element of collective exercise of power).<sup>8</sup>

#### **10.2.2      The tale of do-it-yourself rule-makers and enforcers**

The 'autonomy argument' or the 'autonomous sanctions argument', the second rationale presented to the law, is linked to collective bargaining and its perceived nature:

'Except in marginal situations, conditions of employment cannot be regulated by legislation. . . . *The rules of employment have to be made outside the framework of law making in the technical sense*, that is through collective bargaining. This need for, and

---

<sup>7</sup> Kahn-Freund *op cit* note 2 at 4. Emphasis added.

<sup>8</sup> This prohibition of the strike would take the form of applying the full force of the law against individual employees.

existence of, a body of autonomous norms is not peculiar to labour relations (we find it in commercial relations of many kinds) but what is characteristic of labour relations is that the individual whose rights are involved does not participate in the rule making process. . . . [I]t is a continuous process of rule making by collective entities. . . .

*How can such rules be enforced through sanctions provided by law, through the judgments of courts and the machinery for their enforcement? It is not only desirable that those who have made the autonomous rules should also wield the sanctions, and not leave the enforcement to individuals who did not participate in the rule making. . . .*

As a sanction the strike or the threat of a strike can be far more expeditious and stringent than any legal procedure . . . . [T]he sanction is a kind of self-help which the law . . . is too slow to supplant.<sup>9</sup>

It may be hard to see how this story, containing as it does an insult to the law (the law can neither make the rules, nor effectively enforce the rules created by others), can serve as a reason, a justification why the law should accept the strike. This rationale is that the law should accept the strike as a substitute for its own remedies, for the law's own way of dealing with things (through courts, judgments, and the enforcement of those judgments) - largely due to the fact that the law is simply too slow in providing relief, but also because it makes sense to place rule-enforcement in the hands of those who made the rules in the first place.

However, the autonomy argument is not based on a 'being-separate' (autonomous) from the law at all, as it might appear at first blush; it is not in the slightest based on rules being made outside the law and enforced outside the law by the makers of the rules. It is instead a rationale that relates more to an ex-nominated or un-named empowerment, where the law, for some reason,<sup>10</sup> empowers certain power-entities (collectives, trade unions) to regulate certain matters, and also leaves the enforcement of the auto-regulation to those power-entities. The effect of this ex-nominated empowerment is then the creation of an illusion of an autonomous sphere within which the collective power-entities are 'free' to establish their own rules and enforce them. Both the creation of rules in auto-regulation and the subsequent auto-enforcement are dependent upon power (that very power which the law appears to have abdicated, but has in fact merely transferred) and the exercise of power.

---

<sup>9</sup> Kahn-Freund *op cit* note 2 at 7. Emphasis added.

<sup>10</sup> One possible reason is that the law finds all collective action (including collective rule-making and rule-enforcement) repugnant; the mere fact that the rule-making and enforcement was by collective entities served to turn the law away in disgust and to leave the regulation and enforcement to the makers of the rules (this is quite a nasty piece of ideology): 'Concerted action for economic purposes was obnoxious to the *laisses faire* ideology which dominated the thinking of the middle class and therefore of the courts and the legal profession in the whole western orbit of civilisation in the 19th century, and the spirit of the common law differs only in degree from that of the legal systems of the continent' Kahn-Freund *op cit* note 2 at 4.

The essence of this story is then that the strike says to the law: permit me, embrace me, and I shall serve as a sanction for those whom you have empowered to make rules ostensibly outside you; I shall do what your courts with their judgments can do with difficulty. I shall, with your indulgence, exercise your power.

#### **10.2.3      The story of forced labour**

The third rationale for permitting the strike is based upon the potential perception that were the strike (entailing a cessation of work) not permitted, the law would be seen as forcing people to work:

'If people may not withdraw their labour, this may mean that the law compels them to work, and a legal compulsion to work is abhorrent to systems of law imbued with a liberal tradition, and compatible only with a totalitarian system of government. This argument, ultimately based on the Benthamite postulate of the freedom to dispose of one's labour, is likely to impress the legal mind more than arguments derived from social reality.'<sup>11</sup>

The essence of this rationale is a threat to the law: permit the strike, for should the law fail to do so, the law will be seen as compelling the workers to work when they do not desire to do so. Such legal compulsion is immoral, compatible only with a totalitarian state.

But the shortcomings of this justification for the strike is recognised: this rationale is flawed by its failure to take into account sophistication of legislative technique<sup>12</sup> and the power-realities involved in the strike.<sup>13</sup>

#### **10.2.4      Finally: A story of feeling better**

The final tale told to justify the strike to the law is one of feeling better:

'Lastly, it is now widely accepted that the strike is sometimes a necessary release of psychological tension, especially where men and women have to work under physical or psychological strain. . . . To some extent, but compared with other factors perhaps only to a minor extent, it may help to explain the distribution of the incidence of strikes

---

<sup>11</sup> Kahn-Freund *op cit* note 2 at 7.

<sup>12</sup> 'As a matter of legislative technique it is possible to forbid a strike without forcing the individual striker to go back to work and without threatening him with imprisonment if he does not . . . . The argument against compulsory labour, whilst superficially appealing to sentiment, is thus less than convincing because the freedom to strike can be effectively undermined without directly compelling anyone to work.' Kahn-Freund *op cit* note 2 at 8.

<sup>13</sup> ' . . . legal sanctions cannot be enforced against strikers . . .' Kahn-Freund *loc cit* note 12.

over various industries. It may have something to do with the fact that the mining industries have always and everywhere been the scene of a large number of frequently spontaneous stoppages.<sup>14</sup>

The core of this story can be briefly re-stated: the law should permit the strike because the strike is a method of employees' blowing off steam. Presumably (the text is not too clear on this point), severe physical and psychological damage to employees, especially those who work under difficult circumstances, will result should the law refuse to embrace the strike.

#### 10.2.5      **And the best story is . . .**

A clear distinction is drawn between the four justifications presented, it is plainly stated that there are four 'arguments' or justifications: the equilibrium argument, the autonomy argument, the voluntary labour argument, and the psychological argument.<sup>15</sup> It is also made patently clear that, apart from the sequence in which they are presented (a sequentiality which implies the operation of a hierarchy where the most important is placed first, the least last), there is only one story that succeeds in causing the law to permit the strike:

'However, the imperative need for a social power countervailing that of property *overshadows* everything else. If the workers are not free by concerted action to withdraw their labour, their organisations do not wield a credible social force. The power to withdraw their labour is for the workers what for management is its power to shut down production, to switch it to different purposes, to transfer it to different places. A legal system which suppresses the freedom to strike puts the workers at the mercy of their employers. *This -- in all its simplicity -- is the essence of the matter.*'<sup>16</sup>

Accordingly, there is only one success-story: it is only the tale of the balanced scale which succeeds in transforming the relationship of *versus* in which the law and the strike finds itself. This story, as rationale, as justification, 'overshadows' everything else, it is, in an almost spatial sense, of so overwhelming dimension that all three other rationales are dismissed, cast into darkness; the three other arguments or rationales are banished to the shadows.

---

<sup>14</sup> Kahn-Freund *loc cit* note 13.

<sup>15</sup> 'Why, then, should the law permit the use of the concerted stoppage of work as a means of enforcing rights or their improvement? What is the justification, the rationale of the right or the freedom to strike? To this fundamental question there are at least four answers. These are based on the equilibrium argument, the autonomy argument, the voluntary labour (or Benthamite) argument, and the psychological argument.' Kahn-Freund *op cit* note 2 at 6.

<sup>16</sup> Kahn-Freund *op cit* note 2 at 8. Emphasis added.

It is also only the story of the balanced scale, one which can be stated in the form of a 'simplicity', that is the 'essence' of the matter. It is the equilibrium argument and only the equilibrium argument that succeeds in **being** the essence of the matter (it is also the rationale which succeeded, through its antithetical and polemical nature, in changing labour law history). The equilibrium argument is the answer to the question posed at the outset: why should the law permit the strike?

The hierarchical operation of the text is, then, that the equilibrium argument is in a privileged position: it is the one that 'overshadows' the other three arguments, it renders the other arguments dark and silent; it is also the one argument that is the 'essence' of the matter, an essence that can be stated simply. The privileging of the equilibrium argument would appear to entail the rejection of all three other arguments; they are overshadowed, they are not the essence of the matter (they are rejected as being not-essential, or not-being essential).

But what is the essence of the equilibrium argument? Does this privileged argument not derive its privileging from the very fact of the rejection of 'everything else'; is it not possible that the equilibrium argument is the 'best story' to shatter the relationship of *versus* between the law and the strike because of the uneasy process of shadowing that is taking place with regard to the other three arguments presented? Is not this process one where that which is darkened and silenced persists in shimmering through the darkness into which it has been cast; does not that-which-is-rejected darken that-which-overshadows? Can the equilibrium argument be the sum of that which is rejected or does the operation of the equilibrium argument entail an affirmation of that-which-is-rejected?

The forced labour argument finds itself surfacing within the very act of privileging the equilibrium argument:

*'A legal system which suppresses the freedom to strike puts the workers at the mercy of their employers'.*

Workers are 'at the mercy' of the employer, placed in that position ('put' there) by a legal system which suppresses the right to strike. If the legal system suppresses the right to strike, the employees (being, through the failure of the law to permit the strike, 'at the mercy' of employers) are compelled to obey **all** commands of the employers, commands such as that all employees are to wear protective clothing, all employees are to receive minimal wages in kind, all employees are to clean their places of work, and all employees are to work. If the employee 'is at the mercy' of the employer, the employee is, when ordered to work, compelled to obey the command of the employer (there is no choice: whether or not something is done, or some benefit is granted, depends entirely on the discretion, or the 'mercy' of the employer). Because the employee has no choice, he or she *is not free to withhold his/her labour*. This lack of

freedom to withhold labour is directly attributable to the failure of the law to permit the strike (employees are 'put' at the mercy of the employers by 'a legal system which suppresses the freedom to strike', the legal system 'puts' the employees at the mercy of the employers).

The failure to permit the strike would, by placing the employees 'at the mercy' of their employers (and thereby eliminating any freedom, including the freedom to stop working) mean that the law, through its failure, permits the compulsion to work.

Through the word 'power' an uneasy relationship arises between the equilibrium argument and the autonomous argument. The equilibrium argument is founded upon a balancing of power: 'the imperative need for a social power countervailing that of property', the 'power to withdraw their labour'. The focus of the equilibrium argument is the provision of a social power with which employees (or their collectives) counteract the exercise of the power of accumulated capital: 'to shut down production, to switch it to different purposes, to transfer it to different places'.

These balanced powers are necessary, in the Holmesian terms incorporated into the original formulation of the equilibrium argument, 'if the battle is to be carried on in a fair and equal way . . . .' This formulation clearly foresees that the countervailing powers are not there for their own sake (when is power for its own sake?), but that **these powers are to be exercised in a 'battle'**.

Now the formulation of the autonomous argument refers to neither battles nor skirmishes. But it does concern power and the exercise of power. In a telling paragraph, the exercises of power in collective bargaining (as auto-regulation) become clear:

'It [the strike] is, in other words, an essential element not only of the unions' *bargaining power*, that is for the bargaining process itself, it [the strike] is also a necessary sanction for enforcing agreed rules.'<sup>17</sup>

The bargaining process, it appears from this passage, is a process whereby power is exercised; one party (the union) has a 'bargaining power', and the strike is an **essential** (constituting?) element of that power. Phrased in the reverse: if a strike was not possible, the union would have no bargaining power, and either (a) there would be no bargaining process, or (b) the bargaining process itself would not take place or be flawed (in the sense of being deprived of one of its essential elements).

This, then, is why power is necessary: parties to collective bargaining must have power to exercise during the battle (power-struggle) which is collective bargaining. Without this power collective bargaining would not, could not take place; without countervailing power, the one party would be at the mercy of the other.

---

<sup>17</sup> Kahn-Freund *op cit* note 2 at 7. Emphasis added.

Using a 'sanction' to 'enforce' auto-regulation also implies the use of power. A sanction is used to force the other party to comply with the terms and conditions of the 'agreed rules' (the auto-regulation). Without power, and the concomitant threat of power being exercised, there could be no enforcement: 'As a sanction the strike or the threat of a strike can be far more expeditious and stringent than any legal procedure . . .'

This may merely look like a restatement of the autonomous or autonomous sanction argument. But the importance of this re-formulation and working-through of the autonomous argument serves the purpose of unthreading its importance, namely that it contains the programmes in terms of which power is to be exercised and the purposes for which the power is used. The autonomous argument, as formulated, states that **power is to be used for the purposes of auto-regulation through collective bargaining and auto-enforcement.**

This reformulation leads inevitably to a problematization of the relationship between the equilibrium argument and the autonomous argument, a problematization that the formulation of the equilibrium argument implicitly recognises by re-situating itself within the context of power-exercise: 'In the *context* of the use of the *strike as a sanction* in industrial relations, the equilibrium argument is much the most important of the four.' This initial phrase at the very outset of the exposition of the equilibrium argument admits that the balancing of power is of relevance only within the context of the exercise of power ('sanction', 'battle'). But it is to be that very context which proves to be the undoing of the simultaneous privileging of the equilibrium argument, for through its oblique references to the actual exercise of power, it by implication recognises its own dependence on the autonomous argument which contains programmes and purposes for the exercise of power.

The equilibrium argument, then, focuses on a balance of power: one power is to be matched by another power of equal force. But the formulation of that argument betrays its own stated privileging by admitting that the relevance of this balance-of-power lies in the power-exercising programmes equally obliquely outlined in the formulation of the autonomous argument. The equilibrium argument states that power should be equal (and discloses the significant effect it had on changing the individualist obsession of the law) and balanced; the autonomous argument indicates what power is to be used for and the context within which it is to be exercised.

The uneasy relationship between the equilibrium argument and the autonomous argument also impact on the view of autonomy-as-empowerment outlined earlier. Success is attributed to the the equilibrium argument: it is the **only** argument which has succeeded in changing labour law history by destroying the programmatic legal individualisation of disputes.

If the law yields to the tale of the balanced scale and permits the strike in order to ensure balance of power between labour and management, the law is providing an

instrument of power which may be applied for the purpose of either auto-regulation or auto-enforcement. Without power (itself determined by the availability of the strike), or the potentiality of the exercise of power, neither auto-regulation nor auto-enforcement would be effective. In order for auto-regulation and auto-enforcement to be effective, it is necessary for the law to equalise the power-balance by permitting the strike.

It is with a certain irony that the programmes of auto-regulation and auto-enforcement contained within the formulation of the autonomous argument depend, for their effectiveness, on the equality of power brought about by the equilibrium argument's intercession with the law to permit the strike. The autonomous argument, in spite of its avowed being-separate-from-the-law, its self-regulation and self-enforcement outside the slow and cumbersome law, is predicated, for its effectiveness, upon that very law permitting the use or the threat of a strike: its very programmes of auto-regulation and auto-enforcement depend not on auto-power, but on an empowerment by the very law which is rejected as ineffective.

### 10.3 THE EMBRACE AND THE SEEING-OF-THE-SELF [NIGHT #1001+] (lost in the funhouse)

What is to be made of these tall tales that in their telling inextricably circle and fold back onto, through, and into each other? Is it indeed the operation of **only** the equilibrium argument which succeeds in attaining for the strike the embrace of the law, or is it a combination of the tales (if so, what combination: 50% of one, 20% of the other)?

What **economy** makes possible the transfer of power by the law through her embrace; what rules of demand succeed in attaining the necessary supply of power if the privileged tale, the one said to be the successful one (the one which silences and overshadows the others) depends for its cogency upon the existence and the cogency of those very tales which are rejected? Is the telling, the manner of the telling (with its hierarchical programme) not dialectically a telling of silence (a telling into silence) where a part of what is told is silenced in favour of another part of the tale?

For it is clear that, no matter what discursive operations are involved, the tale-telling succeeds, for the law embraces the strike:

'... a freedom to strike is quite generally recognised as an *indispensable ingredient of a democratic society*'.<sup>18</sup>

Or, expanded ---

---

<sup>18</sup> Kahn-Freund *op cit* note 2 at 2.

'Why is it that in all democratic countries the "freedom to strike," or, as is it sometimes put, the "right to strike", is considered to be a *fundamental freedom*, alongside the freedom to organise, to assemble peacefully, to express one's opinion? Why is the strike, or better perhaps, the potentiality of a strike, that is, of an event which of necessity entails a waste of resources, and damage to the economy, nevertheless *by general consent* an *indispensable element* of a democratic society? Or, to put it the other way, why is there no one (outside a *very insignificant lunatic fringe*) who in countries such as Great Britain, France, West Germany, Italy and the United States would even attempt to argue that all strikes should be made illegal? Why do even communist countries, in which no freedom to strike in fact exists, find it necessary to pay at least lip service to it?'<sup>19</sup>

These two passages indicate the 'true' embrace within which the law now holds the strike -- the strike (the right or the freedom to resort to it) is 'indispensable', it is 'fundamental', and, as such, occupies a position alongside other fundamental rights. Not only has the law recognised (seen) the strike, and not only is the strike permitted (tolerated), but the strike attains a position of security; it joins a panoply of legal idols (fundamental rights of association, freedom of expression).<sup>20</sup>

The strike, as an indispensable element, normatively determines the order within which it is placed -- without the strike, the order would not be 'democratic' (the implicit assumption here, of course, relies on a normative programme in terms of which democracy = good, a programme so obvious and self-authenticating that it requires neither reiteration nor explanation). To such an extent succeeds the telling of the tales of the strike: the presence/absence of a right/freedom to strike normatively determines the law, that very seat of power which had to be deceived into the embrace through the telling of tall tales. The reaction of the law to the strike (whether or not it embraces it or not) becomes a moment in the meta-legal normatizing of the law (as 'good' legal system which embraces the strike; 'bad' system which refuses the gesture of the story-telling).

Through a sudden reversal, the very embrace of the strike, which takes place only after the strike has succeeded in convincing the law of its own normative superiority (the

---

<sup>19</sup> Kahn-Freund *op cit* note 2 at 4. Emphasis added.

<sup>20</sup> 'To recognise the freedom to strike is one thing, to *translate* it into terms of positive law is another. The techniques employed in *crystallising* it into concrete rules of law vary from country to country . . .'. Kahn-Freund *op cit* note 2 at 9, emphasis added. This brief passage gives some indication of the processes involved in the act of embracing: the strike is recognised, but this recognition has to be 'translated' (processed, rephrased in a different language), after which it has 'crystallised'. Once crystallised, the positive right/freedom to strike attains the status of positive law that can be applied and enforced using the remedies dismissed as too slow and cumbersome during the formulation of the autonomous argument. The dynamics of the embrace of the strike can therefore be summarised as: recognition - translation - crystal form (solid state).

stories say why the strike is 'good' in the sense of being 'necessary') becomes the normative determining moment for the law itself. Law, initially demanding a normative justification of the strike, eventually finds itself normatively justified through its embrace of the strike.

It is through its embrace of the strike that the law is able to reflect its own meta-legal normativity: it is, in the light of the embrace or the failure to embrace the strike, that the law can be seen as being either good or bad. The embrace of the strike is, for the law, the mirror in the funhouse mirror-room: it is while (not) locked in the embrace of that which it was initially against that the law sees itself in all the meta-legal normativity of good and bad, going on forever. . . .

But what economy enables this ideal and unobstructed view of the self? What insists on being suppressed in order for the view of the '*itself*' of the law to be possible?

Is it not notable that, in the passage quoted above, those who would have the audacity to suggest that all strikes should be illegal amount to 'a very insignificant lunatic fringe'? Those who suggest that the law should not embrace the strike are negligible, they are 'insignificant' - unimportant, and may be disregarded as being of no account.

The economy of this 'insignificance' lies first in the fact of the alleged insanity of those who would argue that the law should make all strikes illegal, the fact that those who so argue are a **lunatic fringe**, and second in the spatial organisation in which they are found (placed), in their insanity, they are **outside** (the fringe) of the 'general consent'. Those who suggest that the strike should be illegal are mad people ranting outside the gate of the consensual legal discourse, and, mad people ranting outside the gate are (*ex natura?*) insignificant.

It is this very act of silencing, an act thoroughly normative in operation (in terms of an economy of negatives such as 'insanity' {lunatic} and 'being outside' {fringe}), that makes possible the embrace of the strike through which the law sees itself going on forever in the funhouse mirror-room. By silencing those who would re-utter the relationship between the law and the strike as a relationship of *versus* where the law would prohibit the strike, Night #1 of the tale of the the strike-Sheherezade and the king-law is in effect unwritten; the entire intial stage (before the telling of the tales) during which the strike was at peril of prohibition and had to present justifications and rationales for the embrace is un-named as the strike, locked in the self-serving embrace of the law (through which the law can see itself as good or bad), with a forceful and self-obscuring self-evidence, comes to occupy a place amongst the idols of the law. The mad people outside the gates incessantly chant that which is (conveniently) best forgotten, namely that the law would declare all strikes illegal were it not for the tales told by the strike; their very act of transgression (of saying that which is outside the general consent) signifies the troubled start of the relationship between the law and the strike.

That which is said by those who fall outside the general consent, these mad ravings outside the gate, are policed in terms of a process of silencing: these utterances are

silenced as a result of their act of transgressing the general consent. Even though they say that which is, in effect, where the relationship between the law and the strike began on Night #1. But Night #1 is ancient history (it is a fairy tale) and the law, enjoying the unobstructed view of its own normative justification brought about (made possible) by its embrace of the strike, ruthlessly suppresses the insane uprising at the gate.

Steps have been taken.

The police have come and gone; there'll be a story in the papers.

## **DISCOURSE OF ORDER (Series 2 Part 4)**

[ . . . it will be the task of those chapters that follow this breaking point to examine that story in those papers . . . .

Why does that piece of text, which finally utterly surrenders to its own exaggerated poetic, constitute the breach, the crack, but also the hinge, the joint?

What is it that sets that piece of text apart from that which came before, and that which is to follow?

For a *brisure* is not only a break, it is also the hinge between two pieces. Chapter 10 is itself an embrace: it embraces that which came before it in that it is a discourse of order (it pertains to the Series 1 Ordering Discourses) and, as such, it (re)presents a certain context for that which is to follow. But that piece of text equally vigorously embraces that which is to follow, for it narrows the focus in preparation for what is to follow, it lays the foundation upon which the perilous structures of the rest of this text are to be built. If chapter 10 told the story of the telling of a story, subsequent chapters are to have as their concern the ceaseless telling, un-telling, silencing, embroidering, ignoring, abridgement, and improvisations of these stories and other stories told in terms of these stories.

That collection of sentences (demarcated by certain conventions: chapter headings, blank spaces) stands alone. This fact may appear at first to be sloppy organisation: either it should be part of the context (Context/Contratext), or it should belong to the final chapters. But, just as every text has a context, does not every text have a turning point, a break or a crack which is at the same time that which joins the sides of the break?

This is not to say that the text is not whole (in the sense of being coherent) but it is simply a foregrounding of a critical point reached in the development of the discourse (this text, that text, the one pointed to).]

**PART 2**

**ARCHAEOLOGIES**  
**OF**  
**SILENCE**

# 11

## ARCHAEOLOGY OF SILENCE I (OBLITERATION, CONSTRUCTION, TRANSGRESSION)

### THE TRANSGRESSION OF NORMATIVE CLOSURE IN THE INDUSTRIAL ACTION JURISPRUDENCE OF THE GERMAN FED- ERAL LABOUR COURT

---

' "Begin at the beginning," the King said gravely, "and go on till you come to the end: then stop." '

-- Lewis Carroll *Alice's Adventures in Wonderland* (1865) 143 (Everyman's Library Edition 1992)

'Der Große Senat ist nach § 45 Abs. 1 Satz 2 ArbGG nicht verpflichtet, die vorgelegene Fragen nur entweder mit "Ja" oder mit "Nein" zu beantworten.' [The Large Senate is not compelled, in terms of § 45(1) of the Labour Courts Act, to answer the submitted questions with a mere "yes" or "no".]

-- Large Senate of the Federal Labour Court, 28 January 1955

---

#### [PROLOGUE: AN ACT OF READING (Discourse of Order Series 2 Part 5)]

Beyond the hinge, beyond the breach . . .

A (potentially) infinite discourse, stretching into a future infinity from an infinity (from that which came, if only in a temporal sense, before it). . . A sequential text, to be ranged over, potentially infinitely, indefinitely. A ranging over that could arbitrarily fasten upon any random moment of the discursive landscape --- any momentous discursive outcrop being a potential 'beginning'.

What is an act of reading (*this* act, any other act) to fasten upon in its comfortless (obessive?) ranging over a series of texts that together bear the appellation 'the industrial action jurisprudence of the German Labour Court?' Is the question itself aporetic, perhaps even totally superfluous? For is that series of texts found as pre-classified, as grouped, presented (sequentially) in a single volume?<sup>1</sup> Is the act of classification of the texts any concern of an act of reading, implying a blind (or, at best, semi-sighted) acceptance of the archival structures that made that categorization possible in the first place? Is an act of reading (*this* act, any other act) itself a categorization in terms of

---

<sup>1</sup> Hueck, Nipperdey, Dietz (founding eds) *Nachschlagewerk des Bundesarbeitsgerichts - Arbeitsrechtliche Praxis* (looseleaf: Volume first published in 1955).

other categorizations, again referring (endlessly, for there is nothing outside the text) to other categorizations?

This is the nightmare of the archive (and that through which the archive is readable, that which the archive makes possible: an endless labyrinth of text, countertext, text and that which makes the text text). Reading in the funhouse of a serial discourse. The act of reading is an archaeology (excavation) of the archival labyrinth within the text . . . whence it cannot escape . . .]

## 11.1 OBLITERATION AND ESTABLISHMENT (1955)

It may appear, at first glance, as if the beginning need not be problematised for it is ready-made, ready for use. This discourse has a purported 'beginning' (even though it may transgress its own founding nature in the course of the very act of foundation) --- there is a decision **Number 1**, a point which purports to be the point from which all else comes (the point *before* all others). There is a point that purports to be, for want of a better word, the *Beginning of the Discourse*.

This categorization (Decision #1) implies that the founding decision of the Large Senate of the German Federal Labour Court in 1955<sup>2</sup> must be approached with considerable care, for it is the one and only opportunity an act of reading could hope to have of observing the full unfolding of a founding or establishment of a serial discourse: once established, that which follows upon that founding act may take place **in terms of** the archival rules established within that process of founding. The founding (canonical) discourse determines (lays down) the (transgressible) boundaries of the subsequent (or within which the subsequent takes place). The establishment of the principles or rules of the archive will also make possible the transgression (or contamination) of those principles or rules.

There is a following-upon, in a temporal sense (a seriality or sequentiality), but also in the sense of legitimization (subsequent decisions depend, for their legitimacy, upon the legitimacy conferred upon the discourse by the founding act of that discourse). The legitimacy of the subsequent depends on the legitimacy the founding discourse is able to find for **itself**.

The act of founding is no *mere* fiat --- no *mere* calling into being. It is not the creation of something from nothingness. For a traditional analysis the identification of the fiat itself (and the apparent policy considerations motivating that act of judicial creativity) would be sufficient.

But for the purposes of this (instant) analysis, it is important to bear in mind, firstly, that the foundation of a discourse (law-as-discourse) takes place within a context (a

---

<sup>2</sup> BAG AP Nr 1 on Art 9 Basic Law (Industrial Action). Decision of the Large Senate of the Federal Labour Court: 28 January 1955.

context that itself structures the founding and a context that is simultaneously transgressed by that founding). An act of establishment is, secondly, determined by an economy of supply and demand: that which must be *sacrificed* for the establishment, that which the discourse is to demand be sacrificed (forfeited, given up) for its own sake. The operation of this discursive economy can be clearly observed in the following passage:

'Die Lösung kan vielmehr aus dem Wesen des gewerkschaftl. Streiks als kollektiver Kampfmaßnahme gefunden werden.' [The solution may, on the contrary, be found in the nature of the strike (called by the trade union) as a measure of collective action.]<sup>3</sup>

Contained within the grammar of this innocuous-looking sentence lies acts of both obliteration and establishment.

### **11.1.1      Act of obliteration**

The first noun in the passage quoted above is 'solution' (*Lösung*): there is, by implication, a problem to be solved or a question to be answered. This to-be-answered question is about the strike and its effect upon the employment relationship: whether participation in a strike called by a trade union terminates the employment relationship, even though the employees failed to give notice of termination of their employment contracts.<sup>4</sup>

According to the construction of the sentence, the 'solution' to the 'problem' lies 'vielmehr' in the nature (*Wesen*) of the strike.<sup>5</sup> 'Vielmehr' indicates the operation of a process of **privileging**: the standard translation of 'vielmehr' is 'rather' or 'on the contrary'. The solution to the problem can be found, then, in one thing (the nature of the

---

<sup>3</sup> BAG AP Nr 1 on Art 9 GG (Industrial Action) at 4R (the 'R' indicates the 'Reverse' or 'Rückseite' of page 4 --- this looseleaf publication employs an unorthodox numbering system, where each decision is given a number of appearance, and only the recto pages are numbered. Verso pages are labelled 'R').

<sup>4</sup> The complainant had been employed by a fishery for a period of 22 years, becoming a member of the works council. On 9 September 1953, he participated in a strike called by the trade union of which he was a member. All members of the works council participated in the strike. The employees served no notice of termination of employment on the employer. The purpose of the strike was to force the employer to conclude a collective agreement in terms of which the netmakers would be entitled to wages equal to those of other employees. Five days after the strike had begun, all employees were summarily dismissed. On 28 November 1953, the strike collapsed, but the collective agreement did not contain a *Wiedereinstellungsklausel* (a clause reinstating all dismissed employees). Except for the complainant and 6 other employees, all employees who had participated in the strike were reinstated. The complainant approached the court requesting a declaratory order that the dismissal of 14 September 1953 was invalid and that he be reinstated.

<sup>5</sup> The reference is throughout to the 'gewerkschaftlichen Streik', or a strike called by a trade union.

strike), rather than somewhere else. The solution is to be found in that which is privileged, rather than in that which is not. That which is not privileged is **obliterated** (it is not where the solution to the problem lies -- it is not of interest, suffering the fate of exnomination, of being unnamed).

But the process of privileging in the text under consideration amounts to an obliteration of a number of legal arguments:

- According to the majority of opinion, participation in a strike amounts to a breach of the employee's duty to work. This intentional and illegal breach is not protected by either Article 9 of the Basic Law, or by the provisions of the constitutions of the states (*Länder*) that together make up the Federal Republic, or by decisions of the trade unions, or by the precedence enjoyed by a collective law. Participation in industrial action must take place within the limits of the legal order, limits imposed not only by legislation, but also by contractual agreements. Participation in a strike therefore amounts to a persistent refusal to work, thereby entitling the employer to summarily dismiss the employees. The employer is also entitled to claim delictual damages from the employees.<sup>6</sup>
- A counter-argument holds that the participation in a strike does not amount to a refusal to work, and therefore does not entitle the employer to summarily dismiss the employees. The basis of this argument is a recognition of a special constitutional right to strike (*verfassungsrechtlicher Streikrecht*) which supersedes the breach of contract. Others refer to the strike as a principle of the constitutional order and linked to the law of collective agreements, the right to social self-regulation, and the precedence enjoyed by the collective labour law.<sup>7</sup>

Having outlined these arguments, and referred to the relevant sources, the text then proceeds to find that the mere affirmation of a constitutional right to strike does not amount to a solution of the problem -- the majority opinion being that the provisions of Article 9 protects only the freedom to associate, and not the methods employed by the trade union. However, the denial of a constitutional right to strike does not entail that participation in a strike should be construed as a breach of the employment contract.<sup>8</sup> This is what is being obliterated by the use of 'vielmehr': *instead* of these legal arguments, *rather* than these points raised in the literature and case law, *contrary* to the views of the doctrine, the answer is to be found *elsewhere* -- these arguments do not

---

<sup>6</sup> See BAG *op cit* note 3 at 2 and 2R.

<sup>7</sup> BAG *op cit* note 3 at 3 and 3R.

<sup>8</sup> See BAG *op cit* note 3 at 3R-4R.

represent the truth of the matter, they must be discarded, silenced, obliterated, before the actual state of affairs can be found (the answer to the question can 'be found' --- '*kann gefunden werden*'). The answer, the solution, is there, covered, hidden: all that needs to be done, is for the answer to be found (*rediscovered?*). *Es lässt sich finden* -- the answer allows itself to be found (the process of finding implies a certain **passivity**: the answer is not made or constructed; instead it is found, ready-made, and ready to use. There is therefore no need to construct or make an answer). Once discovered, uncovered, the 'true' answer to the problem lets itself be read (*Es lässt sich lesen*).

### 11.1.2      Act of establishment

The obliteration taking place is the economy of (the price to be paid for) the establishment or the construction of the discourse. It is only within the silence which follows upon the act of silencing that the discourse can be established anew.<sup>9</sup> This establishment of discourse is, dialectically, contained in the same act of obliteration: the solution is not to be found in the cited legal arguments -- on the contrary, the solution passively allows itself to be found in the nature of industrial action. The reference to a privileged '*Wesen des gewerkschaftlichen Streiks als kollektiver Kampfmaßnahme*' amounts to an establishment of a discourse, the end of which is not yet in sight (*es lässt sich nicht sehen*).

This act of establishment, structured by its supplement of obliteration, must be approached with care, for once completed, the act of establishment will disappear behind that which was founded, and the discourse will proceed to ex-nominate and cover up its constructed nature, then to present itself with the self-assured self-evidence of *fiat*. Once established, the newly founded discourse becomes Law-as-discourse.

This dynamic (of discourse becoming Law-as-discourse) is made possible by a number of factors. There is the **iterability** of discourse: the archival principles of the founding discourse being, in theory, endlessly iterable, they can be 'extrapolated' from the text in which they are formulated (the text of the judgment, of the decision, their context) and can be 'applied' subsequently, to other factual situations, in other contexts and in the process of application found the transgression of the discourse.

---

<sup>9</sup> Traditional historical-legal analysis could, at this point, attempt to locate the precursors of the discourse, to find that the discourse is based upon another *Urdiscourse* that came before it. So Seegert sees a legal opinion prepared by the then President of the Federal Labour Court at the time, Nipperdey, on a strike in the newspaper industry, as the basis for the decision of the Large Senate. C Seegert *Die Formierung des Streikrechts: Arbeitsgerichtsbarkeit und Koalitionsrecht im Prozeß gesellschaftlicher Restauration 1946 bis 1955* (1985) at 194-201. As convincing as Seegert's analysis may be, the concerns of the present study are discursive: the archival structures which inform (and which are to be iterated) in the law-as-discourse (here and now represented by the text of the Large Senate under discussion). The text makes no reference to the Nipperdey opinion -- it is therefore outside the text, it is not of the text, it is con(tra)text.

Another factor is the **institutional position** of the agent --- it is a decision handed down by the Large Senate, specifically empowered by the legislation to 'create' law (*Fortschreibung des Rechts*).<sup>10</sup> Because of the institutional position occupied by the agent handing down the decision, the discourse attains the status of Law-as-discourse (it would not have had the same canonical effect if it had been a local *Amtsgericht*).<sup>11</sup>

The nature of the discourse established (the iterability of an archival discourse --- the archival nature **and** iterability determined by the agent of the handing-down, the Large Senate) is *serial* in its legitimisation --- that which follows (other decisions) will legitimise itself by reference to the iterability and legitimisation of that which preceded it (the decision of the Large Senate) --- in most cases, however, the iterability and legitimisation will simply be assumed (and thereby fail to deserve mention).

The establishment of the discourse (which is destined to become Law-as-discourse by virtue of its iterability --- in turn made possible and legitimated by the 'author' or agent of the discourse) occurs by referring to the 'nature' of the strike as a *kollektiver Kampfmaßnahme*, a measure of collective action (the wide concept 'Kampf' encompasses 'fight', 'combat', 'action', 'engagement', 'battle', 'struggle'). It is the 'nature' of the strike which not only makes possible the finding of the solution to the problem, but that same nature is such that it enables a process of privileging, where the 'nature' of the strike is privileged over the legal arguments obliterated in the same act.

The establishment of the first archival principle of the discourse takes place in general terms:

'ArbKämpfe (Streik und Aussperrung) sind im allgemeinen unerwünscht, da sie volkswirtschaftl. Schäden mit sich bringen und den im Interesse der Gesamtheit liegenden sozialen Frieden beeinträchtigen; aber sie sind in bestimmten Grenzen erlaubt, sie sind in der freiheitl., sozialen Grundordnung der Deutschen Bundesrepublik [sic] zugelassen. . . .

Es besteht Freiheit des Arbeitskampfes, Streikfreiheit und Aussperrungsfreiheit. . . .'

---

<sup>10</sup> See above, 7.3.3. The matter was referred to the Large Senate by the First Senate of the Federal Labour Court in terms of § 45 ArbGG.

<sup>11</sup> This is an aspect of power, and it is the prevalence of this subliminal aspect of power that made necessary the introduction of chapters 7,8, and 9, chapters relating, if stripped of all their other functions, of introducing the discursive power-structures in terms of which the agents of the decisions function (and attain their institutional power). The canonical force of the decisions of the Large Senate could not be understood unless seen within the context of the power-discourse (a power largely conferred by legislation) in terms of which that agent operates. The power-discourses are, by nature, all interlinked (for there is nothing outside the text): so the archival/canonical force of the decisions of the Large Senate is a function not only of the privileged position in terms of the directly enabling legislation (the Labour Courts Act), but also of the provisions of the Basic Law. Once the discourse currently being operated upon is recognised as being also a discourse of power, its relation to discourses (sometimes uncritically) presented or summarised in previous chapters should become clearer.

[Industrial action (strikes and lock-outs) are generally undesirable, as they cause economic damage and adversely affect the social peace which is in the interests of all. But they [strikes and lock-outs] are allowed within certain boundaries, they are permitted in the free social basic order of the German Federal Republic. . . . Freedom of industrial action, freedom to strike, and freedom to lock out, exists.]<sup>12</sup>

The effect of this establishment can be summarized as being that the German legal order recognises a freedom to resort to industrial action (both the strike and the lock-out), in spite of the damage wrought by industrial action (economic damage, prejudice to social peace). The phenomenon of industrial action has to be accommodated within the legal system.

This first archival principle (the principle of accommodation) of the first industrial action decision of the Large Senate of the Federal Labour Court is also the **first principle** within this particular discursive archive.

But no first principle can be established without the paying of a fee, and the Large Senate then proceeds to pay the price for the founding of the first archival principle of the discourse. This economy of the first principle contains a number of closely related acts: the provision of reasons (a process of legitimization itself), the establishment and linking of supplementary legitimization-discourses, and the placing of limitations upon the first principle. A strange transgressive act (contamination) also lies within the magical circle of these various legitimizing acts.<sup>13</sup>

Yet all of these acts must be seen within the context of the establishment of the discourse through the formulation of the first archival principle of that discourse -- together these acts amount to the price that has to be paid for the formulation of the first principle.

### **11.1.3      The justification of the first principle**

The first archival principle of the discourse (strikes and lock-outs are allowed, are to be accommodated in the legal system) has to be justified -- reasons have to be given for the first principle.

The first archival principle of the discourse must be shown to have a **logical structure** -- that it is not arbitrary (*willkürlich*), that it is itself determined by a certain cause-effect structure that explains the first principle. It needs to be shown (proven) that the first principle is the result of a considered reasoning, that it is not the mere exercise of an untrammelled and unlimited power (it must be shown not to be a fiat), but that it is the result of a logical process, in which advantages and disadvantages have been con-

---

<sup>12</sup> BAG *op cit* note 3 at 4R.

<sup>13</sup> See 11.1.5 below.

sidered. The first principle is legitimised through the very stories told to the law, the tall tales of an utterly logical and thoroughly reasoned process, of which the first principle is the inescapable result.<sup>14</sup>

Two of the justifications or reasons offered are policy related:

'Unterbrechungen der betriebl. ArbTätigkeit durch einen solchen ArbKampf sind sozialadäquat, da die beteiligten ArbN und ArbGeb. mit solchen kampfweisen Störungen auf Veranlassung und unter Leitung der Sozialpartner von jeher rechnen müssen und die deutsche freiheitl. Rechtsordnung derartige ArbKämpfe als ultima ratio anerkennt.' [Interruptions of production through industrial action are socially adequate, because employees and employers must count on these disturbances resorted to by and led by the social partners and the German legal system, based on freedom, recognises such industrial action as ultima ratio.]<sup>15</sup>

The two reasons offered in this passage are:

1. Because industrial action is a part of working life, industrial action (amounting to a cessation of work), is socially adequate, because the employees and employers involved must count on (reckon with) these occurrences.
2. The German legal system, based on freedom ('deutsche freiheitliche Rechtsordnung') recognises industrial action as ultima ratio.

If regard is had to the second policy consideration, and echoing what was said before,<sup>16</sup> industrial action perforce has to be justified before the eyes of the Law. Here again reappears the simultaneous and dialectic link between legal acceptance (and consequent legal protection) of industrial action, and the auto-reflective-normative process of the law (law as free and democratic system because of its acceptance/protection of industrial action). Again the law can describe itself as being 'free' ('freiheitliche Rechtsordnung') only by (at the same time) accepting industrial action as falling within the range of actions that deserve its protection.

The considerations surrounding 'social adequacy' are by their very nature policy and moral considerations, and are intricately related to the principle of accommodation.

The principle of social adequacy has its origins in the criminal law. It means that a human act can only be understood by reference to the function of the act within the

---

<sup>14</sup> This is why the first principle of the discourse is not a *fiat* -- unlike a fiat, reasons have to be given; a certain process of logical legitimisation has to take place. However, once this process of legitimisation is completed, the entire process itself become obliterated through the force exercised by the first archival principle itself: the force of the first principle is of such a nature that its logical legitimisation is obscured.

<sup>15</sup> BAG *loc cit* note 14. Emphasis added in translation.

<sup>16</sup> See chapter 10 above.

social context. An action such as a persistent refusal to work or a persistent refusal to perform duties in terms of a contract of employment can be socially adequate, in spite of the legislative provisions outlawing them --- the actual meaning of the action can only be determined by reference to the function of the action within the social whole. The relevance of social adequacy for the purposes of the decision of the Large Senate lies in the fact that it is through the application of this principle that the accommodation of the phenomenon of industrial action within the strictures of the law of contract is possible: even though there is a breach of the employment contract, through the refusal of the employee to perform his or her contractual duties, this breach (in the form of a strike called by a trade union for the purpose of concluding a collective agreement) is socially adequate and therefore not an unlawful breach of the employment contract.<sup>17</sup> Further justifications of the first principle of the archive are derived from interpretations of statutory provisions and case law:

'Es besteht Freiheit des Arbeitskampfes . . . Das ergibt sich nicht nur aus der gesamten historischen Entwicklung seit 1869, namentl. aus der wichtigen Regel des § 152 Abs. 1 GewO und der allgemeinen rechtl. Überzeugung (vgl. schon RGZ 54,258; 56,275; 58,30; 64,56; 65,212,213; 119,294 und die st. Rechtspr.), sondern neuerdings namentl. auch aus § 49 Abs 2 Satz 3 BetrVG. Dort ist im Anschluß an das Verbot der ArbKämpfe zwischen ArbG. und Betriebsrat ausdrücklich bestimmt, daß ArbKämpfe tariffähiger Parteien durch das Verbot nicht berührt werden.' [Freedom to resort to industrial action exists. . . . That appears from the total historical development since 1869, namely from the important rule contained in § 152(2) of the Commercial Code, and the general legal convictions [case references cited --- Imperial Court Civil Matters] but also recently from § 49(2) of the Works Constitutional Act [1952]. There, in conjunction with the prohibition of industrial action between the works council and the employer, the Act expressly provides that industrial action between parties who have the competence to conclude collective agreements is not affected [by the prohibition contained in the Act].<sup>18</sup>

The justification for the first principle ('the freedom to resort to industrial action exists') is linked to a historical development, legal convictions as expressed in previous court decisions, and legislation passed in 1952 (three years before the founding of the first principle).

The founding of the first principle is, in other words, placed within a certain legal-historical development -- the implication being that the founding of the first principle is

---

<sup>17</sup> See BAG *op cit* note 3 at 7R-8R. Through the use of this doctrine, the Large Senate is in effect accommodating industrial action within the principles of the legal system by re-writing (or, better, un-writing) several legislative provisions, including § 626 of the Civil Code, a provision that entitles either party to the employment contract to summarily terminate the contract if a fundamental breach has occurred.

<sup>18</sup> BAG *op cit* note 3 at 4R - 5.

not a breach with the legal-historical tradition, but that it **forms part of a historical tradition of the law and that the first principle is in fact merely an expression of the first principle of that tradition.**

The first principle 'ergibt sich' (yields *itself*) from viewing the historical tradition; the tradition simply needs to be read, viewed, and the first principle of the discourse yields itself --- it lets itself be read.<sup>19</sup>

#### **11.1.4      The legitimization of the first principle**

The importance of re-situating the first principle within a legal-historical tradition lies in the fact that it is also an exercise in legitimization: the first principle is shown to be no radical breach with what has come before it (and is therefore clothed with the legitimization of that which came before it --- there is a temporal transfer of legitimization). Instead, the first principle is linked in legitimization to a mass of expressions of archival principles that came before (in a temporal sense) the formulation of the first principle: the formulation of the first archival principle by the Large Senate in 1955 was, by implication, no break with the tradition, but it is **of** that tradition.

The process of legitimization continues, but now with different foci:

'Auch die LAG haben das Prinzip der sozialen Adäquanz für das Recht der ArbKämpfe als maßgebend anerkannt . . . .

In diesem Sinne hat Bundespräsident Prof Theodor Heuß in seiner Ansprache am 4.10.1954 vor dem 3. Ordentlichen Kongreß des DGB das "Streikrecht" mit Recht "als eine völlig legitime Sache" bezeichnet . . . .' [The Labour Courts of Second Instance have also recognized the principle of social adequacy as being the relevant principle for the law of industrial action . . . . In this sense, Federal President Prof Theodor Heuß, in his address to the 3rd Congress of the German Trade Union Confederation {DGB or Deutsche Gewerkschaftsbund} on 4 October 1954, correctly described the "law to strike" as a "completely legitimate matter".]<sup>20</sup>

---

<sup>19</sup> This historical situation of the first principle must be seen as a transgression of the founding nature of the discourse: the effect of stating that the first principle is an expression not of an act of founding, but in fact an act contained in the operation of a tradition amounts to admitting that the first principle is pre-established, and pre-legitimated. The act of founding becomes, then, a act of simply re-discovering that **which has already been said**. Instead of establishing a discourse, the act contained in the first decision of the Large Senate could then be seen as merely an **act of reading**: regard is had to the tradition, and the first principle of the tradition is simply taken over. In this manner, the act of founding (the Decision #1), is being contaminated by that which came before, it is being colonised by the operation of a tradition powerful enough to refuse to have itself (the tradition) excluded from the act of founding. The act of founding, having been contaminated by the operation of this powerful tradition, can now be seen as an **allegory** for an act of reading: where the text (the tradition, the previous court decisions, the previous legislation, the legal convictions) simply has to be read correctly, and the result of that act of reading then becomes the cornerstone of a new discourse.

<sup>20</sup> BAG *op cit* note 3 at 5.

The nature of the legitimisation process that occurs here differs in nature from the legitimisation process of providing the first principle with a logical substructure. Here the concern is to indicate a social legitimacy: it is shown (by adducing evidence to that effect) that the first principle is generally acceptable because other bearers of power have legitimised the first principle.<sup>21</sup> It is therefore sufficient, for the purpose of socially legitimating the first archival principle of the discourse, to take over the available (ready-made) legitimisation provided by the other courts and the Federal President. Once this final process has run its course, the first principle is fully legitimised: it has been shown to have a logical structure (reasons can be advanced for it, arguments can be brought in support of it), it amounts to a continuation (affirmation) of the tradition which temporally precedes it, and social legitimisation (social acceptance) can be demonstrated.

#### **11.1.5 Obliteration, establishment and contamination**

From the intricate processes of legitimisation of the first principle, the founding discourse falls prey to a certain contamination. There is a sudden shift into what can best be called a 'sociological perception':

'Dabei ist der gewerkschaftl. Streikbeschuß mit seiner Aufforderung zur ArbNiederlegung die entscheidende selbständige Kampfhandlung, die als solche rechtl. zu bewerten ist, wenn sie tatsächlich durch ArbNiederlegung durchgeführt wird. Diese Rechtsauffassung allein wird den soziologischen Massenerscheinungen der modernen sozialen und wirtschaftl. Kämpfe gerecht. Sie legt es nahe, den Streik hinsichtl. seiner Rechtmäßigkeit oder Unrechtmäßigkeit nur als *kollektive Aktion* und ohne Rücksicht darauf zu beurteilen, ob die einzelnen, den Streik vollziehenden Handlungen, also die ArbNiederlegungen nach erfolgter Kündigung oder ohne eine solche erfolgen. Die bisher überwiegende Meinung ist in dieser Kernfrage unkonsequent und verschiebt zu Unrecht *das soziologische und rechtl. Schwergewicht*.' [The decision of the trade union to go on strike, coupled with the call to down tools, is the decisive action that should be legally evaluated, if that action is followed by actual cessation of work. *It is only this legal point of view that accords with the sociological mass phenomena of modern social and economic action [Kampf]*. This entails that the strike, with reference to its legality or illegality, can only be judged as a *collective action* and without taking into consideration whether the individual actions that constitute the strike (in other words, the downing of tools) follows the giving of the required [contractual] notice or

---

<sup>21</sup> It is vital that the legitimisation process which occurs here be understood as a power process, where the exercise of power is justified by referring to other, homologous exercises of power by bearers of power of a not entirely dissimilar nature and extent (courts of a similar institutional position, high government officials). The exercise of power by one bearer of power (the Large Senate of the Federal Labour Court) is being situated in the context of the exercise of power by other bearers of power, thereby, by analogy, legitimizing the exercise of power.

not. The current majority opinion on this pivotal question is inconsistent and displaces *the sociological and legal emphasis* wrongly.]<sup>22</sup>

This crucial passage contains both a contamination and the unfolding of the second archival principle of the discourse, namely the strike as collective action.

The contamination lies in the fact that recourse must be had to a sociological perception. It can hardly be termed a sociological opinion, for no evidence is cited, and no expert evidence had been heard. In other words, it is the sociological perception of the agent of the decision that is being presented here. But the sociological perception that is offered is one of such a self-evident and axiomatic nature, that there is no difficulty in recognising it as 'truth', and thereby as acceptable.

This subtle contamination<sup>23</sup> is of the legal discourse by an unproved (yet utterly self-evident) sociological perception --- it amounts to the introduction of a normative paradigm other than a legal paradigm (one of the key moments of juridification). In spite of this being a contamination of the legal discourse by sociological perceptions, the axiomatic force of the contamination (and the force of the contents of the paradigm with which the contamination is achieved) is such that it can structure the unfolding of another (second) archival/canonical discursive principle: the collective nature of the strike (or the strike as collective action).<sup>24</sup>

Considerable care needs to be taken to re-link the obliteration/construction process taking place in this text to some of the general themes of juridification outlined earlier.<sup>25</sup>

---

<sup>22</sup> BAG *op cit* note 3 at 5. Emphasis added.

<sup>23</sup> The dynamic of the contamination can be unravelled from the quoted passage. There are certain mass phenomena, it is said, and there is a legal opinion that has to accord with the sociological view of the mass phenomena (of *inter alia* industrial action). The legal perspective must accord with the sociological view of industrial action --- the legal perspective is therefore determined by the sociological perspective, and not the other way around. The sociological perspective (or perception) functions as the normative paradigm for the legal perspective --- the legal perspective must be changed until it is in accordance with the sociological perception of mass phenomena. The meta-juridical standard functions as a corrective to the legal perception, and the legal perception is shifted until it is in accordance with a standard that is not of a legal nature.

<sup>24</sup> The fact that the establishment of a first and second archival principle can be traced from the text does not imply that these two principles are not, in their logic, closely related. The act of obliteration and of establishment which makes possible the unfolding of the canonical principles is itself an indirect reference to the 'sociological contamination' which follows: the solution or the answer to the question can be found in the nature of the strike as a measure of *collective action*. In this manner the first principle can unfold itself only within the context of the second principle, while the second principle depends for its iterability on the existence of the first principle (there would, after all, be little point in formulating the collective nature of industrial action -- principle 2 -- if industrial action had not been allowed --- principle 1).

<sup>25</sup> See above, 1.1.4.

The processes occurring in the 1955 decision of the Large Senate of the German Federal Labour Court can be linked to normative closure and cognitive openness. If the law is a normatively closed system, it is the argument of this text that the obliteration/establishment of the two archival principles in the decision under discussion amounts to juridification in that the normative closure is expressly breached. The text relies for its operations not on mere information (cognitive openness), but relies on a number of meta-juridical considerations (history, the sociology of collective action). The decision does not, in line with the legal system's cognitive openness, depend on these meta-juridical considerations merely as supportive arguments. On the contrary, the text depends, for its own normative operations on these meta-juridical principles (which are, of course, archival in themselves). The fact that a disregard of the normative closure takes place (through the obliteration of the legal arguments) makes possible a transgression of the normative closure (the legal rules) towards a shift into normative openness, where meta-juridical considerations not only inform (cognitively) the text's normative operations, but serve as the very foundation of those normative operations. The rules (archival principles) of the law are obliterated, to be replaced by a normativity structured upon meta-juridical considerations. The process of juridification in this instance, then, relates to a shift from normative closure to normative openness, from the strict application of legal principles (which were obliterated) to the importing of other non-legal considerations.

In this instance, the juridification process relies on a construct, namely the *doctrine of social adequacy*. This imported doctrine serves the very important function of allowing (covering up) the shift from normative closure to normative openness.<sup>26</sup> It is through a

---

<sup>26</sup> Meyer poses the question whether the importation of the concept of social adequacy through the courts brought about a social change (sozialen Wandel). It is clear from his work that the concept of social adequacy is an opening or a node between law and the social consequences of law. After considering in detail the origin and development of the construct of social adequacy, Meyer makes the following statement: 'Die "soziale Adäquanz" ist in der Form und mit dem Inhalt, den ihr die Rechtsprechung gegeben hat, Rechtsnorm. Rechtsteoretisch ist diese Rechtsnorm als Generalklausel zu qualifizieren. Hierunter sind Normen zu verstehen, die den Richter für den zu entscheidenden Einzelfall *ausdrücklich* auf außergesetzliche "Maßstäbe von wechselnder empirischer Basis und Dichte: Verkehrssitten, gute Sitten, Standesethos, Treu und Glauben, ehewidrig . . ." verweisen. Das Merkmal zur Unterscheidung zwischen Generalklauseln und anderen Rechtsnormen ist nicht, daß der Rechtsanwender bei der Generalklausel "außergesetzliche Maßstäbe" anwendet, sondern daß die Generalklausel ihn *ausdrücklich* auf eine Ausfüllung mit Hilfe solche Maßstäbe verweist. Die Rechtsnorm mit festen, d.h. genau umschriebenen Tatbestandsmerkmalen unterscheidet sich also nicht *grundsätzlich* von Generalklauseln, sondern lediglich *graduell*, denn auch bei der Definition angeblich fester juristischer Begriffe und bei ihrer "Anwendung auf den Einzelfall" spielen nicht dem Gesetz zu entnehmende, sondern dem richterlichen Vorverständnis entwachsene Gesichtspunkte die entscheidende Rolle.' [ "Social adequacy, in the form and with the content given to it by the courts, is a legal norm. From a legal-theoretical point of view, this norm should be qualified as being a *general norm* (or general clause). This includes norms that expressly refer the judge to extra-legislative "standards of flexible (non-stable) empirical basis and consistency: practices and customs, moral standards, ethics, good faith, contrary to the institution of marriage . . .". The feature that distinguishes general clauses from other legal norms is not the fact that the applier of the law applies standards outside the legislation, but that the general clause expressly directs

vague and general concept that the normatively closed structure of the law can be breached to allow for the importation of that-which-is-not-law (history, sociology, etc).<sup>27</sup> Once imported into the text through this opening, the meta-juridical becomes anchored to the Law-as-text by virtue of the legal reasoning which *justifies* that importation.

The juridification process occurring in this text (called the first decision of the Large Senate) can be summarised as follows:

1. Normative closure (which would entail the application of legal principles) is *obliterated*.
2. This obliteration is dialectically linked to the *establishment* of two archival principles (industrial action is allowed, industrial action is collective action).
3. These two principles have their *origin* not within the normative confines of the law, but in *meta-juridical* considerations such as democracy, freedom, historical development and a particular sociological view.
4. The normative application of the meta-juridical considerations takes place through the use of the concept of social adequacy. Through the concept of social adequacy the meta-juridical is imported and turned-into-law (the meta-juridical thereby obtains normative status).

---

(footnote continued from previous page)

him to filling the norms with such standards. The legal norm with fixed (i.e. well-defined) elements do not differ in nature from general clauses, but only as a matter of degree, because also in the case of the application of ostensibly fixed legal concepts and their application in an individual case the legislation does not play the decisive role, but this role is instead played by the judge's points of view.' Jürgen A E Meyer 'Der Rechtsbegriff der "sozialen Adequanz -- ein Vehikel des sozialen Wandels?' in Rehbinder & Schelsky (eds) *Zur Effektivität des Rechts* (1972) 139 at 160-1. The argument can be taken much further, namely that the concept of 'social adequacy' is, as a general clause, wide enough to enable or make possible a breach of the normative closure (which according to Luhman characterises the legal system) by virtue of its being a legal norm on the one hand (and therefore not foreign to the legal discourse) but on the other hand also wide enough in scope to enable the passing of extra-legal standards into the legal system. See, in this regard, Jürgen A E Meyer 'Von der "sozialen Adequanz" zur "Verhältnismäßigkeit der Kampfnahmen"' (1974) 7 *Zeitschrift für Rechtspolitik* 253 at 253 and 255.

<sup>27</sup> For the purposes of this work, these types of concepts (such as social adequacy, proportionality, the core-zone doctrine and others) will be referred to as being both **indeterminate** (because the meaning of the term is unstable and shifts) and **polyvalent**. The polyvalency of the *Öffnungskauseln* relates to the fact that the term in question is, simultaneously, a legal norm (which means that it can be used with unproblematically in law-as-discourse) but that it also either contains actual links or enables the structuring of links to the meta-juridical. In the case of social adequacy, for example, the polyvalency of the concept 'social adequacy' is shown by its being a legal norm (established in the discourse of law in a temporally anterior sense) and that it makes possible the reference to the sociology of industrial action (as being a collective action).

- 5 The importation and reliance on the meta-juridical (as norms) is justified and juridified through a legal and policy logic and legitimization.

#### **11.1.6 The archival implications of the principles**

The largest part of the decision of the Large Senate is devoted to the application of the second archival principle and the processing of the consequences of that application:

- If a strike and the participation in a strike is of a collective nature, the participation in a strike cannot be seen as a breach of the individual employment contract and therefore as illegal if the strike as collective action is legal.<sup>28</sup> The implication of this is that the participation in a strike does not entitle the employer to summarily terminate the employment contract.<sup>29</sup>
- The aim of the strike is to interrupt (and thereby to suspend) the employment relationship in order to place pressure on the other party to achieve a favourable collective regulation of the terms and conditions of employment.<sup>30</sup>
- For tactical reasons a strike cannot be called by giving the required notice (not only in terms of the employment contracts, but also in terms of the relevant collective agreements).<sup>31</sup>

---

<sup>28</sup> 'Sind Streik und Streikbeteiligung . . . ausschließl. kollektivrechtl. Größen, so scheidet die Charakterisierung der Streikbeteiligung als Verletzung des Einzelarbeitsvertrages und damit als vertragswidrig und rechtswidrig dann aus, wenn der Streik als Kollektivakt rechtmäßig ist.' [If a strike and participation and a strike are collective concepts the participation in a strike cannot be regarded as a breach of the individual employment contract and therefore unlawful if the strike as a collective action is lawful.] BAG *op cit* note 3 at 6R. The Large Senate also discusses the breach of the employment contract from the point of view of *Sozialadäquanz* (or social adequacy), coming to the conclusion that the breach of the duty to work may be socially adequate (and therefore justified). See BAG *op cit* note 3 at 7R.

<sup>29</sup> 'Der von einer Gewerkschaft beschlossene, von den ArbN ohne fristgemäße Künd. durchgeführte legitime Streik um die ArbBedingungen berechtigt somit den bestreikten ArbGeb. *nicht* zur fristlosen Einzelentlassung des einzelnen ArbN oder mehrerer ArbN wegen Vertragsverletzung.' [A legitimate strike relating to terms and conditions of employment decided on by a trade union and which is put into practice by the employees without their giving the required notice does *not* entitle the employer to summarily dismiss individual employees or more than one employee on the basis of breach of contract.] BAG *op cit* note 3 at 8-8R. Emphasis added. The court proceeds to hold that various laws governing civil matters do not apply to the case of a strike or the participation in a strike (including § 626 of the Civil Code, regulating the refusal to work).

<sup>30</sup> BAG *op cit* note 3 at 7.

<sup>31</sup> BAG *loc cit* note 30.

- The lock-out is also a collective act, and in terms of the principle of equality contained in the Basic Law (Article 3), the state is not permitted to treat the collective actions of the employer differently from the actions of the trade unions.<sup>32</sup> 'Dem Streik der Gewerkschaften entspricht die Aussperrung . . .' [The strike of the trade unions is equal to [balanced by] the lock-out . . ].<sup>33</sup> In spite of this this equalisation, the consequences are different: whereas a strike (its motivation being to change the terms and conditions of employment) merely suspend the employment relationship, the lock-out terminates the employment relationship. There is no general duty on the employer to re-employ workers whose services had come to the end as a result of a lock-out.<sup>34</sup> The lock-out, being a *sui generis* form of termination of the employment relationship, is not subject to the rules relating to dismissal.

The importance of these principles formulated in the 1955 decision lies in the fact that they constitute a normative paradigm constructed by the court: in its decision, and by extracting the consequences of the archival principles contained in that decision, the court formulates new archival rules.

---

<sup>32</sup> This decision is justly for its reliance on the principle of equality of weapons (*Waffengleichheit, Kampfparität*), which the Large Senate links to social adequacy, and also specifically to the basic social principles contained in the Basic Law, and, surprisingly, the right to freedom of development of personality, contained in Article 2 of the Basic Law. Even though the Large Senate therefore studiously avoided linking industrial action to the organisational rights and freedom of association contained in Article 9 of the Constitution, it is clear, however, that the Constitution did influence this first seminal decision of the Large Senate.

<sup>33</sup> BAG *op cit* note 3 at 8R. Despite the basic structure of the lock-out principles so formulated, the Large Senate approves of a differential in the case of the lock-out, namely that the lock-out terminates the employment relationship. The reasons offered for this are that 'the lock-out in Germany has always entailed a termination of the employment relationship'. At 9-9R. It is made clear that the risk of losing employment (the result of a lock-out) is a part of the risk involved in resorting to industrial action.

<sup>34</sup> As to re-employment (*Wiedereinstellung*) see BAG *op cit* note 3 at 11-12R.

## 11.2 OBLITERATION AND ESTABLISHMENT (1971)

### 11.2.1 Principles new and not-so-new

The concept of social adequacy proved to be short-lived: by 1963, it had disappeared from the discourse altogether.<sup>35</sup>

If the structure of the decision and the approach (and formulations) of the Large Senate are borne in mind, it would appear (misleadingly) that the problems experienced with the application of the 1955 decision related not to the application of the first archival principle (that industrial action is allowed) or the second principle (industrial action is collective action), but with the application of the normative hierarchy (itself a consequence of the two archival principles).<sup>36</sup> But the effect of the 1971 decision on the discourse (law-as-discourse) was decisive because it totally changed not only the normative paradigms of the law of industrial action (i.e. what types of industrial action would be permitted and what would be the consequences of that action), but that the justification and the structural accommodation of the phenomenon of industrial action in the system of legal norms was also undergoing a change, albeit subtle.

The 1971 decision of the Large Senate of the German Federal Labour Court was an extended reply to a question formulated by the first Senate of the Federal Labour Court in 1968:

'Hält der Große Senat an seiner in BAG AP Nr 1 zu Art 9 GG Arbeitskampf vertretenen Auffassung fest, daß der Arbeitgeber einem von der Gewerkschaft geführten legalen Streik mit einer die Arbeitsverhältnisse lösenden Aussperrung begegnen kann, oder billigt der Große Senat die Auffassung, daß der Arbeitgeber durch Aussperrung

---

<sup>35</sup> See Meyer *op cit* note 26 at 64.

<sup>36</sup> By 1960, the rules formulated by the Large Senate in 1955 were judged strong enough to enjoy precedence over legislation protecting pregnant women (legislation which could be linked directly to Article 6 of the Basic Law) BAG AP Nr 11 on Art 9 GG (Industrial Action) (1960). The legislation in question was the *Mutterschutzgesetz* (Protection of Mothers Act). The implication was that the rules formulated by the Large Senate in 1955 were of such force (no doubt in part attributable to the institutional position of the Large Senate itself) that the archival principles and the legal rules relating to the termination lock-out which were based on those principles were judged sufficiently strong to override protective legislation tracing policy (protection of the family) from the Constitution itself. By 1963, it was confirmed that pregnant women could be locked out (even where they were not actively involved in the strike). However, the first Senate of the Federal Labour Court added a proviso that pregnant women (those enjoying the protection of the legislation) had to be re-instated by the employer once the industrial action had run its course. BAG AP Nr 24 on Art 9 GG (Industrial Action) (1963).

Also in 1963, the rules established by the Large Senate suffered the imposition of a further proviso: before a lock-out enjoys the protection of the law, the employer must be prepared (and there must be some indications of this willingness) to negotiate with the employees who had been locked out after the industrial action has come to an end. BAG AP Nr 31 on Art 9 GG (Industrial Action) (1963).

die Arbeitsverhältnisse nur suspendieren kann?' [Does the Large Senate retain its view, as expressed in BAG Ap Nr 1 on Art 9 GG Industrial Action that the employer can respond to a union-supported legal strike with a lock-out that terminates the employment relationships or does the Large Senate approve of the view that the employer can, by locking out, merely suspend the employment relationships?] <sup>37</sup>

The question posed in this polite form should not conceal the fact that the First Senate of the Federal Labour Court had in actual fact refused to follow the 1955 decision of the Large Senate for some time.<sup>38</sup>

The 1971 decision of the Large Senate<sup>39</sup> has a structure ostensibly similar to that of the 1955 decision. After summarising the salient point of the 1955 decision, the development of the jurisprudence between 1955 and 1968, the Large Senate *obliterates* the normative paradigm developed in the 1955 decision in the following terms:

'Der Gr. Sen. hält an den Grundgedanken über den kollektiven Charakter des Streiks fest. Nach Ablauf von 16 Jahren muß aber die gesamte Problematik des Arbeitskampfrechts neu überdacht werden ...' [The Large Senate affirms the basic principle relating to the collective nature of the strike. After 16 years have passed the entire issue of the law relating to industrial action has to be reconsidered {neu überdacht werden}.]<sup>40</sup>

What the Large Senate said in this passage is that the *normative paradigm*<sup>41</sup> constructed in the 1955 decision had become problematic with the passing of time and the development of the jurisprudence. The entire law of industrial action had to be re-thought. Considering the criticism in respect of the 1955 decision as it had emerged in the literature and the jurisprudence, the Large Senate in effect silences the 1955 decision by stating that the 1955 decision failed to sufficiently accommodate all relevant legal values ('... nich alle rechtl. Wertvorstellungen genügende Beachtung gefunden haben').<sup>42</sup>

---

<sup>37</sup> BAG AP Nr 39 on Art 9 GG (Industrial Action) (1968) First Senate.

<sup>38</sup> 'Dieser Rechtsansicht vermag sich der 1. Senat nach nochmaliger Überprüfung nicht mehr anzuschließen.' [After reconsidering the matter, the First Senate does not share the view {that a lock-out terminates the employment relationship}]. BAG *op cit* note 37 at 1.

<sup>39</sup> BAG AP Nr 43 on Art 9 Basic Law (Industrial Action) 21 April 1971). Large Senate. The facts of the matter can be summarised briefly as follows: Croupiers employed in a casino were locked out by their employer after they had followed a call by their trade union to go on a strike. The employees (whose services had been terminated as a result of the lock-out) argued that the lock-out was illegal and they claimed arrear wages and reinstatement.

<sup>40</sup> BAG *op cit* note 39 at 3R.

<sup>41</sup> See 11.1.6 above and 11.2.3 below.

<sup>42</sup> BAG *op cit* note 39 At 6R.

Having succinctly despatched the first principle as established in the 1955 decision, the Large Senate in 1971 proceeds to re-establish a close relative to that principle in the following terms:

'Arbeitskämpfe müssen zwar nach unserem freiheitl. Tarifvertragssystem möglich sein, um Interessenkonflikten über Arbeits- und Wirtschaftsbedingungen im äußersten Fall austragen und ausgleichen zu können. In unserer verflochtenen und wechselseitig abhängigen Gesellschaft berühren aber Streik wie Aussperrung nicht nur die am Arbeitskampf unmittelbar Beteiligten, sondern auch Nichtstreikende und sonstige Dritte sowie die Allgemeinheit vielfach nachhaltig. *Arbeitskämpfe müssen deshalb unter dem obersten Gebot der Verhältnismäßigkeit stehen.* Dabei sind die wirtschaftl. Gegebenheiten zu berücksichtigen, und das Gemeinwohl darf nicht offensichl. verletzt werden. Diese Gesichtspunkte hat das BAG wegen der möglich tiefgreifenden wirtschaftl. und sozialen Folgen von Arbeitskämpfen sowie in Hinblick auf die Verantwortung der Tarifvertragsparteien gegenüber der Allgemeinheit schon mehrfach betont . . .' [Industrial action must be possible in our system of voluntary collective agreement in order to resolve, should it be necessary, disputes of interest. In our interwoven and inter-dependent society a strike or a lock-out, however, adversely affects not only those actually involved, but also those who are not striking and other third parties as well as society as a whole. *Therefore industrial action must comply with the standard of proportionality.* In this, the economic facts should be taken into account, and the common weal should not be detrimentally affected. The Federal Labour Court has expressed these points of view on many occasions before, because of the serious economic and social consequences of industrial action and in view of the responsibility that the bargaining partners have towards the general society.]<sup>43</sup>

It is vitally important to note a number of shifts that have taken place in the discourse. It is no longer stated that there is a freedom to strike or a freedom to lock-out (as the Large Senate did in 1955): Instead, for the first time, the *rationality of industrial action is made contingent upon the normative rationality of the collective bargaining process.*<sup>44</sup> This amounts to a significant shift from the discursive foundations of 1955, where the accommodation of the strike and the lock-out in the legal system relied on the formulation of indeterminate policy considerations (the historical development of the law, for example) and the expression of principles equally indeterminate (such as the *fiat*-like statement by the Large Senate in 1955 that there is a freedom to strike and a freedom to lock-out).

---

<sup>43</sup> BAG *op cit* note 39 at 6R. Emphasis added.

<sup>44</sup> The German term 'Tarifvertrag' is normally translated as 'collective agreement': while 'Vertrag' is a 'contract' or 'agreement', the term 'Tarif' relates more to (collective) terms and conditions of employment (such as working hours and rates of increase of remuneration) than what is understood by the English term 'collective'. The German Tarifvertrag is usually substantive in nature, but may be a 'Rahmentarifvertrag' which sets out only certain minimum and maximum standards. The term 'Tarifvertragssystem' is translated as the 'system of collective agreements'. Another problematic term is 'Tarifautonomie', which is traditionally translated as 'collective autonomy', but refers more to the freedom to bargain and conclude substantive collective agreements.

The normative change that has taken place here is marked by the fact that the Large Senate, in 1955, broke through the normative closure of the law by considering various other factors, such as a sociological view of the strike (and seeing the strike as a collective action). In order to accommodate this collective phenomenon in the legal system, the Large Senate relied on an open-ended concept of social adequacy or justification. In the 1971 decision, a discursive shift towards a teleology has been added: the strike as a part of the collective bargaining system; the function of collective industrial action within the system of collective bargaining. The function of industrial action, in other words, is dispute resolution, as unpleasant as it may be, and regardless of the consequences.<sup>45</sup>

It is this teleological link between industrial action and its purpose (dispute resolution) that makes possible the accommodation of the destructive (note the emphasis the Large Senate places on the potential negative consequences of industrial action, compared to the sparse mention of the dispute-resolution function of industrial action) phenomenon in the legal system. In a sense, the end (the resolution of disputes about interests) justifies the means (industrial action and all its adverse effects). The action is justified, or, phrased differently, socially adequate.

Because of the apparent similarity in the structure of the decisions it would be tempting to argue that there is very little difference between the principle of accommodation established in the 1955 decision of the Federal Labour Court and the process used to

---

<sup>45</sup> The fact that the phenomenon of industrial action had been linked to dispute resolution in the context of collective bargaining made possible a re-evaluation of the role of the lock-out. In this regard the Federal Labour Court held as follows: 'Unsere Rechtsordnung geht davon aus, daß der ArbGeb. derartige Maßnahmen -- und zwar auch als den ersten Akt eines Arbeitskampfes -- ergreifen kann. Denn andernfalls wäre nicht gewährleistet, daß es im Rahmen der Tarifautonomie durch Verhandlungen und notfalls durch Ausübung von Druck und Gegendruck zum Abschluß von TV und damit zu einer kollektiven Regelung von Arbeitsbedingungen kommt. Könnte die eine Seite, nämlich die Arbeitnehmerschaft vertreten durch die Gewerkschaft, allein das Kampfgeschehen bestimmen und wäre der ArbGeb. auf ein Dulden und Durchstehen des Arbeitskampfes beschränkt, so bestünde die Gefahr, daß die Regelung der Arbeitsbedingungen nicht mehr auf einem System freier Vereinbarungen beruht, das Voraussetzung für ein Funktionieren und innerer Grund des Tarifvertragssystems ist.' [Our legal system takes the view that employers can apply such measures {lock-outs}, even as the first move in industrial action. Were this not the case, there could be no guarantee that a collective regulation of terms and conditions of employment could take place within the framework of collective bargaining and, where necessary, through the application of pressure and counter-pressure. Could one side, namely the employees represented by the trade union, determine the industrial action and were the employer-side limited to bearing and withstanding the action, the danger would exist that the regulation of terms and conditions of employment would no longer be based on a system of voluntary agreements, which is the prerequisite for the efficiency and the foundation of the system of collective bargaining.] BAG *op cit* note 39 at 7R. In terms of the principle of proportionality, the court continued, any measure of industrial action which opens an industrial action (be it a strike or a lock-out) has the effect of suspending the employment contracts. See BAG *op cit* note 39 at 8R-9R. But the Large Senate did make provision for a lock-out which terminates the relationship between employer and employee (see at 9R-11R).

accommodate the phenomenon of industrial action within the normative structures of law in the 1971 decision. This would, however, be a mistaken view. The 1971 decision does not establish a normative justification of industrial action itself, but achieves that normative justification by linking industrial action teleologically to a dispute resolution function in collective bargaining. It is only as the servant of collective bargaining that industrial action is permitted: the freedom has disappeared behind the means to an end.

### **11.2.2 Proportionality as limitation**

Because the Large Senate achieved the accommodation of industrial action in the normatively closed system of the law by linking it to (and placing it in the service of) another normative value-system (collective bargaining as a concept and collective bargaining as a system which not only establishes norms but which is also established in terms of legal norms), the concept of social adequacy could be jettisoned. It was no longer needed.

It is important to note that the Federal Labour Court does not rely on the concept of proportionality (*Verhältnismäßigkeit*) to accommodate industrial action within the legal system. Breaching the normative closure of the law had already taken place through teleologically linking industrial action and collective bargaining: Through the non-problematic position of collective bargaining within the normative structures of the law, strikes and lock-outs are also stripped of their problematical nature and are seen to be institutions recognised by the law -- because they serve a useful function in respect of conflict resolution, the law recognises the 'legality' (in the sense of having a function sanctioned by law) of industrial action.

This does not mean that all industrial action of whatever nature will be sanctioned. It is in this respect that the concept of proportionality plays an important role, as it is (mis)applied (*Zweckentfremdet*) in this context in order to place limitations on industrial action-as-dispute resolution.

Originally developed as a construct of constitutional and human rights law in order to evaluate the legality of the infringement of rights, the concept of proportionality indicated a tendency towards a cognitive indeterminacy as early as 1968

'Mit der immer häufigeren Heranziehung und Zitierung droht der Grundsatz zum Schlagwort zu erstarren und in einem allgemeinen Appell an die Gerechtigkeit aufzugehen. Damit wird er entweder so unbestimmt, daß er für die Entscheidung einer Rechtsfrage nichts mehr hergibt, oder er wird zum Einfallsstör eines unkontrollierbaren und unkontrollierten Gerechtigkeitsgefühls, das die objektiven Wertungen von Verfassung und Gesetz durch die subjektiven des Richters ersetzt.' [With its increasingly common citation and use, the principle {of proportionality} is threatening to petrify into a mere slogan and to turn into a general appeal to justice. Through this the principle either becomes so indeterminate that it yields nothing for the deciding of a specific case or it becomes a trapdoor for a uncontrollable and uncontrolled feeling of justice, which

replaces the objective values of the constitution and the legislation with the subjective values of the judge.]<sup>46</sup>

The (mis)application of the principle of proportionality was not warmly received.<sup>47</sup>

### **11.2.3      The new normative paradigm in the wake of proportionality**

Once the Federal Labour Court had succeeded in establishing a teleological means/end link between collective bargaining and industrial action, and had applied the concept of proportionality to limit the exercise of industrial action, the foundations had been laid for a new normative paradigm:

1. Industrial action could only be used for the purpose of achieving legitimate aims, and only to the extent required in order to achieve labour peace. All measures of industrial action (whether it be a strike or a lock-out) may only be applied after all other possibilities had been exhausted (industrial action is the *ultima ratio*).<sup>48</sup>
2. The principle of proportionality applies also to the conduct of industrial action (and both in the case of the strike and in the lock-out). The measures of industrial action taken may not exceed that which is required to achieve the aims. The principle of proportionality does not relate only to the timing of the industrial action and the aim of the action, but also relates to the conduct of the action and the intensity of the action. This entails that industrial action is legal only when it is conducted in terms of fair rules: industrial action may not have as its aim the destruction of the other party, but must aim at the restoration of labour peace.<sup>49</sup>

---

<sup>46</sup> M Gentz 'Zur Verhältnismäßigkeit von Grundrechtseingriffen' (1968) 21 *Neue Juristische Wochenschrift* 1600 at 1601. See similarly H G Joachim 'Ist der Grundsatz der Verhältnismäßigkeit ein geeignetes Kriterium für die rechtliche Erfassung des Phänomens "Arbeitskampf"?' in M Kittner (ed) *Streik und Aussperrung* (Protokoll der wissenschaftlichen Verantstaltung der Industriegewerkschaft Metall von 13. bis 15. September 1973 in München) (1974) 27 at 30ff.

<sup>47</sup> See above note 46 and also M Löwisch 'Das Übermaßverbot im Arbeitskampfrecht' (1971) 2 *Zeitschrift für Arbeitsrecht* 319, G Müller 'Fragen zum Arbeitskampfrecht nach dem Beschuß des Großen Senates des Bundesarbeitsgerichts vom 21. April 1971' (1972) 23 *Gewerkschaftliche Monatshefte* 271, F J Säcker 'Zu den rechtspolitischen Grundlagen der Arbeitskampf-Entscheidungen des Bundesarbeitsgerichts vom 21. April und 26. Oktober 1971' (1972) 23 *Gewerkschaftliche Monatshefte* 287.

<sup>48</sup> BAG *op cit* note 39 at 6R.

<sup>49</sup> BAG *op cit* note 39 at 6R-7.

- 3 After the industrial action had run its course, both parties had to endeavour to re-establish labour peace to as large an extent as possible.<sup>50</sup>

#### **11.2.4 Transgression and juridification**

If the most significant feature of the decision of the Large Senate was the means/end link between collective bargaining and industrial action (for it was this link which formed the basis for the 1980 decisions -- see below), the most significant aspect of juridification is again the use of a vague and indeterminate legal norm (proportionality) which structures a large part of the decision.<sup>51</sup>

The indeterminate concept of social adequacy which structured the 1955 decision is exnominated (unnamed), but the means/end teleological construction amounts to a justification of industrial action as being socially adequate because of its dispute resolution function. The fact that the structural (and polyvalent) norm of social adequacy is jettisoned, means that another basis had to be found on which to structure the accommodation of the phenomenon within the system of legal norms. Proportionality plays no role in this, even though the text of the Federal Labour Court's decision often seeks to establish links between proportionality, collective bargaining, and industrial action. But these endeavours go no further than the oracular: that industrial action, collective bargaining and proportionality appear in the same place, and as parts of the same sentences or paragraphs does not necessarily entail that proportionality is used for anything other than a means of placing a normative limitation on industrial action.

Even though the first archival principle is, therefore, retained in outcome, the transgression takes place in the logical and normative reasoning which is pressed into service to justify the first archival principle (accommodation of industrial action within the legal system). The normative shift which marks this transgression is from justification to a means/end construction.<sup>52</sup>

---

<sup>50</sup> BAG *op cit* note 39 at 7.

<sup>51</sup> Most of the new normative rules relating to the lock-out are presented as being 'within the framework of proportionality', or that they should be seen 'as an expression of proportionality'.

<sup>52</sup> There is, of course, a certain economy operating in this shift as well. It is clear from the textual excerpts quoted above that the link between collective bargaining and industrial action (as the method of dispute resolution in collective bargaining) is presented as fact: according to the way in which this construct is presented, there can be no doubt as to the functional link between collective bargaining and industrial action. If one bears in mind, however, that the social adequacy construct amounted, in essence, to nothing more than an argument of justification, the means/ends link between collective bargaining and industrial action does not differ in nature: industrial action (and the damages caused by industrial action) are *justified* not because the actions are socially adequate (*justified*), but because they serve as a dispute resolution system --- a means to the end of ensuring the efficiency and functionality of the collective bargaining system.

It is vitally important to distinguish proportionality from this structure, because it is only once the first archival principle (accommodation) has been re-structured that the adverse effects of industrial action (the damages to the economy, to those not participating in the strike) can be addressed by subjecting industrial action to the limitation principle of proportionality.

In its function as a limitation principle, proportionality again indicates a significant juridification. The structure of the process is similar to the structure of the 1955 decision: The application of a norm ('proportionality') that is sufficiently polyvalent and indeterminate to enable the breach of the normative closure on the one hand and allow the importation of values and meta-juridical standards into the balance of normativity on the other hand. Much as social adequacy was shown to be sufficiently devoid of meaning to make possible the flow of values from the meta-juridical (sociology, history, development, the 'true nature') to the legal, so proportionality is sufficiently polyvalent and vague to enable a similar flow, from policy considerations to law -- it is in this light that the development of a new normative paradigm (see 11.2.3 above) must be seen. Again juridification relates to the importation of meta-juridical considerations through the opening clause of an indeterminate and polyvalent norm.

### **11.3 THE EMPIRE STRIKES BACK (1980)**

Another important similarity between the 1971 decision of the Large Senate of the Federal Labour Court and the 1955 decision is that, with one exception, the constitutional and human rights aspects of industrial action were ignored (obliterated).

It is strange to find that, in 1971, the Large Senate of the Federal Labour Court refers to the provisions of Article 9(3) of the Basic Law<sup>53</sup> only to state that an individual employer enjoys the right to lock out employees but goes no further in interpreting the constitutional considerations of industrial action.<sup>54</sup> The constitutional normative framework did not serve as the basis for the normative paradigm established by the Federal Labour Court in its 1971 decision, even though it appears that the Federal Labour Court was aware of that framework and the doctrines that were developing around the provisions of Article 9(3).

It is only in 1980 that the legal empire struck back: in two major lock-out decisions of the First Senate of the Federal Labour Court the legal norms of the Constitution (the

---

<sup>53</sup> See above, Chapter 3.

<sup>54</sup> 'Auch der einzelne ArbGeb. hat das Aussperrungsrecht. Art 9 Abs. 3 GG besagt nichts Gegenteiliges. Er geht vielmehr nach seinem Wortlaut gerade von der Koalitionsfreiheit des einzelnen aus.' [The individual employer also has the right to lock out. Article 9(3) of the Basic Law contains nothing to the contrary. Indeed, (Article 9(3)) instead takes as its point of departure the freedom of the individual to associate. (*Koalitionsfreiheit*).] BAG AP Nr 43 (1971) on Article 9 Basic Law (Industrial Action) at 7R.

1949 Basic Law) obliterated the uncertain bases of the industrial action jurisprudence, and anchored it firmly to a constitutional base.<sup>55</sup>

### **11.3.1 Affirmation of principles**

The first step taken by the First Senate in the first of the two major lock-out decisions handed down in 1980 was to affirm the normative principles laid down by the Large Senate in 1971:

'Der Senat hält an der Rechtspr. des Gr S. des BAG fest, daß das Kampfmittel der Aus-sperrung für die ArbGeb, unter bestimmten Voraussetzungen aus Gründen der Parität und im Rahmen der Verhältnismäßigkeit verfügbar sein muß.' [The Senate affirms the decision of the Large Senate, namely that the lock-out must be at the disposal of the employer under certain circumstances on the grounds of parity and within the framework of proportionality.]<sup>56</sup>

The First Senate in this paragraph affirms that industrial action must be accommodated (allowed) in the legal system (this first archival principle is by now regarded as sufficiently well-established that to forego mention), and that this accommodation entails the accommodation of the lock-out.<sup>57</sup> Proportionality is still seen to fulfill its function of limiting the exercise of the right to resort to industrial action.

At first blush, it would appear as if the First Senate is merely following the normative paradigm as established by the Large Senate in the 1971 decision, for all the structural elements (proportionality, industrial action) are accounted for.

### **11.3.2 In slavery to freedom (I): Die Tarifautonomie**

But the First Senate then immediately proceeds to place both collective bargaining and industrial action in the service of another legal norm, namely the core-zone of collective autonomy:

---

<sup>55</sup> BAG AP Nr 64 and 65 on Article 9 Basic Law (Industrial Action). Decisions of the First Senate of 10 June 1980. Both decisions related to the legality of lock-outs, and were based on claims for arrear wages which employees claimed were payable during the course of the illegal lock-out.

<sup>56</sup> BAG *loc cit* note 55.

<sup>57</sup> There is a slight but pivotal difference. The First Senate in the quotation states the justification of the lock-out to be based on 'parity'. This is a signifier for an important shift which is to take place in the 1980 decisions, namely the broader linking of collective bargaining to the concept of collective autonomy (which is itself regarded as being anti-juridificatory in structure), which is in turn linked to a constitutional provision (Article 9(3) of the Basic Law). Whereas the 1971 decision of the Large Senate of the Federal Labour Court went only so far as to hold that industrial action is in the service of collective bargaining, the major shift taking place in the 1980 decision is the *further* means/ends links between collective bargaining, collective autonomy, industrial action and proportionality.

'Im Interesse einer sinnvollen Ordnung des Arbeitslebens hat der Staat seine Zuständigkeit zur Rechtsetzung weit zurückgenommen und die Bestimmung über die regelungsbedürftigen Einzelheiten des Arbeitsvertrages grundsätzl. den Koalitionen überlassen. . . Den freigebildeten Koalitionen ist durch Art. 9 Abs. 3 GG die Aufgabe zugewiesen und in einem Kernbereich garantiert, insbes. Löhne und sonstige materielle Arbeitsbedingungen in eigener Verantwortung und im wesentlichen ohne staatliche Einflußnahme durch Gesamtvereinbarungen zu regeln.' [In the interests of a meaningful regulation of the working life the State has largely taken back its powers to make rules and has left the regulation of those details of the labour relationship {Arbeitsvertrag=contract of employment} that require regulation to the coalitions. The voluntarily established coalitions are given the task by Article 9(3) of the Basic Law, which also guarantees this core-zone, in particular to regulate wages and other substantive terms and conditions of employment in their own responsibility and essentially without any influence from the state through collective agreements.]<sup>58</sup>

Noteworthy about this passage is its apparent and stated anti-juridificatory movement, as the passage relates how the state (and, by implication, the law) has given up its own power to regulate (*Zuständigkeit zur Rechtsetzung*) in favour of employers and trade unions (the coalitions). The law has, in other words, withdrawn in order to leave a zone (the zone of collective autonomy, the zone of freedom) in which the parties can auto-regulate those aspects of their (employment-based) relationships that require regulation. If the term 'juridification' were understood in its accepted sense of legal profusion this could be described as being anti-juridificatory: the law withdraws in order to leave a zone of freedom within which the parties active within that zone are free to structure their own relationship substantively.

Once '*the core of collective autonomy*' has attained the power of being a transcendental signifier in this discourse (the signifier which gives meaning to others),<sup>59</sup> it comes as no surprise to find that the core of collective autonomy also structures the meaning of

---

<sup>58</sup> BAG *op cit* note 55 at 3R.

<sup>59</sup> Collective autonomy attains this position by being the source of all: it is the *raison d'être* of collective bargaining, the collective bargaining legislation, and industrial action as a whole, as well as the constitutional provisions contained in Article 9(3) of the Basic Law. It is placed in a privileged position, because it is regarded as being the norm from which other norms obtain their validity (the Collective Agreements Act is only a *manifestation* of the core-zone of collective autonomy, and the process of collective bargaining is *protected* by the core-zone of collective autonomy, and the core-zone is protected by Article 9(3) . . .). The concept of collective autonomy (the core-zone of which is protected in Article 9(3) of the Basic Law) therefore appears, at this stage, to structure (inform) a *normative (re)closure*. But again, a certain discursive economy is operative: the core-zone of collective autonomy can only be placed in a privileged position if other legal norms are obliterated. This obliteration occurs when the court dismisses the legal discussions and literature, which bases the law of industrial action not only on the concept of collective autonomy, but also on other norms of the positive law, international agreements, and federal (German) legislation. The court dismisses these other norms as being unhelpful (see BAG *op cit* note 55 at 6).

legislation on collective agreements, as the First Senate holds that the core of collective bargaining is realised (crystallised, or, in the metaphor of the court, concretised) by the Collective Agreements Act. The Senate found that the Collective Agreements Act, being the *manifestation* of the core of collective autonomy (freedom) ensures that coalitions (trade unions and employer organisations) have the right to create norms (through binding collective agreements).<sup>60</sup> In order to ensure that the system of collective bargaining is functional (again the means/ends construction), the court continues to state that 'without the pressure applied through a strike, collective autonomy would not be functional'.<sup>61</sup>

The structural conflict can therefore be summarised as follows: Article 9(3) of the Basic Law protects not a specific system of collective bargaining or a specific system of industrial action, but the core of collective autonomy (*Tarifautonomie*) instead. The Collective Agreements Act and the system of collective bargaining is but one manifestation (concretisation) of collective autonomy. Industrial action (strike and lock-out) serves the functionality of the collective bargaining system by ensuring that parties to the collective bargaining process have instruments at their disposal to place pressure on the other party. This structure means that the only decision the First Senate had to take was what consequences (for industrial action) flow from collective bargaining (which is a manifestation of *Tarifautonomie*).<sup>62</sup>

It is important to note that the term *Tarifautonomie* is not defined, that it is a construct simply taken over from the jurisprudence of the Federal Constitutional Court, and that it functions in the text under consideration as an indeterminate and polyvalent term structuring a decision. The borders and limitations of the *Tarifautonomie* are not decided or mentioned: for the concept of the 'core-zone' (*Kernbereich*) of collective autonomy is sufficiently vague to make it polyvalent.

---

<sup>60</sup> BAG *op cit* note 55 at 3R.

<sup>61</sup> 'Ohne das Druckmittel des Streiks könnte die Tarifautonomie nicht wirksam werden' [Without the pressure instrument of the strike, collective autonomy would not function]. BAG *op cit* note 55 at 4R. The Federal Constitutional Court held, similarly, in 1991: 'Zu den geschützen Mitteln zählen auch Arbeitskampfmaßnahmen, die auf den Abschluß von Tarifverträgen gerichtet sind. Sie werden jedenfalls insoweit von der Koalitionsfreiheit erfaßt, als sie erforderlich sind, um eine funktionierende Tarifautonomie sicherzustellen.' [Measures of industrial action, aimed at the conclusion of collective agreements, are also protected. They are, at any rate, protected by the protection of freedom of association, to the extent that they are necessary to ensure a functioning {system of} collective autonomy.] BVerfGE 84, 212, 225.

<sup>62</sup> 'Der Senat hat nur zu entscheiden, welche Folgen sich aus dem geltenden Tarifautonomie konkretisierenden Tarifrecht für das Arbeitskampfrecht ergeben.' [The Senate only has to decide which consequences follow from the applicable law of collective bargaining --- itself a concretisation of Tarifautonomie --- for the law of industrial action.] BAG *op cit* note 55 at 6.

### **11.3.3 In slavery to freedom (II): Freedom of association**

In having to pronounce upon the validity of the principles laid down by the First Senate in the 1980 decision, the Federal Constitutional Court took the means/end construction one step further by firmly linking collective bargaining and industrial action to the protection of freedom of association contained in Article 9(3) --- with only one reference made to the vague concept of *Tarifautonomie*.

The Federal Constitutional Court held that the provisions of Article 9(3) of the Basic Law in the first place protects the individual's freedom of association (this includes, the Court held, the employer's freedom of association). The organisations (or coalitions) that are formed as a result of the freedom of association also enjoy protection under Article 9(3). A significant aim of the organisations is the conclusion of collective agreements, and in achieving this aim, the Basic Law leaves the instruments to be used to the choice of the parties. Because these instruments used to achieve the conclusion of collective agreements are also protected by the constitutional provision, it follows that industrial action, in so far as the instruments are necessary to ensure a functional system of collective bargaining (and the conclusion of collective agreements) also enjoy constitutional protection.<sup>63</sup>

## **11.4 NORMATIVE CLOSURE AND JURIDIFICATION**

Throughout the industrial action jurisprudence of the Federal Labour Court (and the affirmation of that jurisprudence by the Federal Constitutional Court), a gradual process of juridification-as-discourse has been observable.

All decisions of the Federal Labour Court, whether it be the decisions by the Large Senate of 1955 or 1971, or the pivotal decisions of the First Senate in 1980, rely, for their structure, on a term that is both indeterminate and polyvalent.

In the 1955 founding decision, the norm used was social adequacy, a term that never made a re-appearance in the discourse after 1963. In the 1971 decision the term was proportionality, a term which succeeded in surviving even after the 1980 decisions.<sup>64</sup> The 1980 lock-out decisions were structured on the concept of collective autonomy.

These indeterminate and polyvalent terms serve the function of enabling the transgression of the normative closure, on the one hand, while ostensibly retaining the structural integrity of the system on the other hand. This is achieved by the fact that the term or

---

<sup>63</sup> See BVerfGE 84, 212 at 224-225.

<sup>64</sup> The 1980 lock-out decisions even went so far as to concretise the concept of proportionality numerically, holding that a lock-out in response to a limited partial strike must be proportionate to the scope of the strike.

norm is, simultaneously, a legal norm, with an established legal provenance, but at the same time, indeterminate enough (in the sense that the meaning of the norm is vague and flexible) to make possible a flow of information into the normatively closed system. But by being imported into the normatively closed system of the law through an indeterminate and polyvalent (legal) norm, the meta-juridical becomes part of the normative discourse of the law. The meta-juridical (and in the case of the 1955 and 1971 decisions, this is especially clear) thereby becomes part of the law by occupying the vacant space of the indeterminacy in the *Öffnungsklauseln*. So social adequacy is meaningless until determined by reference to the historical development of the law, or the sociological perspective of industrial action, so proportionality is stripped of its own meaning (that of a doctrine limiting the infringement of individual rights) to become, instead, the structure of limitation of the exercise of rights. Furthermore, in respect of proportionality, it is clear from the development of the jurisprudence that even this term is slowly stripped of its significance as the centralising concepts of the discourse become anchored in the other discourse (constitutional law-as-discourse), from which the industrial action jurisprudence gains conceptual legitimacy. The concept of 'collective autonomy' or *Tarifautonomie* is sufficiently indeterminate in meaning (not even the Federal Constitutional Court attempts a definition) to make possible the teleological linking between itself, industrial action, and collective bargaining in 1980, whereas the 1971 decision merely linked collective bargaining and industrial action in a means/end structure. By 1991, the entire industrial action jurisprudence is stripped of its own normatively closed nature, as it is enclosed within the normative closure of the jurisprudence of the Federal Constitutional Court. The normative openings and transgressions which marked, significantly, the 1955 and 1971 decisions, and, to a lesser extent, the 1980 lock-out decision, again undergoes a normative closure.

# 12

## ARCHAEOLOGY OF SILENCE II (SILENCE AND POWER)

### JUDICIAL RESPONSES TO INDUSTRIAL ACTION IN THE JURISPRUDENCE OF BRITISH COURTS

---

'Yet it must be understood that judges do and will (to use a neutral word) develop the common law and interpret statutes along lines of their own policies to draw new contours of liability out of old principles. This is an inescapable fact for labour, as for other, law. *This process has a legitimacy of its own that is very difficult to question.* Most judges have now jettisoned, as Lord Reid put it, the idea that "in some Aladdin's cave there is hidden the Common Law", which judges need only to find ("we do not believe in fairy tales any more"). But the new principle or the new tort they create is, upon its creation and its admission into the *hallowed corpus of common law, invested with an authority equal to the rules that have been included there for centuries, as if it had been there all along.*'

-- Lord Wedderburn of Charlton *The Worker and the Law* 3 ed (1986) at 46. Emphasis added.

'This is simply the common law in action.'

-- *Express Newspapers Ltd v MacShane and another* [1980] 1 All ER 65 at 70 HL (per Lord Wilberforce)

---

### [PROLOGUE: READING THE HALLOWED BODY OF THE COMMON LAW (Discourse of Order Series 2 Part 6)]

From the old principles come the new, according to Weddeburn, new grounds of liability, new delicts, new applications of power against the power of the individual or the power of the collective entity. Again the act of establishment depends on a powerful ex-nomination, an axiomatic assumption and presentation of legitimacy that is, in the words of Wedderburn quoted above, very difficult to question. That which is new, through this ex-nomination process that characterises its establishment, appears to have been there always. All that was needed was for the principle to be 'read', for the archive to have been excavated in order to 'yield' the new principle.

Ex-nomination is a sleight-of-hand, but it is more than magic. Ex-nomination is also the discursive cover for the exercise of power (anew).]

A full reading of the entire archive, were that possible, or even an attempt at a full diachronic analysis of the development of that archive falls outside the scope of this study, concerned as it is with the traces of juridification in the law-as-text.

This study will, therefore, largely confine itself to a close analysis of some of the canonical texts in which the focus of this study can be addressed, following a procedure not dissimilar to that used in the previous chapter on the jurisprudence of the German courts.

The repugnance shown to the combination of employees into unions can be traced back to the 14th century:<sup>1</sup> the legal attitudes (which in turn inform the judicial responses to industrial action) can therefore largely claim to be inherited, to be part of an invisible archive that, through various routes of communication, is passed on from one legal generation to the next.

This organic transfer of a repugnance in respect of organised labour would explain, were it to suffice as a thesis, only a point of departure, perhaps a glimpse of a motivation -- no more. If one were to generalise and say that the judicial reaction to industrial action has always been one of disapproval, disaffection, repugnance even, this would explain the 'why', but not the 'how'. A general thesis of disapproval would do little to illustrate the manner in which this disapproval has been expressed, and the textual economy utilised in that process of expression.

This chapter focuses on that very textual economy: how the judicial response finds its roots within the corpus of the common law, how any policy considerations as expressed by statute may be ex-nominated, and how the judicial response to industrial action legitimises itself, both in a logical sense (in that it can be shown to be logically consistent with the archive, with the corpus) and in a legal sense (in that the expression finds itself legitimised through the position of the party or institution -- a court for example -- or its reliance upon other, higher, sources).

The literature traditionally draws a number of distinctions in discussing the judicial reactions to industrial action in Great Britain, most prevalent being a distinction between a view of industrial action as a breach of contract and a view of industrial action (and some of its concomitant phenomena) as a tort. This divide is sufficiently established in the literature for it to be regarded as canonical.<sup>2</sup>

It is not, for the purposes of the present study, necessary to rely on this distinction, because once the structural function of these legal constructs (breach of contract, tort) are recognised, and analysed (as they are in this chapter), then it becomes obvious that regardless of its nature, the legal construct serves the same function, namely to ground the (legal) reasoning presented.

---

<sup>1</sup> See R Lewis 'The Historical Development of Labour Law' (1976) 14 *British Journal of Industrial Relations* 1 at 2-3.

<sup>2</sup> See, for example, Wedderburn *The Worker and the Law* 3 ed (1986) 578-680; R W Rideout *Rideout's Principles of Labour Law* 5 ed (1989) at 321-343.

It will be shown that the legal canon or archive responds to the phenomenon of industrial action not merely with repugnance or mere disapproval,<sup>3</sup> but that the archive sees fit to apply force against that phenomenon. This in turn means that the discourses under consideration in this chapter relate, in a broad sense, to power and the exercise of that power. More specifically, they relate to the conditions of that power, such as the silence that makes the exercise of power possible and the ex-nomination which accompanies the exercise of legally-sanctioned and legitimated power.

## 12.1 AT THE BEGINNING: ILLEGALITY

This beginning is an example, it is not the true beginning. It could be said that what is presented here is a *simulation* of the beginning: it is an arbitrary point serving as a beginning, a point of departure.

At this (arbitrary) beginning, stands *Hornby v Close*.<sup>4</sup>

In holding that a trade union 'would certainly operate in restraint of trade, and would therefore, in that sense, be unlawful',<sup>5</sup> the text is instructive in that it traces the construction of the concept 'trade union' within the discourse:

'Under that term [trade union] may be included every *combination* by which men bind themselves *not to work* except under certain conditions, and to *support* one another, in the event of being *thrown out of employment*, in carrying out the views of the *majority*'.<sup>6</sup>

A further constitutive trace-element of the concept is the spectre of industrial action, the strike:

'Some of the *substantial objects* of the society are those of a trades' union, and for the maintenance of its members when on *strike*, and these *objects cannot be separated* from the other objects, if any, of the society.'<sup>7</sup>

---

<sup>3</sup> In chapter 11 above, it was clear that, in spite of the repugnance and disapproval shown by the German courts in respect of the strike, the archival principles which governed legal thought made it imperative for the strike to be 'permitted' or allowed: some accommodation had to be reached between the archival principles of the law (the legal system) and the phenomenon of the 'destructive' and 'disruptive' strike.

<sup>4</sup> [1867] 2 QB 153. Cited as *Hornby v Close*.

<sup>5</sup> *Hornby v Close*, per Cockburn CJ at 158.

<sup>6</sup> *Hornby v Close* at 158. Emphasis added.

<sup>7</sup> *Hornby v Close* at 160 (per Blackburn J). Emphasis added.

This may appear to be history, but it is vital to trace the development of the concept of a 'trade union' in the development of the archive, because, as will be shown, the archive will depend, structurally, on that very concept.

The essential features of the concept 'trade union' at this point in the development of the discourse (1867) can be summarised as follows in the terms of the two extracts from *Hornby v Close*:

- A trade union amounts to a *collective entity*: it is a 'combination' of persons.
- The membership in the collective entity is *voluntary*: 'men' 'bind themselves'.
- The purpose of the combination into a collective structure is
  - (a) not to work except under certain conditions,
  - (b) to offer mutual support in the case of termination of employment, and
  - (c) to maintain the members of the collective if they are on strike. It is important to note, already at this point, the judicial conception of the trade union as encompassing, within its objects and purposes, the strike and the consequences of the strike. Note that the 'object' (the maintenance of strikers) cannot be separated from any other objects ('if any') of the society.

The judicial response to the phenomenon of a trade union was to apply the archive of the common law and hold that a trade union operates in restraint of trade, and, as such, it would be illegal.

This illegality (itself the consequence of an application of the principles of the archive)<sup>8</sup> could only be obliterated by a power greater than the courts: the power of the legislature. The Trade Union Act of 1871 'gave trade unions basic protections from the criminal and civil consequences of the restraint of trade doctrine'.<sup>9</sup>

---

<sup>8</sup> 'Even without encouragement from Acts of Parliament the judges developed their own "common law" crimes, notably conspiracy and restraint of trade. Conspiracy could take the form of either a combination to pursue an unlawful object (the so-called "simple" conspiracy) or alternatively a combination to pursue a lawful object by unlawful means. Since many judges regarded trade unionism as a criminal objective simple conspiracy was of fundamental importance. Criminal liability for restraint of trade was equally basic because trade unions were obviously intended to restrict competition in the labour market.' Lewis *op cit* note 1 at 2-3.

<sup>9</sup> Lewis *op cit* note 1 at 3.

## **12.2 THREE TEXTS (AT THE TURN OF THE CENTURY)**

### **12.2.1 The rights of the individual**

The turn of the century was a significant period for the archive and its development, as three decisions<sup>10</sup> of the House of Lords structured, and thereby determined the foundation and future structure of, the archive.

Momentous, not only in size, is the decision of *Allen v Flood* (1897). Flood and Taylor, the respondents, were employed as shipwrights on a certain project, and they could be dismissed at any time. Their duties related to woodwork, but Flood and Taylor had done some ironwork on a previous project. The boilermakers or iron-workers (and their trade union) engaged on the same project as Flood and Taylor objected to the employment of Flood and Taylor and called for a union official (Allen). Allen was informed by the iron workers that they would cease working unless Flood and Taylor were dismissed: the ironworkers were trying to put a stop to the practice of allowing shipwrights to do ironwork. Allen informed the employer that, unless Flood and Taylor were dismissed, the ironworkers would cease working. The employer, in fear of the disruption of the work, complied and dismissed Flood and Taylor, also refusing to re-employ them in the future.

The matter came before the House of Lords. Taylor and Flood claimed damages on the ground that Allen had maliciously and wrongfully, and with the intent to injure Flood and Taylor, intimidated and coerced the employers to break contracts, and not to enter into contracts with them.

*Allen v Flood* was not a unanimous decision of the House of Lords. Three of the Law Lords were of the view that Allen was liable in tort (to Flood and Taylor) for maliciously inducing the employer to breach the employment contracts of Flood and Taylor. This opinion depended on a certain view of the nature of the rights involved:

'The first objection made to the plaintiffs' right to recover for the loss which they thus undoubtedly suffered is that no right of the plaintiffs was infringed . . . I think the right to employ their labour as they will is a right both recognised by the law and sufficiently guarded by its provisions to make any undue interference with that right an actionable wrong.'<sup>11</sup>

---

<sup>10</sup> *Thomas Francis Allen v William Cridge Flood & Walter Taylor* [1897] AC 1 HL (cited as *Allen v Flood*), *Quinn v Leathem* [1901] AC 495 HL (cited as *Quinn v Leathem*) and *The Taff Vale Railway Company v The Amalgamated Society of Railway Servants* [1901] AC 426 HL (cited as *Taff Vale*).

<sup>11</sup> *Allen v Flood* at 71 per Lord Halsbury LC.

The right at the core of this passage is a right pertaining to an individual: the right of the individual to employ his or her labour at will.<sup>12</sup> This right, according to the logic of the passage, is recognised by the law and thereby deserves the protection of the law. In his or her exercise of this right, therefore, the individual is also a constructed legal subject, deserving protection.

Once the judicial gaze is focused upon the rights of the individual (the right to dispose of his or her labour), the logic of the archive demands that the power of the law responds to any unjustified infringement of that right.<sup>13</sup>

The fact that there had been interference with the individual rights of Flood and Taylor to dispose of their labour was beyond question --- what remained was to establish the motive for that interference.

The focus being on the individual rights of the plaintiffs and the fact that these rights deserved protection led to a finding that Allen 'was guilty of intimidation and coercion through that intimidation'.

But there is a certain economy to the focus on individual rights, namely the disregard of the collective nature of the matter. The focus on the individual rights-aspect is only possible once the collective aspects of the dispute had been silenced: 'I think the dissatisfaction among the boiler-makers at these two men being employed has been greatly exaggerated.'<sup>14</sup> This statement contains an obliteration of the collective discontent that was an essential feature of the dispute -- the dissatisfaction is dismissed as being 'exaggerated'. This sentiment also depends on another act of silencing, for it completely obliterates the involvement and position of the employer in the collective dispute.<sup>15</sup>

At this point in the reading of *Allen v Flood* it can therefore be proposed that maintaining and protecting the right of the *individual* (in this case, the plaintiffs Flood and

---

<sup>12</sup> 'My Lords, I regret that I am compelled to differ so widely with some of your Lordships; but my difference is founded on the belief that in denying these plaintiffs a remedy *we are departing from the principles which have hitherto guided our Courts in the preservation of individual liberty to all.*' *Allen v Flood* at 90 (per Lord Halsbury LC). Emphasis added.

<sup>13</sup> 'It will be observed in what Bowen LJ says, [in *Mogul Steamship Co v McGregor* [1889] 23 QBD 598 at 614] intimidation, obstruction or molestation, or intentional procurement of a violation of *individual rights*, contractual or other (always assuming that there is no just cause for it), are each of them, where damage has been caused, actionable wrongs.' *Allen v Flood* at 75 (per Halsbury LC). Emphasis added.

<sup>14</sup> *Allen v Flood* at 81 per Halsbury LC.

<sup>15</sup> This silencing operates only at the margins of the text: the evidence of Edmonds, the foreman of the employer was, in part, as follows: ' "They were rather busy just then with the boiler-makers; that they employed three times as many boiler-makers as shipwrights, and if the boiler-makers had knocked off work or struck, it would have stopped the business of the company altogether --- entirely --- at that time, and that is was a very serious matter to the firm, and that the discharge of the men was in order to prevent their having to stop their business." ' *Allen v Flood* at 80-1, per Halsbury LC. Emphasis added.

Taylor) depends on an obliteration of the exercise of collective power, the recognition of that power, and the recognition of the legitimacy of the exercise of that power. The power-play between the boilermakers union and the employer is disregarded, for the rights of the individual take precedence.<sup>16</sup>

It is possible to read the divide between the dissenting minority (which held that Allen would be liable in tort for the loss suffered by Flood and Taylor) and the majority (who denied such liability) in terms of the majority's wider view, a view which also encompassed the collective aspects of the dispute. According to this view, Allen's role was not to 'coerce' or 'intimidate' the employer, but, in the words of Lord Shand, that Allen 'simply informed the employers of the true state of matters'.<sup>17</sup>

The following passage contains a number of important traces of two aspects of the archive: the collective nature of the trade union's representation and the exercise of power:

'I cannot doubt either that the appellant or the authorities of the union would equally have acted within his or their rights if he or they had "called the men out." They were members of the union. . . . It is not for your Lordships to express any opinion on the policy of trade unions, membership of which *may undoubtedly influence the action of those who have joined them*. They are now recognised by law; there are combinations of employers as well as of employed. The members of these unions, of whichever class they are composed, act in the *interest* of their class. If they resort to unlawful acts they may be indicted or sued. If they do not resort to unlawful acts they are *entitled to further their interests* in the manner which seems to them best, and most likely to be effectual.'<sup>18</sup>

This passage indicates an acceptance of the legal existence of trade unions (unions are 'now recognised by law'), as well as the fact that the interests of the union may determine the actions of the members ('membership of which may undoubtedly

---

<sup>16</sup> See in this regard O Kahn-Freund 'The Role of the Courts in the Development of English Labour Law' (1961) 1 (New Series) *Rivista Di Diritto Internazionale e Comparato del Lavoro* 172 at 173-4.

<sup>17</sup> *Allen v Flood* at 161. The 'true state of matters' referred to appear in the following context: 'I find no evidence of exaggeration or misrepresentation on the part of the defendant [Allen] . . . . It seems impossible from a perusal of the evidence to come to any other conclusion than this --- that the boilermakers had made up their minds they would not continue to work on the same vessel with the plaintiffs. That the boiler-makers had made up their minds as to the course they would pursue is clear from their meetings and demeanor before they sent for the defendant to come to the yard, and from the fact that they did send for him and required him to make the communication he did to the employers. I think the evidence proves that in these communications he made no false representation, but simply informed the employers of the true state of matters.' It is clear from this extract that the operative structure here relies on a recognition of the dispute as a *collective* dispute: that the breach of Flood and Taylor's rights were not due to the actions of Allen alone, but was consequent upon a collective dispute between the employer and the boilermakers' union.

<sup>18</sup> *Allen v Flood* at 129-130 per Lord Herschell. Emphasis added.

influence the action of those who have joined them'). The actions of the individual members, therefore, may be influenced by the policy of the trade union -- the policy comes from the trade union, which informs or determines the actions of the members. The unions (and their members) may resort to any action which is not unlawful: they have a wide choice in this regard ('the manner which seems to them best, and most likely to be effectual'). Importantly, the union acts 'in the interest' of the class -- in other words, the union acts in the interest of the employees.

It is clear from this passage that there is a different focus here, an emphasis on the collective entity, and the rights of that collective entity to act in the interests of its members. There is a recognition that the members act collectively: that their actions are informed by the policy of the collective they have joined.

Based on this recognition of the nature of the trade union as a bearer of collective power, the employer is re-assigned a role in the dispute, the passive role of the object of the exercise of collective power:

'If, then, the men had ceased to work for the *company* either of their own motion or because they were "called out," and the *company* in order to secure their return had thought it expedient no longer to employ the plaintiffs, they could certainly have maintained no action. Yet the damage to them would have been just the same. The *employers* would have been subjected to precisely the same "*coercion*" and "*intimidation*," save that it was by act and not by prospect of the act; they would have yielded in precisely the same way to the *pressure* put upon them, and been actuated by the same motive . . .'<sup>19</sup>

From this passage it is clear that there is a recognition that the actual dispute was not between the union official Allen and the dismissed shipwright Flood, but that the discharge of Flood and Taylor was the result of collective pressure placed on the employer by a trade union.

#### **12.2.2      Conspiracy: the power of the many (part 1)**

Within the shadow of *Allen v Flood* stands *Quinn v Leathem*, a case determined on the basis of a conspiracy: Leathem, a butcher, employed one Dickie, and several other assistants who were not members of the union. In order to force Leathem not to employ non-unionised employees, the union persuaded other customers of Leathem to breach their contracts with Leathem.

The House of Lords held that a combination of two or more persons who combine (conspire) to injure someone else in his or her trade by inducing breach of contracts or

---

<sup>19</sup> *Allen v Flood* at 130, per Lord Herschell. Emphasis added.

induce employees not to continue in his or her service is actionable if such acts (performed in terms of a conspiracy) cause loss.

Prefacing the judgment of the Lord Chancellor (Halsbury LC) are two statements of particular interest:

' . . . there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be *read as applicable to the particular facts proved*, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be *expositions of the whole law*, but *governed* and *qualified* by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. *I entirely deny that it can be quoted for a proposition that may seem to follow logically from it*. Such a mode of reasoning assumes that the law is necessarily a *logical code*, whereas every lawyer must acknowledge that the law is not always logical at all.'<sup>20</sup>

What are the anti-archival implications of this marginal passage? Certainly, there must be more here than an attempt by the Lord Chancellor to negate the effect of *Allen v Flood*, which is patently part of his concern at this point. Most important in this quoted passage are the anti-logical gestures, the openings of the process of law-making and application. The starting point for these two observations is that the law is not a logical code, it is therefore not determined by logical rules. This entails that a statement or proposition cannot be deduced ('follow logically') from an antecedent. Nor can any statement be regarded as an exposition of the 'whole law' (assuming that the 'whole law' could exist), but that it is *governed* (*qualified*) by the facts.

But it appears from the decisions of the various Law Lords that the law is governed by something else as well, something that lies beyond the scope of the law. Lord Macnaghten, for example, comes to the conclusion that a proposition that a conspiracy to injure, resulting in damage, gives rise to civil liability is '*founded in good sense*'.<sup>21</sup> Lord Chancellor Halsbury holds that if the plaintiff were without remedy in a case such as this, where the conspiracy 'induced the servants of the plaintiff not to continue in the plaintiff's employment' then 'it could hardly be said that our jurisprudence was that of a *civilised community* . . .'.<sup>22</sup>

Read together, the implications of these texts are that the law is not a strictly legal code, that it is governed not by its own archival logic but instead by the facts of the matter at hand. Yet at the same time, hovering on the margins of the law, are those

---

<sup>20</sup> *Quinn v Leathem* at 506, per Halsbury LC. Emphasis added.

<sup>21</sup> *Quinn v Leathem* at 510-511. Emphasis added.

<sup>22</sup> *Quinn v Leathem* at 506. Emphasis added.

norms and standards beyond the law, the 'good sense', the 'jurisprudence of a civilised community'.

### **12.2.3      The unbridled power of the few**

Also in 1901, the House of Lords held that a registered trade union itself, as distinct from its members, could be liable damages in tort. The processes at work in the text of the judgment make it clear that the conception being addressed is, firstly, the concept 'trade union' (again, as in *Hornby v Close*, as a subject of legal power -- as something that could be subjected to the power of the law) and, secondly, an object of power, in the context of this text the power of those few persons who control the trade union. For this reason, and as it appears from the extracts below, it is argued that this decision relates to subjecting the power of the few to the power of the law.

The basic structure of the text is apparent from the following passage:

'Subject to such control as an annual general meeting can exercise, the government of the society [the trade union] is in the hands of its executive committee, a *small body with vast powers, including an unlimited power of disposition over the funds of the union . . .*'.<sup>23</sup>

Not only frightening in itself, the spectre of an unbridled power in the hands of a *few persons* is compounded by considerations of the ends to which that power could be applied: ends of which the law would disapprove, such as 'the purposes of strikes and in connection therewith'.<sup>24</sup>

The prospect is of power (in the hands of a few) wide enough to be applied to purposes which do not, in terms of an unstated normative paradigm, meet with the approval of the law. The response of the legal archive is therefore to move to suppress this unlimited power, to place limitations on it.

Limiting the power of the trade union is accomplished with few words:

'Has the Legislature authorized the creation of *numerous bodies of men capable of owning great wealth* and of acting by agents with *absolutely no responsibility* for the wrongs they may do to other persons by the use of that wealth and the employment of those agents? In my opinion, Parliament has done nothing of the kind. I cannot find anything in the Acts of 1871 and 1876, or either of them, from beginning to end, to warrant or suggest such a notion.'<sup>25</sup>

---

<sup>23</sup> *Taff Vale* at 437. Emphasis added.

<sup>24</sup> *Taff Vale* at 437.

<sup>25</sup> *Taff Vale* at 438 (per Macnaghten LC). Emphasis added.

The power of the union and the potential exercise of that power, therefore, is subjected to limitations. The power cannot be absolute, for the trade union is not, as the text proceeds to claim, 'above the law' -- the law is sufficiently powerful to place limits on the exercise of that power. Phrased differently, the union can be held liable as an organisation, it can be held 'responsible' or 'accountable' by the 'law' for the exercise of its power. The exercise of power (by the union) is countered by the exercise of power (the imposition of liability and 'responsibility'), in terms of a normative paradigm that is exnominated on the part of the law.

Another important aspect of the passage quoted above lies in the traces of the methodology employed by the text in order to make space for its own normative pronouncements: nothing 'can be found' in the Acts of Parliament, these Acts having been read 'from beginning to end'. Nothing in the Acts supports a certain conclusion (that the trade union cannot be held liable for wrongful acts). This fact may, at this point, appear to be relatively immaterial, yet it needs to be borne in mind in relation to the establishment of the structural determinants of the archival discourses.

In holding that the 'collective' entity (the trade union), as distinct from its members or office bearers, can be held liable, concerns relating to power (this time the power of the law) again enter into consideration:

'I should be sorry to think that the law was so powerless; and therefore it seems to me that there would be no difficulty in suing a trade union . . . if it be sued in a representative action by persons who fairly and properly represent it.'<sup>26</sup>

The key to the passage lies in the maintenance of the power of the law: the law should not be regarded as powerless, everything should be done to preserve the power of the law.

Structurally, the decision in *Taff Vale* and the resultant Trade Disputes Act of 1906 were to determine the future form the archive and the archival discourses would take:

'The Trade Disputes Act of 1906 which reversed *Taff Vale* was of great importance in the historical development of labour law as it entrenched a *legal structure and tradition that would subsequently be described as "abstentionist"*. The Act gave trade unions a blanket immunity by prohibiting legal actions in tort against them and for persons acting "in contemplation or furtherance of a trade dispute", it gave immunities from liability for the torts of simple conspiracy, inducing breach of employment contract and interference, as well as providing them with more legal protection for peaceful picket-

---

<sup>26</sup> *Taff Vale* at 439. Emphasis added.

ing. *Anomalous privileges and statutory immunities from judge-made liabilities thus became the distinguishing characteristic of the law of industrial conflict in Britain.*<sup>27</sup>

The *Taff Vale* decision therefore determined not only the structure of the archive (judicial extension of common law liability to be met by new legislation), but also, in its focus on power and limits on that power, constituted the trade union as a full legal subject, more so than after *Hornby v Close*. In the *Taff Vale* decision, what was at issue was the power of the few; those who could make decisions (and who had an unlimited power) and whose decisions could impact on trade union funds. In imposing responsibility on and potential liability of the trade union (as an entity apart from its members), the trade union became an object greater than provided for in the Trade Unions Act of 1871 and 1876.

In response to the decision of the House of Lords, the legislature passed the Trade Disputes Act of 1906,<sup>28</sup> and this legislation operates within the discursive structure (the power of the many) established by the House of Lords in *Taff Vale*:

'An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable . . .' (section 1).

### **12.3 CONSPIRACY: THE POWER OF THE MANY (part 2)**

At the same time, another vision of power started operating, namely the vision of collective power, as in *Quinn v Leathem*. This decision marked the beginning of the application of the tort of conspiracy in British labour law. Temporarily eclipsed by the Trade Disputes Act of 1906, the tort of conspiracy re-emerged in *Crofter Hand Woven Harris Tweed Company Limited and Others v Veitch and Another*.<sup>29</sup>

---

<sup>27</sup> Lewis *op cit* note 1 at 4. Wedderburn writes that ' . . . from 1875 onwards Parliament provided for those organizing industrial action "immunities" in trade disputes against tort liabilities. The judges then expanded tort liabilities. Parliament then, belatedly, countered the judicial expansions of liabilities by adjusting the "immunities" (often with some gaps or uncertainties remaining). . . . Let us in parenthesis note that the classical pendulum that swung to and from between 1875 and 1980 -- judge-made liability, parliamentary immunity, then more liability -- did not arise merely from the peculiarities of "creative" judges (though it is often best illustrated by them). It derived from the very nature of the common law, its attitude to property and to the social order, its ability to archive mutations in its doctrines, and its relationship to Parliament.' Wedderburn *op cit* note 2 at 577.

<sup>28</sup> 6 Edw. 7 c. 47.

<sup>29</sup> [1942] AC 435 HL. Cited as *Crofter v Veitch*.

It was clearly a case falling outside the scope of the protection offered by the Trade Disputes Act of 1906:<sup>30</sup> at issue was whether the combination of two trade union officials to block the importation (and thereby use of) all yarn from the mainland attracted tort liability.

The House of Lords found the corpus of the law to contain both a crime of conspiracy (where the crime is complete if there is an agreement to effect any unlawful purpose) and a tort of conspiracy, the latter being defined in the following terms:

'[T]he tort of conspiracy is constituted only if the agreed combination is carried into effect in a greater or less degree and damage to the plaintiff is thereby produced. It must be so, for, regarded as a civil wrong, conspiracy is one of those wrongs (like fraud or negligence) which sound in damage, and a mere agreement to injure, if it was never acted upon at all and never led to any result affecting the party complaining, could not produce damage to him.'<sup>31</sup>

Clear in defining the parameters of the tort of conspiracy, the reasoning behind the tort is less easy to pin down. One of the motivations for the creation of the tort of conspiracy is the *collective nature of the tort*, the fact that there is a combination of persons to inflict damage on another party. Much authority, including many statements of the House of Lords, can be cited for the proposition that an act that may be lawfully committed by an individual may become unlawful if committed by a number of persons. Another explanation for the origin of the tort of conspiracy is offered, only to have the origin rendered irrelevant: 'However the origin of the rule may be explained . . .'<sup>32</sup>

Even in 1982, the House of Lords<sup>33</sup> cited, even though not fully approving, a dictum that:

'[t]he distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise.'<sup>34</sup>

---

<sup>30</sup> 'In argument before this House it was conceded that no issue is involved which might bring into the case any provision of the Trade Disputes Act, 1906.' *Crofter v Veitch* at 438 (per Viscount Simon LC).

<sup>31</sup> *Crofter v Veitch* at 439-440, per Viscount Simon LC.

<sup>32</sup> *Crofter v Veitch* at 444.

<sup>33</sup> *Lonrho v Shell Petroleum (No 2)* [1982] AC 173 HL.

<sup>34</sup> *Mogul Steamship Co Ltd v McGregor & Co* [1889] 23 QBD 598 at 616.

The logic, then, relates to the collective nature: innocent when performed by one person, the actions become a danger or 'oppressive' when performed by more than one person.<sup>35</sup>

But it is important to note that a definite shift has occurred in respect of sentiments expressed in the earlier decision of *Quinn v Leathem* and in *Allen v Flood*:<sup>36</sup> no longer is the individual employer's power to trade an absolute right:

'As the claim is for a tort, it is necessary to ascertain what constitutes the tort alleged. It cannot be merely that the appellants' right to freedom in conducting their trade has been interfered with. That right is not an absolute or unconditional right. It is only a particular aspect of the citizen's right to personal freedom, and like other aspects of that right is qualified by various legal limitations, either by statute or common law. Such limitations are inevitable in organized societies where the rights of individuals may clash. . . . Where the rights of labour are concerned, the *rights of the employer are conditioned by the rights of the men to give or withhold their services. The right to strike is an essential element in the principle of collective bargaining.*'<sup>37</sup>

Gradually, the interests of others have begun to enter the discourse, and have begun to structure the development of the archive. The rights of the employer (the employer's 'trade rights' as they were called in *Quinn v Leathem*) are now being counterbalanced by the 'labour rights' of the workers. No longer is the right of the individual absolute, but it may also be tempered by the rights of the collective: the 'right' to strike (or to cease work) has, by the time *Crofter v Veitch* was decided, gained some currency in the discourse, and it appears to be exercising some archival force. According to the passage from *Crofter v Veitch* quoted above, the right to strike is an *essential element* in the principle of collective bargaining (the origins of this principle, which gives meaning to the 'strike' is not explained or dealt with in any detail).

---

<sup>35</sup> As Lord Diplock pointed out in the *Lonrho* decision, this fails to take into account the nature of the individual entities who participate in the conspiracy: 'But to suggest today that an act done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or an oil company such as Shell or B.P. does not exercise greater *economic power* than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II.' *Lonrho v Shell Petroleum* at 189A-C (note 33). Emphasis added.

<sup>36</sup> In *Allen v Flood*, Lord Watson held (at 92) that 'Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences in so far as these are injurious to the person whose right is infringed.' Applying this dictum to the facts of *Quinn v Leathem*, Lord Brampton stated (at 526): 'I cannot suppose any intelligent person reading the evidence adduced on the trial of this case failing to come to the conclusion that the acts complained of amounted to a serious and wrongful *invasion of the plaintiff's trade rights . . .*' (emphasis added).

<sup>37</sup> *Crofter v Veitch* per Lord Wright at 463. Emphasis added.

The recognition of the collective nature of trade unionism or the collective aspects to collective bargaining and the application of the strike within that context did not, however, prevent the House of Lords from holding that there was a conspiracy to injure which attracted liability.

## **12.4 THREATS OF POWER AND THE DISAPPEARANCE OF THE TRADE DISPUTE**

### **12.4.1 The mere threat of power**

The mere threat of power (and the effect of that threat) also attracted legal consequences. In *Rookes v Barnard*,<sup>38</sup> the employer (the British Overseas Airways Corporation) suspended and then dismissed an employee (Rookes) after the employer had received a threat from a trade union (which enjoyed a closed shop and to which Rookes had belonged) that the union would strike unless Rookes was dismissed (he had resigned his trade union membership). The union and the employer had concluded a 'no-strike' and 'no-lock-out' agreement -- all disputes were to be resolved through arbitration instead of industrial action.

According to the House of Lords, what was at stake was 'whether it is a tort to conspire to threaten an employer that his men will break their contracts with him unless he dismisses the plaintiff [Rookes], with the result that he is thereby induced to dismiss the plaintiff and cause him loss'.<sup>39</sup>

There was no doubt that a tort of intimidation, if it did not exist at that point, was on the verge of being created. The policy considerations behind the establishment of the tort of intimidation were put by Lord Reid as follows:

'Intimidation of any kind appears to me to be highly objectionable. The law was not slow to prevent it when violence and threats of violence were the most effective means. Now that subtler means are at least equally effective I see no reason why the law should have to turn a blind eye to them.'<sup>40</sup>

For Lord Hodson, similar considerations applied:

'It would be strange if threats of violence were sufficient and the more powerful weapon of a threat to strike were not, always provided that the threat is unlawful. The injury and suffering caused by strike action is very often widespread as well as devastat-

---

<sup>38</sup> [1964] AC 1129 HL. Cited as *Rookes v Barnard*.

<sup>39</sup> *Rookes v Barnard* at 1166 per Lord Reid.

<sup>40</sup> *Rookes v Barnard* at 1169 per Lord Reid. Emphasis added.

*ing, and a threat to strike would be expected to be certainly no less serious than a threat of violence.* That a breach of contract is unlawful in the sense that it involves the violation of a legal right there can be no doubt.<sup>41</sup>

Lord Devlin echoed these sentiments:

'I find nothing to differentiate a threat of a breach of contract from a threat of physical violence or any other illegal threat. The nature of the threat is immaterial, because . . . its nature is irrelevant to the plaintiff's cause of action. *All that matters to the plaintiff is that, metaphorically speaking, a club has been used. It does not matter to the plaintiff what the club is made of --- whether it is a physical club or an economic club, a tortious club or an otherwise illegal club.* If an intermediate party is improperly coerced, it does not matter to the plaintiff how he is coerced. *I think, therefore, that at common law there is a tort of intimidation . . .*'<sup>42</sup>

A reading of these three excerpts makes it clear that the essential concerns underlying the creation of 'intimidation' relate to power, the exercise, or merely the threatened exercise of that power, as well as the response that the law should take to that (threatened) exercise of power.

The processes used in these passages clearly show the force of the ex-nomination, as the axioms and obviousness of the processes take over to cover up the fact that the common law is in fact being extended in a direction where it had not been since the late 18th century.<sup>43</sup>

Power also motivates the response of the law to the threat of the exercise of power (the threat to strike): what must be preserved, according to Lord Devlin, is the power and flexibility of the common law:

'But there is one argument, or at least one consideration, that remains to be noticed. *It is that the strike weapon is now so generally sanctioned that it cannot really be regarded as an unlawful weapon of intimidation; and so there must be something wrong with a conclusion that treats it as such. . . . I see the force of this consideration. But your Lordships can, in my opinion, give effect to it only if you are prepared either to hobble the common law in all classes of disputes lest its range is too wide to suit industrial disputes or to give the statute [the Trade Disputes Act of 1906] a wider scope*

---

<sup>41</sup> *Rookes v Barnard* at 1201. Emphasis added.

<sup>42</sup> *Rookes v Barnard* at 1209. Emphasis added.

<sup>43</sup> 'The threat had to be a threat of an *unlawful act*. The last clear example of such a liability had been in 1793. An unduly enthusiastic sea captain (A) had fired cannon near to the canoes of potential customers (B) in order to scare them from trading with a rival ship (C) off the Cameroon coast. There C could sue A. But how was that threat of violence relevant to a peaceful threat to strike? Indeed, lay observers in the court room were understandably puzzled by the very idea of modern industrial rights of workers being determined by precedents about canoes and cannons off the Cameroon coast 170 years earlier.' Wedderburn *The Worker and the Law* at 41. Emphasis in the original.

than it was ever intended to have. As to the former alternative, I cannot doubt that the threat of a breach of contract can be a most intimidating thing. . . . Granted that there is a tort of intimidation, I think it would be quite wrong to cripple the common law so that it cannot give relief in these circumstances. *I think it would be old-fashioned and unrealistic for the law to refuse relief in such a case and to grant it where there is a shake of a fist or a threat to publish a nasty and untrue story.*<sup>44</sup>

This passage contains the traces of a number of pivotal archival principles, and also traces of the most powerful process operative within the context of this archive, namely the force of the ex-nomination.

Lord Devlin's analysis starts off by re-stating sentiments expressed in the House of Lords in 1942, namely that the strike is generally sanctioned (Lord Wright, in *Crofters v Veitch*, regarded it as an essential part of the principle of collective bargaining). But, according to Devlin's analysis, the economy of this sentiment is unacceptable -- the statement (the strike is sanctioned, approved) entails, as its economy, that the common law must be 'hobbled' -- in other words, that the power or force of the common law must be reduced. This economy is, by its very nature (and the nature of the forum in which it is expressed: the House of Lords) unacceptable: 'I said that I thought it would be wrong to *cripple* the common law. . . .'<sup>45</sup>

The logic of this economy, as analysed by Lord Devlin, is as follows: to accept the strike (as 'generally sanctioned' and therefore not an instrument of 'intimidation') would 'hobble' or 'cripple' the common law. The strike, in other words, if accepted as generally sanctioned by the common law would have the result of 'crippling' (diminishing the power) the common law, as the common law would be powerless to proceed against the strike. Once accepted as 'generally sanctioned', the strike would in effect move beyond the normative grasp of the archive of common law.

This is not acceptable: limiting the power of the common law in this fashion would be 'unrealistic' and 'old-fashioned' -- and, as such, this is an option not to be contemplated.

The only option which would preserve the power of the common law, then, is to perform an ex-nomination by virtue of which the threat of a strike can become equated with the 'shake of a fist' (that is the threat of physical violence). This is performed, in a very overt manner, by detailing the consequences that follow the exercise of power in the form of a strike: the 'incalculable loss' suffered by the company, and the 'grave inconvenience to the public it [the company] serves'.

It is quite clear from the excerpts quoted from the texts in *Rookes v Barnard* that one of the pivotal concerns in those texts is the threat of power, and the manner in which the

---

<sup>44</sup> *Rookes v Barnard* at 1218-1219. Emphasis added.

<sup>45</sup> *Rookes v Barnard* at 1219 per Lord Devlin. Emphasis added.

the archive responds to that threat. By equating the threat of the exercise of collective power (the threat of a strike) with physical violence, it is clear that the law finds the collective action of the strike and the threat that it will be exercised, as abhorrent as the threat of physical violence (the raised fist). As structurally equivalent to the raised fist, therefore, the common law must respond and attach a devaluing (or negative) legal consequence to the threatened exercise of power.

But this extension of the common law must not be seen as to occur either organically (naturally) or in a vacuum (there is a 'countertext' to these texts). The logic in the texts of *Rookes v Barnard* is inexorable: there is an utter determination in those texts to reach a certain conclusion.<sup>46</sup> This is indicated by the fact that it is *only after* the creation of the delict of intimidation that the various texts proceed to structure their own position in respect of the provisions of the Trade Disputes Act.<sup>47</sup> Having created a liability the text must seek to accommodate that creation within another archive (the archive signified by the legislation, by the Trade Disputes Act of 1906).

The economy of this accommodation is, on the one hand, an obliteration, a silencing or destruction of the (legislative) archive in order to provide the structural (logical) space and context (thereby causing a shift from contra-text to context) for the new construct.

In order to obliterate the archival force of the Trade Disputes Act of 1906, the text proceeds to interpret the legislative provisions in a singularly narrow manner. In doing so, at least one of the texts relies in part on the historical coincidence that Lord Loreburn was Lord Chancellor when the Trade Disputes Act was passed in 1906, and therefore 'he must have been well acquainted with its provisions'.<sup>48</sup>

In 1906, however, the tort of intimidation did not exist, so it proves relatively easy to obliterate the archival force of the legislation in the following terms:

'In my judgment, it is clear that section 3 does not protect inducement of breach of contract where that is brought about by intimidation or other illegal means and the section

---

<sup>46</sup> 'A "coercive threat" of a breach of contract gave a cause of action just like a coercive threat of violence. *What stands out in the speeches of the Law Lords is their determination to reach this result.*' Wedderburn *op cit* note 2 at 42. Emphasis added.

<sup>47</sup> Section 1 of the Trade Disputes Act of 1906 reads as follows: '1. The following paragraph shall be added as a new paragraph after the first paragraph or section 3 of the Conspiracy and Protection of Property Act, 1875: -- An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable. . . .' Section 3 of the same Act reads as follows: '*An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills.*' Emphasis added.

<sup>48</sup> *Rookes v Barnard* at 1173 (Lord Reid).

must be given a similar construction with regard to interference with trade, business or employment. So, in my opinion, the section does not apply to this case.<sup>49</sup>

Once the immunities provided for by sections 1 and 3 of the Trade Disputes Act had been obliterated, liability for the new creation of intimidation could be established.

The processes taking place within these texts (the establishment of a new liability and a new delict, within the ruins of the obliterated legislation) elicit some very insightful passages on the processes themselves. Again relating to a maintenance of the power and the flexibility of the common law, one text makes a comment about the implicit unknowability of the common law: 'one of the characteristics [of the common law] . . . is . . . that its principles *are* never finally determined but *are* and *should be* capable of expansion and development as changing circumstances require . . .'.<sup>50</sup> As the circumstances change, in other words, the law changes to meet those circumstances -- the law reacts to changing circumstances. It should also be noted that the force and flexibility of the law (and, by implication, its unknowability) are approved: note the use of 'should' -- the law should (normative approval) be able to change, it should be capable of expansion and development, and this is only possible if the principles of the law 'are never finally determined'.

#### 12.4.2      These are not trade disputes?

The legal (legislative) archive signified by the Trade Disputes Act of 1906 consists of two main elements. In *Rookes v Barnard*, the relevant consideration was the act done in contemplation or furtherance of a trade dispute. The other element of the legislative archive is the definition of 'trade dispute' --- another element of the legislative archive that was soon to be subjected to judicial scrutiny.

The first remarkable feature of *JT Stratford & Son Ltd v Lindley and Another*<sup>51</sup> is the immediate expression of dissatisfaction with the decision of *Rookes v Barnard*, and an attempt to deny the canonical or archival force of the *Rookes v Barnard* decision:

'In my judgment . . . the acts of the trade union officer are protected by section 3 of the Trade Disputes Act, 1906. That section makes it clear that it is not an actionable wrong to *induce* some other person to break a contract of employment. If it is not actionable to *induce* such a breach, I cannot see that it is actionable to *threaten* to induce it. . . . I must decline, therefore, to extend *Rookes v Barnard* beyond its own particular circumstances: for if we did, we should greatly diminish the right to strike in this country. Nearly every strike notice would be unlawful as being intimidation. It would mean that

---

<sup>49</sup> *Rookes v Barnard* at 1178 (per Lord Reid).

<sup>50</sup> *Rookes v Barnard* at 1185 (per Lord Evershed). Emphasis added.

<sup>51</sup> [1965] AC 269 HL. Cited as *Stratford v Lindley*.

an employer who, under the threat of a strike, raised the wages would be entitled to recover damages from the trade union officers on the ground that the increase was extorted by intimidation. No one has ever supposed that any such action would lie. It has always been thought that section 3 covered it.<sup>52</sup>

Another important aspect of the case relates to its finding that there was no trade dispute. In essence, the dispute was about the recognition of a minority trade union -- yet it was held that this was not a trade dispute, as it 'was not connected with the employment or non-employment of any person' nor was it 'connected with the terms of employment or with the conditions of labour of any person'.<sup>53</sup> Elsewhere the view is expressed that the officials of the minority union resorted to the embargo of the business because 'they considered that the prestige of their union required this course'.<sup>54</sup> This view of the matter having prevailed, the door opened to the archive proceeding to evaluate the industrial relations. The view was expressed, for example, that the fact that a majority trade union had been recognised offered sufficient protection 'from a practical point of view' to the members of the minority union.<sup>55</sup> What is subject to scrutiny at this point is the purpose of whatever action the trade union and its officials has resorted to, and if it is borne in mind that the protection offered by section 3 of the Trade Disputes Act of 1906 relied on there being a 'trade dispute', the power-implications become obvious.

In order for the exercise of collective power on the part of the trade union to qualify for the protection of the law in terms of the Trade Disputes Act, there has to be a 'trade dispute' and the actions of the trade union must be in 'furtherance' or 'contemplation' of that trade dispute. Once the actions taken by the union fall outside the scope of the protection offered by section 3, because of a finding that there is no 'trade dispute', all protection is lost. It may appear to be only a matter of statutory interpretation (is there a trade dispute or not), but the implications are far more significant.

One of the reasons for the importance of this structure (the definition of the trade dispute) is that it appears to be incapable of processing all the power structures involved in collective disputes. It even appears that once the law has taken a certain view of what a 'trade dispute' is, the legal gaze becomes fully incapable of recognising the exercise of

---

<sup>52</sup> *Stratford v Lindley* at 285G-286B per Lord Denning, MR. Emphasis in the original.

<sup>53</sup> *Stratford v Lindley* at 323A-C. Per Lord Reid.

<sup>54</sup> *Stratford v Lindley* at 327B (per Viscount Radcliffe). Similarly: 'The defendants struck at the plaintiff's business by an embargo and brought it to a standstil. Their reason for so doing had no connection with the working conditions or pay of the plaintiff's workmen; none of them were members of the defendants' union. The defendants' object in damaging the plaintiffs' business was, to put pressure on another company for the purpose of maintaining or enhancing the prestige of the defendants' union as against a rival'. *Stratford v Lindley* at 330E-F (per Lord Pearce).

<sup>55</sup> See *Stratford v Lindley* at 334-5 (per Lord Pearce).

power by a collective of employers: once a vision has been recognised and accommodated, in other words, the gaze is blinded to the peripheries of the vision.

In *Torquay Hotel Co Ltd v Cousins and Others*,<sup>56</sup> a dispute, again about the recognition of a trade union, spread from one hotel to another, and from hotels to fuel suppliers. An initial dispute at one hotel (the Torbay Hotel -- which employed members of the union seeking recognition) erupted when the managing director of the plaintiff company, (reportedly) made some relatively inflammatory remarks, threatening to 'stamp out the intervention' of the union. A picket spread from the one hotel to the next (the Imperial Hotel), and the drivers of the fuel-trucks supplying the hotels would not cross the picket-lines, especially because the drivers were members of the union in dispute with the hotel company.

The Appeal Court came to the conclusion that there was no 'trade dispute' as contemplated by the Trade Disputes Act of 1906:

'There was, I think, a trade dispute between the defendant union and the Torbay Hotel. The Torbay Hotel employed workers of the defendant union. The defendant union claimed that it should be recognised as having authority to negotiate on their behalf. The Torbay Hotel refused to recognise them. Such a recognition dispute is, I think, clearly a trade dispute . . .

But I do not think there was a trade dispute between the defendant union and the Imperial Hotel. The Imperial Hotel employed no members of the defendant union. . . . Counsel for the defendants said that the Imperial Hotel, through its managing director, had taken sides in the dispute at the Torbay Hotel and could thus be regarded as parties to that dispute. . . . No doubt Mr Chapman sympathised with the employers at the Torbay Hotel, *but sympathy with one side or the other does not make a person a party to the dispute*.

[Holding that the actions against the Imperial Hotel were not in furtherance of a trade dispute, the court continued] They [the actions] were done in furtherance of the anger which they felt at Mr Chapman for having, as they said, "intervened" in the dispute.'<sup>57</sup>

Wedderburn points out that the *Torquay* decision is 'one of the few cases when an employers' association has played a role',<sup>58</sup> and certainly the role of the Torquay Hotel Association in the dispute (it stated itself to be the 'innocent victim' under threat by the union's action).

What are the power implications involved, those structures of power that go some way to explaining this case? It needs to be borne in mind that, when speaking to a reporter, Mr Chapman, the managing director of the Torquay Hotel Company, also used terms of power -- terms that are repeated in the evidence before the court: He said that the

---

<sup>56</sup> [1969] All ER 522 CA. Cited as *Torquay Hotel*.

<sup>57</sup> *Torquay Hotel* at 528F-I, per Denning MR. Emphasis added.

<sup>58</sup> Wedderburn *op cit* note 2 at 567.

hoteliers 'can only take a certain amount of knocks before they will have to defend themselves. They feel they must make a stand'. Even though it was a misquote, the newspaper reported Mr Chapman to have said that the Hotels Association would 'stamp out' the intervention of the defendant union.<sup>59</sup>

In this situation, then, power responds to power: the apparently inflammatory rhetoric of the employers and attributed to a collective entity (the employers' association) is a response to the collective actions by the trade union. But one could ask, rhetorically, whether the law would respond to that kind of statement: would it be regarded, in the terms used in the *Rookes v Barnard* decision, as intimidation of the union?

## 12.5 COLLECTIVE POWER AND THE POWER OF THE LAW

### 12.5.1 The legitimacy of power is subjective (part 1)

The provisions of the Trade Disputes Act of 1906, which provided an immunity for acts done in furtherance or contemplation of a trade dispute were re-written in section 13(1) of the Trade Union and Labour Relations Act of 1974.<sup>60</sup> But the fact that the words granting the immunity had come a long way (they have appeared in British legislation in virtually unchanged form since 1875) did not ensure that the meaning apparently lurking behind the words was any more accessible.

In 1980 the question was raised whether compliance with the provisions of the immunity was based on a subjective state of mind (in other words, that the trade union

---

<sup>59</sup> *Torquay Hotel at 525I-526A.*

<sup>60</sup> The 1974 legislation (the Trade Union and Labour Relations Act -- TULRA) and amendments in 1976 had largely removed the difficulties in determining whether or not a dispute was a 'trade dispute'. The legislation introduced in the 1970s contained a very wide definition of a 'trade dispute' -- according to the statutory definition contained in section 29 TULRA, a trade dispute ranges from disputes about terms and conditions of employment, engagement, non-engagement, or termination of employment of one or more employees, allocation of work or the duties of employees, matters of discipline, trade union membership, facilities to be provided to trade union officials, machinery for negotiation or consultation, recognition of trade unions and other procedures. Section 13(1) TULRA echoes the provisions of the 1906 Trade Dispute Act as follows: 'An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only --- (a) that it induces another person to break a contract or interferes or induces any other person to interfere with its performance; or (b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a contract or to interfere with its performance.'

By 1979, a Law Lord claimed that, after the 1974 legislation (amended in 1976 and 1978), 'the law now is back to what Parliament had intended when it enacted the 1906 Act, but stronger and clearer than it was then'. (*NWL Ltd v Woods, NWL v Nelson and Another* [1979] 3 All ER 614 HL at 630 (per Lord Scarman). In the same decision, the objective nature of the inquiry as to whether a 'trade dispute' existed or not (in effect an extended interpretation of section 29 TULRA) is discussed at some length (see at 630g-632g).

officials took action with the intention of furthering a trade dispute) or whether the test is objective (in that the actions resorted to by the union must be reasonably capable of furthering the trade dispute).

This is the question the House of Lords had to answer in *Express Newspapers Ltd v MacShane and Another*.<sup>61</sup> A trade dispute ('a *normal* one between employers and employees'<sup>62</sup>) arose between a trade union representing journalists and a body representing the owners of provincial newspapers. As the dispute continued, secondary action was initiated at another company, the Press Association (PA), a news-copy distributor. The president of the union (MacShane) stated that the only reason for the secondary action at PA was to make the strike (as regards the provincial newspapers) more effective. The morale of the striking workers were also a consideration in launching and maintaining the secondary action.

As the legislation introduced in 1974 had increased the scope for industrial action, the action could also now be aimed against customers or suppliers of the company involved. The question before the House of Lords in 1980 therefore, was

'whether action against such *innocent and powerless* third parties or parties even more remote from the original trade dispute is in "furtherance" of that dispute becomes one that is difficult to answer. The answer must depend on some test other than the possibility of pressure being exercised on the original party . . .'.<sup>63</sup>

It is the 'innocence' and powerlessness of the third parties, those who are not directly involved in the trade dispute, that deserve protection: If the action taken against such an 'innocent and powerless' third party is not in 'furtherance' of a trade dispute, the action would fall outside the scope of the statutory immunity. So, at the very core of this consideration lies a concern with power (or, rather, the lack of power): the protection of those who have, within the context of a collective power struggle (a 'trade dispute'), no power to exercise, and therefore deserve the protection of the law.

The House of Lords held that determining whether or not action is taken in 'furtherance' of a trade dispute relies on a subjective test of the motivations of the person or persons initiating the action(s):

---

<sup>61</sup> [1980] 1 All ER 65 HL. Cited as *MacShane*.

<sup>62</sup> *MacShane* at 67, per Lord Wilberforce. Emphasis added.

<sup>63</sup> *MacShane* at 69 per Lord Wilberforce. Emphasis added. Lord Wilberforce dissented from the view expressed by the majority of the House of Lords, and held that the test is an objective test: 'in my opinion there is an objective element in "furtherance" which the court must appraise. It should do so in the light of the evidence, giving due weight but not conclusive force to the genuine belief of those who initiate the action in question' (at 71).

'Given the existence of a trade dispute ... this makes the test of whether an act was done "in ... furtherance of" a purely subjective one. If the party who does the act honestly thinks at the time he does it that it may help one of the parties to the trade dispute to achieve their objectives and does it for that reason, he is protected by the section. I say "may" rather than "will" help, for it is the *nature of industrial action* that success in achieving its objectives cannot be confidently predicted. Also there is nothing in the section that requires that there should be any proportionality between on the one hand the extent to which the act is likely to, or be capable of, increasing the "*industrial muscle*" of one side to the dispute and on the other hand the *damage* caused to the victim of the act . . . .'<sup>64</sup>

Again there are traces of several important considerations here: the fact that industrial action and the outcome of a trade dispute rely on, or are linked to 'industrial muscle' (in other words, an explicit recognition of the power aspect of industrial conflict), the fact that the exercise of power may cause damage to parties and institutions who are not involved in the complex web of the power relations which determine the trade dispute, and the recognition of the fact that, in spite of the damage done to the 'innocent and powerless', the exercise of power for the purpose of industrial action is legitimate and deserves the protection of the law.

The law does not, in this case, counter the exercise of power (industrial action) with its own power: it grants the exercise of collective power in industrial action considerable leeway, accepts it and even legitimises it (even where it causes damage to the 'innocent and powerless'). It is important to note, at this point, that the legitimisation of the exercise of power is not performed by the law itself, in terms of any normative paradigm: the normativity of the legitimisation lies outside the law (it is 'subjective') and is therefore, in a sense, indeterminable by the law: there can be no normative paradigm of general application (applicable in an iterable manner from one case to the next) as regards the 'intention' or the 'state of mind' that the person taking the action must have in order to legitimate the use of power. In this sense, then, the law is silent as regards the legitimisation of the use and application of power: there is nothing the law can say except to refer the normativity of the legitimisation process to a normative paradigm that lies outside itself (in the motives of the person taking the action).

The change in judicial approach must be seen to be more than a reflection of a change in legislative policy: appearing in the context of almost 80 years of judicial intervention in industrial action and the exercise of collective power, it must be seen as a strategic withdrawal of the (judge-made) law. But this does not mean that the power of the law has been forfeited totally, because on the margins of the withdrawal flickers the dim outlines of the strategic position into which the force of the law had withdrawn: in rela-

---

<sup>64</sup> *MacShane* at 72 per Lord Diplock. Emphasis added. The 'section' referred to is section 13(1) of the Trade Union and Labour Relations Act of 1974 (amended in 1976), which reiterates the immunity contained in the Trade Disputes Act of 1906.

tion to the granting of injunctions prohibiting industrial action, for example, the House of Lords states that there may be cases 'where the consequences to the employer or to third parties or the public and perhaps the nation itself, may be so disastrous that the injunction ought [not] to be refused . . .'.<sup>65</sup>

The power of the law (the power exercised by the judge) may be in abeyance, like a sword sheathed -- but there may be situations where the full force of the law may be unleashed to place a limitation on the exercise of collective power. The power of the law may be silent, but it is still there . . .

### **12.5.2      The legitimacy of power really is subjective (part 2)**

And from this retreat the law again took up the battle against the collective power of industrial action: relying, in part, on the statement by the House of Lords that there are cases where the consequences of the industrial action will be disastrous, the Court of Appeal (under the guidance of Lord Denning MR) refused to follow the precedent set by the House of Lords in *Express Newspapers Ltd v MacShane*. But the House of Lords was not to stand idly by while the Master of the Rolls sowed confusion in the archive.<sup>66</sup> The facts giving rise to the case were not entirely dissimilar. The Iron and Steel Trades Confederation (ISTC), a trade union, were in dispute with the British Steel Corporation, the public-sector steel producer in Great Britain. The trade union was threatening to extend the scope of the strike to several private-sector companies. Sitting alone in the Queen's Bench Division, Kenneth Jones J felt constrained by the decision of the House of Lords in *Express Newspapers Ltd v MacShane* and refused to grant the injunctions. The Court of Appeal, on the other hand, granted the injunctions.

Lord Denning held that there were two disputes: the first was the trade dispute between the employer and the union, and the second a 'public battle against the Government's attitude'. The 'second' dispute (against the Government) could by no stretch of the imagination be classified as a trade dispute, and therefore, Lord Denning held, the statutory immunity did not apply in respect of the 'second' dispute. The Court of

---

<sup>65</sup> *NWL Ltd v Woods, NWL Ltd v Nelson and Another* [1979] 3 All ER 614 HL at 626f per Lord Diplock. And also: 'My Lords, in a case where action alleged to be in contemplation or furtherance of a trade dispute *endangers the nation or puts at risk* such fundamental rights as the right of the public to be informed and the freedom of the Press, it could well be a *proper exercise of the court's discretion* to restrain the industrial action pending trial of the action. It would, of course, depend on the circumstances of the case; but the law does not preclude the possibility of the court exercising its discretion in that way' *Express Newspapers v MacShane* at 79 per Lord Scarman. Emphasis added in latter quote.

<sup>66</sup> *Dupont Steels Ltd and others v Sirs and Others* [1980] 1 All ER 529 HL. Cited as *Dupont Steels*. The report of the case as it appears as cited contain the judgments of Kenneth Jones J (sitting alone in the Queen's Bench Division), the judgments of the Court of Appeal, and the speeches of the Law Lords. The various courts are indicated in the footnotes.

Appeal then proceeded to ignore the principle of the subjective legitimisation of the exercise of power and held that determining whether or not an act was 'in furtherance' of a trade dispute is 'a question on the facts. It does not depend on a state of mind, or anything of that kind'.<sup>67</sup>

What is interesting to note are the concerns motivating the fact that the Court of Appeal allowed the appeal: again the spectre of unlimited power and the harm that such power could do:

'To call out these private steel workers, who have no dispute at all with their employers, would have such a *disastrous effect on the economy and well-being of the country* that it seems to me only right that the court should grant an injunction to stop these people being called out . . . to stop all this picketing . . .'<sup>68</sup>

From outside the law comes a normative system: a system of values against which the exercise of collective power is to be exercised -- in terms of the discourse here, the health of the economy and the common weal. But there are other constitutive elements to this meta-juridical paradigm: the maintenance of the rights of the 'public' and the protection of 'freedom of the press'.<sup>69</sup>

At the very core of the House of Lords' response to the challenge of their dicta lies a conception which has become the common view of the issues:

[Referring to the legislative immunities] 'That conclusion as to the meaning of words that have been used by successive Parliaments since the Trade Disputes Act 1906 to describe acts for which the doer is entitled to immunity from the law . . . is (as I pointed out in the MacShane case) one which is *intrinsically repugnant* to anyone who has spent his life in the practice of the law or the administration of justice. Sharing those instincts it was a conclusion that I myself reached with considerable reluctance, for given the existence of a trade dispute, it involves *granting to trade unions a power*, which has *no other limits* than their own *self-restraint*, to *inflict* by means which are contrary to the general law, *untold harm* to industrial enterprises unconcerned with the particular dispute, to the employees of such enterprises, to members of the public and to the nation itself, so long as those in whom the control of the trade union is vested honestly believe that to do so may assist, albeit in a minor way, in achieving its objectives in the dispute.'<sup>70</sup>

A judicial repugnance of industrial action that is almost a cliché at this point of time, but, as one of the Law Lords recognised, 'below the surface of the legal argument lurk

---

<sup>67</sup> *Duport Steels* in the Court of Appeal -- at 536j of the report (per Lord Denning MR).

<sup>68</sup> *Duport Steels* in the Court of Appeal (per Denning MR) at 538g-h. Emphasis added.

<sup>69</sup> See above, note 65.

<sup>70</sup> *Duport of Steels* (House of Lords) at 541d-f, per Lord Diplock. Emphasis added.

some profound questions as to the proper relationship in our society between the courts, the government and Parliament'. These profound questions relate not to institutions, but to institutions-as-functions, and ultimately, to the manner in which the institution exercises power.<sup>71</sup>

The repugnance of the law when confronted with the prospect of collective power being exercised is clear from the excerpt above; even more apparent is the distaste of collective power unlimited by any objective means, a system of checks-and-balances, some control. But the *Auseinandersetzung* with the phenomenon of industrial action reflects on the law itself: it places the law and the application of the law in considerable peril.<sup>72</sup> For the manner in which the power of the law responds to the challenge posed by another system of power (collective power) determines the normative standing of the law itself, it affects the 'morality' of the law in the eyes of the subjects of the law:

'It *endangers continued public confidence* in the political impartiality of the judiciary, which is *essential* to the continuance of the rule of law, if judges, under the guise of interpretation, provide their own *preferred amendments* to statutes which experience of their operation has shown to have had consequences that members of the court before whom the matter comes consider to be injurious to the public interest.'<sup>73</sup>

This is the actual challenge that the exercise of collective power puts to the power system of the law: if the judiciary is seen to be amending legislation that does not accord with its own tastes and/or normative paradigms, the 'continued public confidence' would be in peril, and, without this 'continued public confidence', the entire position and structure (the 'rule of law') would be endangered. For there should be no mistaking the fact that the law, even as pronounced by the judiciary, and as traced in this text, occupies a certain position of power: it is certainly no pun or mere turn of phrase to say the *rule of law*.

The manner in which the law (here, specifically, the judiciary) responds to the phenomenon of industrial action (the exercise of collective power) thereby determines the legitimacy of the law itself: specifically, the judges should not provide 'their own preferred amendments' to the legislation: there are certain limits 'beyond which the judge may not go'.<sup>74</sup>

---

<sup>71</sup> *Duport Steels* (House of Lords) at 550j-551a per Lord Scarman.

<sup>72</sup> This is a concern that has been alluded to earlier. See generally chapter 10 above as regards the relationship between the 'law' and the 'strike'.

<sup>73</sup> *Duport Steels* (House of Lords) at 542c-d (per Lord Diplock). Emphasis added.

<sup>74</sup> *Duport Steels* (House of Lords) at 551b per Lord Scarman.

## 12.6

## POWER, LAW AND JURIDIFICATION

Following the broad outlines of the developments of the archive has yielded a number of traces, of sudden ellipses, silences, such as the virtually total obliteration of the legal archive in *Rookes v Barnard*, where, from the fertile soil of the common law, and with the strange power of the ex-nomination, the court creates, using policy, a new liability, a new manner and method in terms of which the power of the law can be exercised.

The entire archive, especially as presented here, can be represented as being an auto-juridificatory archive, an archive that juridifies itself, as, through its reliance on precedent, it is able to select the sources from which to take the elements of new judicial creations, as the 'hallowed corpus' is of sufficient force and sufficient scope to make possible a change in the archive without necessitating a breach in the archive. Whereas the German courts had to rely on terms indeterminate and polyvalent, the British courts have the holy body of the archive of the common law which provides most, if not all, of the structural elements required for a re-structuring of the archive.

As stated at the outset, a detailed consideration of the legislation does not form part of this text. But even the few examples of legislation included in the current reading make it clear that legislation and the necessity for the interpretation of that legislation are important structural elements for the creation of law (or breaches or changes in the archive). It is within the zone of silence left between the words of the legislation that the archive of common law, using its advanced techniques of interpretation and law-finding (the processes of finding policy-precedent within the archive itself), can unfold, it is within that zone of empowerment (for it is the function of the courts to interpret and apply the legislation) that the archive of the law-as-text can structure its own breaches and differences. There is a certain irony involved here: that the place-of-power is the silence which results from the text, from the placing and arrangement of words by another (the legislature). For it is within the powerful zone of silence called forth by that legislative text that the archive, like some frail flower requiring the protection of a glass house, can unfold, and bloom: this is simply the common law in action.

# 13

## ARCHAEOLOGY OF SILENCE III (THE DICTATES OF FAIRNESS)

### THE STRUCTURE AND SILENCE OF FAIRNESS IN THE INDUSTRIAL ACTION JURISPRUDENCE OF SOUTH AFRICAN COURTS

---

'... fairness dictates ...'

-- Scott JA in *National Union of Mineworkers v Black Mountain Mineral Development Company (Pty) Ltd* 705/94 (Appellate Division), unreported.

'In finding an unfair labour practice the tribunal concerned is expressing a moral or value judgment as to what is fair in all the circumstances.'

-- Nienaber JA in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Others* (1996) 17 ILJ 455 (A) at 459E-F.

---

### [PROLOGUE: READING THE FINITE ARCHIVE WITHIN A SERVO-MECHANICAL LOOP (Discourse of Order Series 2 Part 7)]

If the archive (the object of the act of reading) is finite, if it has the properties of a beginning, a middle and an end, a singular question remains: How is that archive to recognise its own closure --- its own beginning, or end?

Certainly, neither of these momentous moments or points can be read from within the archive (or by the archive): it is the act of reading that structures the temporality of the archive, and thereby structures the artifactuality of the archive as the object of an act of reading. The archive is not able to recognise its own status as artefact: it is not capable of recognising *itself*.

This, then, is the reading of the archive as artefact: the excavation of the archive in terms of its own artifactuality, by an act of reading which must, necessarily, be artificial (and this, the product of the reading, itself is artefact) and which is constrained by the rhetoric of the archive being excavated and/or by its own rhetoric.

By implication the act of reading takes place within a servo-mechanical loop, where the artifactuality and artificiality correct through feedback the reading itself, away from the artifactuality. Reading, then, what is not there, but which determines that which is to be read and the reading of that which is to be read.

This is a reading of silence.]

Except for the period 1988-1991, the unfair labour practice jurisdiction never included the power to determine whether or not a strike or a lock-out amounted to an unfair labour practice. Strikes and lock-outs were explicitly excluded from the definition of an unfair labour practice.

But the exclusion of industrial action from the scope of the statutory jurisdiction did not preclude the courts (not only the Industrial Court, but also the Labour Appeal Court and the Appellate Division) from constructing a jurisprudence relating to the dismissal of striking employees. In this process of construction, the courts established an archival discourse (the object of study in this chapter) which is now historically and structurally finite.<sup>1</sup>

### **13.1 BEYOND LAWFULNESS: THE PRIMACY OF FAIRNESS**

#### **13.1.1 The establishment of the archive**

It may appear, unproblematically, that the beginning of the archive can be marked from a specific text (1984 vintage). This text (and this beginning) bears the following conventional name: *Die Raad van Mynvakbonde v Die Kamer van Mynwese van Suid-Afrika*.<sup>2</sup>

If this text is seen as the beginning of the archive, it could serve the useful purpose of problematising (again)<sup>3</sup> the beginning of the archive or the power discourse in question. The beginning of the archive becomes a problem worth observing (an artefact worth excavating) because that which appears to be the 'beginning' of the archive latches, in terms of its own textual and logical structure, onto temporally anterior discourses for its legitimisation (in terms not entirely dissimilar from the establishment of the discourse by the Large Senate of the Federal Labour Court in 1955). The beginning, in other words, relies for its status as 'beginning' on that which came before it (logically and temporally). The beginning (as breach, as new direction, as change) is dependent upon the anterior.

---

<sup>1</sup> The 'beginning' and 'end' properties of the discourse is determined by historical shifts in the power discourses: the Industrial Court only obtained the power to strike down unfair labour practices in the course of amendments to a legislative text in 1979 and 1980, with further amendments to the definition of the unfair labour practice in 1981. In this regard, see chapter 5 above. Similar historical power-text constraints determine the end of the discourse, as the institution of the Industrial Court has been done away with in terms of the Labour Relations Act 66 of 1995. Structurally, these historical facts also impact on the development of an archival discourse: the conceptual foundations of the discourse based upon the text of the 'unfair labour practice definition' simply did not exist before a given time.

<sup>2</sup> (1984) 5 ILJ 344 (IC). This was the first major dismissal-for-striking decision of the Industrial Court (see chapter 9 above).

<sup>3</sup> See above, Chapter 11.

The 'beginning' is the beginning because it is a *breach* with that which precedes it, because it is distinguishable (the beginning is therefore the beginning by virtue of its being, dialectically, not only *of* the archive or *within* the archive, but also a breach *with* the archive). It is within the confines of this present text (*Die Raad van Mynvakbonde*) that an excavation will yield the processes which structure the departure from the archive, or the change within an archive from one or more source(s) or bases of legitimisation to another, or from one logical basis to another.

In order to function as 'beginning', an act of establishment has to take place. This is the distinguishing feature of the beginning-as-breach: the act of establishment, an act itself fraught with its own textual economy.

The pivotal act of establishment takes place within a single paragraph:

*'Uit die voorafgaande* is dit duidelik dat ons regstelsel 'n vryheid of bevoegdheid om te staak erken. Soms word daar ook melding gemaak van 'n reg om te staak.' [From the foregoing it is clear that our legal system recognises a freedom or capacity to strike. Mention is also sometimes made of a right to strike.]<sup>4</sup>

The act of establishment (one economical in the extreme) here already signifies its own structure of legitimisation:<sup>5</sup> it ex-nominates its own nature (that of being an act of establishment of the discourse) by linking the establishment-statement to other sources or arguments: simply, the form of the argument is: logical/sequential ('From the foregoing . . .')

The act of establishment is therefore structurally linked (the link is one of dependence: it follows, it can be deduced) to other discourses (and in this structural linking lies the process of ex-nomination of the founding act). It depends, for its signification value, on that which is both logically and temporally anterior to itself (the act of establishment), and thereby the act of establishment becomes (through ex-nomination) merely a *consequence* of a discourse which came before, logically and temporally.<sup>6</sup>

Under a rubric ('The consequences of a legal strike') preceding the above-quoted act of establishment or founding, the text proceeds from point to point in preparing for its

---

<sup>4</sup> At 360E. Emphasis added.

<sup>5</sup> It is important to note that this is not an auto legitimisation. The legitimisation does not take the form of the axiomatic (it is therefore not simply presented as an unquestioned norm). The establishment does not justify or legitimate itself. The legitimacy depends on a process of signification *external* (in this case, logically and temporally *anterior*) to the establishment itself. In this sense, then, it could be said that the legitimisation of an archival discourse (the new archive) is logically dependent upon the legitimisation of the anterior archive.

<sup>6</sup> This could create the impression, at this point of the reading, that the act of establishment is in fact no breach or beginning, and that it is rather merely a 'continuation' of the discourse upon which it is prey-ing or relying for its legitimisation structures.

own (putative) act of foundation by excavating the discourse(s) which are to serve as the grounds of legitimization: the definition of a strike in terms of the legislation,<sup>7</sup> and the statutory limitations on strikes.<sup>8</sup> But the text also proceeds to cover ground more uncomfortable, namely the consequences that the civil law attaches to a strike.<sup>9</sup>

The discomfort that arises at this point in the text lies in the fact that the prior archival texts cited and imported by reference yield the principle that the participation in a strike and the cessation of work does not justify the breach of the employment contract, and that the employer would be entitled to dismiss an employee on the grounds of the employee's refusal to work. The archival texts quoted persist in regarding participation in a strike and the cessation of work as an unlawful repudiation of the contract, a fundamental breach of the employment contract, justifying dismissal of the employee.

In performing an excavation of yet more archival texts, attention is turned next to the contents of section 79 of the Labour Relations Act of 1956 (as amended), a clause which exempted from liability trade unions, their office-bearers and officials, as well as their members from any civil action arising from any act or omission in the context of a strike (or lock-out) that complies with the procedural requirements of the Labour Relations Act. The text notes that there is no jurisprudence relating to the interpretation of section 79 of the Act.<sup>10</sup>

It is at this point that the text performs an ex-nominated act of establishment, relying on these pre-fabricated archival texts for its own legitimization. But this legitimization is not a comfortable one, as it is structured (causally) on premises that do not support the conclusion. There is nothing in the excavation performed by the text upon the archive that supports the conclusion: the fact that industrial action (strike or lock-out) is mentioned in legislation and that some immunities attach to actions accompanying the action if procedural requirements have been complied with cannot serve as the basis for coming to the conclusion that there is a freedom to strike or even a right to strike.<sup>11</sup>

---

<sup>7</sup> At 358B-G.

<sup>8</sup> At 358H-D.

<sup>9</sup> As regards this issue, the seminal decision of *R v Smit* 1955 (1) SA 239 (C) is quoted at length, as well as a shorter excerpt from *Ngewu v Union Co-op Bark and Sugar* 1982 (4) SA 390 (N).

<sup>10</sup> At 360A-D.

<sup>11</sup> It is at this very point that the powerful discursive trope of the ex-nomination operates. It is clear from the excavations performed in *Raad van Mynvakbonde* that there is a powerful archive relating to the consequences attaching to the strike. Yet this archive has to be negated or silenced in order for the act of establishment to take place. In doing this, the text resorts to ex-nomination by referring to other discourses (the legislation, for example), while leaving unsaid the process whereby the one (new) discourse obtains the power to supersede the other discourse. The act of establishment, therefore, relies (again a structure of dependence) on a silence at its very core.

This act of establishment, by its own implicit admission, fails, for the force of the new archival structure established is, as the following passage shows, insufficient to serve as the basis for re-structuring the consequences that attach to a strike:

'Dit is ook duidelik dat nóg die gemene reg nóg die bepalings van die Wet op Arbeidsverhoudinge enige verbod plaas op die bevoegdheid van die betrokke werkewer om die kontrakbreuk of repudiasie van die werknemer te aanvaar en daardeur die diensooreenkoms te beëindig.' [It is also clear that neither the common law nor the provisions of the Labour Relations Act prohibit the capacity of the employer concerned to accept the breach of contract or the repudiation of the employment contract and thereby terminate the contract of employment].<sup>12</sup>

At this point in the text, therefore, it is clear that the act of establishment has been a putative act. There has, *firstly*, been a founding statement: there is a freedom (or right) to strike, and this freedom/right to strike is recognised by the archive (the legal system). The founding or purportedly-archival statement obtains its legitimacy not in itself, but by referring to the archive within which it is operating. *Secondly*, however, the establishing statement is countered by a response delivered by the very same archive, where the archive denies the implications of the establishment. The archive of fairness (the new archive) is not (yet) powerful enough to supersede the (legal archival) power of the employer to terminate the services of employees who are participating in a strike. Still the rules of legality reign supreme.

Recognising that the act of establishment failed,<sup>13</sup> the text resorts to another discursive structure, and in the context of this discourse the act of foundation or establishment succeeds. Within the radically indeterminate (vague and open-textured) archival structure of the unfair labour practice, it becomes possible to perform an act of establishment or founding in very simple terms:

*'Myns insiens is dit heel moontlik en sou dit 'n logiese ontwikkeling wees om in gepaste omstandighede die regmatige afdanking van 'n werknemer of werknemers wat aan 'n regmatige staking deelneem as 'n onbillike arbeidspraktyk te beskou. . . . Sou 'n werknemer wat afgedank is terwyl hy aan 'n regmatige staking deelneem 'n saak aanhangig maak sal dit nodig wees vir die hof wat daardie aansoek aanhoor om ag te slaan op die besondere omstandighede van die geval.'* [In my view it is possible and it would be a logical development to regard the lawful dismissal of an employee or employees

---

<sup>12</sup> At 360G-H.

<sup>13</sup> This recognition is implicit in the statement that '[d]aar bly die moontlikheid van die onbillike arbeidspraktyk-jurisdiksie oor' [the possibility of the unfair labour practice jurisdiction still exists]. In terms of the logic and structure of the text, then, the unfair labour practice, not being regarded as the first (or primary) source of archival principles, is resorted to only as a *last resort*: only once reliance on other archival structures had *failed* does the text move on to seek reliance on the archival structures implicitly made possible by the unfair labour practice jurisdiction and definition (see chapter 5 above).

who participate in a lawful strike as an unfair labour practice. . . . If an employee who is dismissed while participating in a legal strike brings a matter to court, the court hearing that application will have to consider the special circumstances of the case.]<sup>14</sup>

The discursive economy governing this (successful) act of establishment again relates, first and foremost, to an express legitimatory statement (it is stated to be a 'logical development') which is at the same time (dialectically) an ex-nomination, for the legitimatory structure which is being expressed finds no treatment in the discourse that precedes it. The obviousness of the statement of legitimization obliterates the need for any express treatment of the logic of the legitimization.

At this point it is necessary to consider the nature of the archive within which the text under consideration is situated and is situating itself, namely the archive of the unfair labour practice discourse.

The fact that the unfair labour practice, in spite of a statutory definition, is a concept essentially without content,<sup>15</sup> entails that a number of the operations in terms of that statutory empowerment will have to rely on extensive ex-nominations or un-namings and coverings-up of discursive processes. In examining the passage quoted above, it appears that the operative process is one of *viewing* (seeing, regarding), for the text resorts to a rhetoric of vision, most graphically represented by the phrases: 'myns insiens' (in my view), 'te beskou' (to regard), 'ag te slaan' (to consider, to pay attention to). This rhetoric in the act of foundation, as the rhetoric reinforces the process of establishment that is taking place, re-directs the gaze of the archive away from the anterior (given) archival structures (the principles of common law or the archive of legality) towards a breach (a beginning) in and of the archive (that the dismissal of strikers may 'be seen' to amount to an unfair labour practice). In terms of the rhetoric of the establishment, then, one could argue that the archive of fairness is being 'read'. It is also important to note that the gaze is focusing on how logical the process is: this is without question the most important signifier of the ex-nomination taking place: the axiomatic force of the 'logic' renders virtually any further processes in the establishment of the archive and the legitimization of that establishment redundant.

In re-directing the gaze from the logically and temporally anterior (the established sources of the law, the archive of legality) and into the contentlessness of the unfair labour practice definition (a contentlessness displaced by the 'logic' that is being 'seen'), a *full* act of establishment takes place. Again, this act is made possible only by the full application of a fundamental structural effect of a radical indeterminacy (the *sans-content* unfair labour practice definition): the re-direction of the gaze towards the

---

<sup>14</sup> At 361A-C. Emphasis added.

<sup>15</sup> See chapter 5 above.

beginning of the new archive is therefore dependent (in a structural sense) on the operation of a silence, a contentlessness that is sufficiently malleable (yet at the same time legitimised enough and sufficiently empowering -- it has its origin in an act of state: legislation) to allow the re-establishment of an archive (an archive of 'equity')<sup>16</sup> within the context (being here both the with-text and the contra-text) of an archive established before.

### **13.1.2 Structuring the vision of silence**

Once a breach has taken place in the archival structure, and a new archive has been established, the act of establishment has to complete itself by providing a fuller account for and of itself. The importance of this process lies not in the fact that the archival text is now going to legitimise itself, for that process has already occurred with reference to the concept of the unfair labour practice (this being seen as a discourse of power, a discourse which legitimates the text or discourse being read or excavated). The archival text instead now turns its discursive operations upon **iterability**: that of itself which is to be repeated, which is to be disseminated into the archive which has just been established:

'Sonder om enigisins te probeer om 'n omvattende lys van relevante faktore op te noem mag die volgende faktore of van hulle, ter sake wees, naamlik: [Without at all trying to provide an exhaustive list of the relevant factors, the following factors or some of them may be applicable, namely:]

- (a) Die oorsaak, aard, omvang en doel van die betrokke staking. Stakings kan heelwat verskyningsvorms aanneem. [reference omitted] *Dit volg egter nie dat elke regmatige staking beskerming behoort te geniet nie.* [The cause, nature, scope and aim of the strike in question. Strikes can take many forms. *It does not, however, follow that every lawful strike should enjoy protection.*]
- (b) Die omstandighede van die werknemer of werknemers. [The circumstances of the employee or the employees.]
- (c) Die omstandighede van die werkgewer. [The circumstances of the employer.]
- (d) Die duur van die staking. [The duration of the strike.]
- (e) Die uitwerking en uitslag van die staking. [The effect and result of the strike.]
- (f) Die doel van die Wet en in besonder die beginsel van kollektiewe bedinging. [The purpose of the Act and in particular the principle of collective bargaining.]
- (g) Die aanwesigheid of afwesigheid van onderhandelinge ter goeder trou tussen die twee partye tydens die staking. [The presence or absence of negotiations in good faith between the two parties in the course of the strike.]
- (h) Die bepalings van die betrokke diensooreenkoms enveral enige bepaling daarin bevat wat met die deelname van 'n werknemer aan 'n regmatige staking

---

<sup>16</sup> The term 'equity' is used throughout this section as representing the new archive established in terms of the unfair labour practice jurisdiction.

handel. Die blote feit dat die diensooreenkoms gelyk staan aan die gemene reg of selfs minder gunstig vir die werknemer is as die gemene reg, verhoed die hof nie om te bevind dat die beëindiging van diens 'n onbillike arbeidspraktyk daarstel nie. [The terms contained in the contract of employment and specifically any condition contained in that contract that relates to the participation of an employee in a lawful strike. The mere fact that the contract of employment is the same as the common law or is even less favourable for the employee than the common law does not prevent the court from finding that the termination of service amounts to an unfair labour practice.]

- (i) Die gedrag van die werknemers tydens die staking: byvoorbeeld, het die werknemer 'n daad teenoor sy werkgever gepleeg wat 'n verbreking van die kontrak sou wees as die diensooreenkoms sou voortbestaan? [The behaviour of the employees during the strike, for example, whether the employee committed an act against the employer that would be a breach of contract if the contract continued to exist?]<sup>17</sup>

Due care and attention must be directed at the formulation of these archival principles (which are to become a normative paradigm for the archival discourse established). There is no indication of the sources of the normative principles set out here. As an *obiter dictum*, these normative considerations (normative in the sense that they structure or inform a determination whether striking employees should be dismissed or not) simply appear from nowhere. The list does not purport to be exhaustive: a *genus* and *species* analysis of the characteristics or the norms listed therefore hardly appears to be appropriate. Yet there can be no discounting their archival status.<sup>18</sup>

It is also important, at this point, to note the relationship between the archive of legality and the archive of fairness that has been established. The fact that a phenomenon (a strike) complies with the normative paradigm of the archive of legality (the strike is therefore legal) does not necessarily entail the application of the archive of fairness. Not every legal strike ('regmatige staking') deserves protection: the fact that the archival rules of legality have been complied with does not necessarily mean that the archival rules (protection) of the archive of fairness will find application. From this it is clear that the archive of fairness occupies a *superior position*: the archive of fairness (and its normative paradigm) comes into operation regardless of the (non-) compliance with the archival rules of the archive of legality.

---

<sup>17</sup> *Die Raad van Mynvakbondे* (supra, note 1) at 361D-I. Emphasis added.

<sup>18</sup> See below 13.1.4.

### 13.1.3 A discourse of power and silence

The relationship between the archive of legality and the archive of fairness is addressed within the text itself. Once established (and legitimated), and once the iterability of the text has been established, the text itself proceeds to determine, finally, its own relationship with the archive it breached:

'Uit die voorafgaande behoort die *interaksie* van die gemene reg (insluitende dieregsgevolge van die beëindiging van die diensooreenkoms) en die onbillike arbeidspraktyk jurisdiksie duidelik te wees. In die eerste plek geld die bepalings van die betrokke kontrak so ver die diensbeëindiging betref. Die werkewer is geregtig om die diensooreenkoms van 'n stakende werker te beëindig al neem die werker deel aan 'n regmatige staking. Indien die werknemer wat ontslaan is homself nie wend tot die nywerheidshof of indien die nywerheidshof egter bevind dat die ontslag of weiering om die werknemer herindiens te neem nie 'n onbillike arbeidspraktyk daarstel nie word die regsposisie deur die kontrak en die gemene reg beheers. Slegs indien die nywerheidshof bevind dat die ontslag of weiering om die werker herindiens te neem 'n onbillike arbeidspraktyk konstitueer en 'n bevel uitvaardig sal die statutêre remedie, na gelang van die terme van die vasstelling, die gemeenregtelike of kontraktuele gevolge was [sic] uit 'n staking voorspruit vervang. Die onbillike arbeidspraktyk jurisdiksie kan myns insiens nie die gemene reg wysig of verander nie.' [From the foregoing the interaction between the common law (including the consequences of the termination of the employment contract) and the unfair labour practice jurisdiction should be clear. In the first place the provisions of the contract concerned apply in respect of termination of service. The employer is entitled to terminate the contract of employment of a striking worker even if the worker participates in a lawful strike. If the dismissed employee does not proceed to the Industrial Court or if the Industrial Court finds that the dismissal or the refusal to re-employ the employee does not amount to an unfair labour practice, the legal position will be determined by the contract and common law. Only where the Industrial Court finds that the dismissal or the refusal to re-employ the worker constitutes an unfair labour practice will the statutory remedy replace (to the extent provided for in the order handed down by the court) the common law or contractual consequences which attach to a strike. In my view the unfair labour practice jurisdiction cannot replace or amend common law.]<sup>19</sup>

This passage relates expressly to the archive of legality (common law and the law relating to the termination of the employment contract), the new archive (unfair labour practice jurisdiction -- the archive of equity), and the relationship between the two archives (the relationship between the common law rules and the unfair labour practice jurisdiction).

Generally, and in terms of the logic of the text itself as quoted above, the first (anterior) archive prevails: an employer is still entitled to terminate the employment of a worker on strike in terms of the common-law rules; the unfair labour practice jurisdiction does not change or amend the rules of the common law. The new normative

---

<sup>19</sup> At 362E-H. Emphasis added.

system applies if and only if the Industrial Court determines that the dismissal or refusal to re-employ the worker amounts to an unfair labour practice. If, and only if it has been established that the dismissal or the refusal to re-employ constituted an unfair labour practice, will the unfair labour practice jurisdiction (the archive of equity) replace or obliterate the consequences that would attach to the action in terms of the normative structures of the archive of legality (common law).<sup>20</sup>

The decisive factor in determining what archival system will apply appears to be whether or not the action in question can be seen to be an unfair labour practice. A determination of unfairness therefore structures the recourse to an archival discourse: if an act or omission is not regarded as unfair, the archive of legality applies. Once the determination of unfairness has been made, however, the archive represented by 'the unfair labour practice jurisdiction' takes over in providing a normative structure against which acts or omissions can be evaluated. And, once the archive of fairness has come into operation, its force obliterates the archive of legality and that archive's normative paradigm.

Whether or not the archive of equity should find application therefore depends on a finding of 'unfairness' -- the application of the archive, in other words, appears to result from the application of itself: the archive itself determines when it should be applied. If an act is 'unfair' in terms of the archive of equity, then the archive of equity is applied.

No indication is given as to the manner in which the concept 'unfair labour practice' (the key to the application of the archive of equity) is to be understood, except as something that has to be determined with reference to the facts of the case. In making a normative determination (whether or not a dismissal for striking amounted to an unfair labour practice or not), the nine factors set out in the *Raad van Mynvakbonde* text function as a normative paradigm against which to evaluate the impression given by the facts of the case.

### **13.1.4      The application of the archive of equity**

Less than one year later, the Industrial Court applied the normative paradigm as set out in *Die Raad van Mynvakbonde v Die Kamer van Mynwese van SA*. In *National Union of Mineworkers v Marievale Consolidated Mines Ltd*,<sup>21</sup> a determination whether or not

---

<sup>20</sup> The uncomfortable relationship between the two archives persists. Finding that there is a 'dichotomy' between the application of the archive of legality and the archive of fairness, the Labour Appeal Court has said the following: 'Employers and employees should not be expected to arrange their affairs in a schizophrenic manner where one set of rules applies when the common law holdsway, [sic] whilst another does when the Act applies.' *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* [1997] 2 BLLR 124 (LAC) at 128E.

<sup>21</sup> (1986) 7 ILJ 123 (IC).

a strike dismissal was fair or not was again, in part, processed in terms of the available normative paradigm present (that is, readable or iterable) in the archival discourse. But in this latter text, a major extending operation is taking place as the normative paradigm outlined in the earlier decision is itself again undergoing a dual process of, firstly, gaining in content, and, secondly, becoming normatively qualified.<sup>22</sup>

- As to the cause of the strike, it is held that the demand in question was a 'legitimate and reasonable' demand for higher wages. This entails that, in order to satisfy this criteria, the demand which gave rise to the strike must be 'legitimate and reasonable' (terms also verging on contentlessness).<sup>23</sup>
- The nature of the strike was found to be 'primary' (as opposed to 'secondary' or sympathy).<sup>24</sup>
- As regards the criterion of 'the extent of the strike', the following entered into consideration: attempts to avoid the strike, restraint by union, holding of pre-strike ballot, and that strike rules were posted. In summarising, it appears that the extent of the strike relates to the 'damage done by the strike', including physical damage.<sup>25</sup>
- The objective of the strike was to 'remedy, in part at least, the low wages, being consistent with its cause'.<sup>26</sup> From this it appears that there must be a consistency between the cause of the strike and the objective of the strike.
- The circumstances of the employees were taken into consideration, including the fact that they were migrant workers.<sup>27</sup>

---

<sup>22</sup> This process of normative qualification of a pre-existing paradigm can only take place once the relationship between the main archive of legality (common law) and the part-archive (equity or fairness) had been established. This structure (establishing the archive of equity in preference to the archive of legality) is indeed a prerequisite for the operation of any normative processes consequent upon the archive of equity. As regards the status of the archive of equity and fairness in respect of the common law archive, the text (*NUM v Marievale Consolidated Mines*) makes it clear that what is at stake is not 'the lawfulness or otherwise of a dismissal, but . . . in fact . . . the *fairness and equity* of a dismissal' (at 147D, with authorities cited). Emphasis added. Again the application of the archive of equity depends on a normative paradigm that is not presented: whether or not the act in question (a dismissal) was 'fair' or not.

<sup>23</sup> At 136D-H.

<sup>24</sup> At 136H-I.

<sup>25</sup> At 137A-C.

<sup>26</sup> At 137D.

<sup>27</sup> At 137E-F.

- In applying the criterion of 'the circumstances of the company', the following entered into consideration: the profitability of the company (i e whether it could afford a wage increase) and the attitude of the company to labour relations.<sup>28</sup>
- The duration of the strike was considered, and the fact that the strike lasted only three days was seen as relevant.<sup>29</sup>
- As regards the consequences and result of the strike, it was argued that the harm the company suffered was light.<sup>30</sup>
- Relevant to the consideration of good faith negotiations between the parties during the strike, a number of facts entered into consideration, such as the fact that the company did not allow the branch chairman of the union access to trade union members, and that the employer made only half-hearted attempts to initiate discussions.<sup>31</sup>
- It was argued that the company had acted contrary to the provisions of a recognition agreement.<sup>32</sup>
- The conduct of the union was argued from the formulation of strike rules, the fact that other employees in the industry were not brought out on strike, and the suspension of the strike upon the dismissal of the striking workers.<sup>33</sup>
- Much attention was paid to the conduct of the company, including evictions of employees who were on strike.<sup>34</sup>

In drawing conclusions from the facts, the strange relationship between the common law archive and the equity system of rules again emerged:

---

<sup>28</sup> At 137G-138A.

<sup>29</sup> At 138B-I.

<sup>30</sup> At 139A.

<sup>31</sup> At 139B-140D.

<sup>32</sup> At 140E-141D.

<sup>33</sup> At 141H-I.

<sup>34</sup> See at 142Aff.

'The company appeared to be solely concerned with the lawfulness of its actions and paid little or no heed to the fairness thereof. *The failure to direct its concern to the fairness of its actions was consequently in the circumstances of this case not conducive to generating conciliatory or sound industrial relations.*'<sup>35</sup>

In this context, the archive of equity formed the basis for the determination:

' . . . the behaviour of some of the company's officials coupled with the *attitude which they adopted* and which eventually resulted in the dismissal of the employees can in the circumstances be characterized as an unfair labour practice . . .'<sup>36</sup>

The relevance of these excerpts lies in the fact that they trace the force of the archive of equity that was arising at this point. The mere compliance with the rules of legality within the common law archive no longer meets with approval -- on the contrary, it is the rules of equity in the archive of equity ('the unfair labour practice') that must now be complied with.<sup>37</sup>

Another important operation taking place in these passages should not be overlooked, for it provides a trace of the juridification process.

A key to 'fairness' (or 'unfairness') is provided: the two key phrases 'sound industrial relations' and 'attitudes'. These are the names, or metaphors, for the operation of a *new normativity*, the new archive that is in force, an archive which is determining the normative structure of all the discursive operations. Because the actions and attitudes of the company did not promote sound industrial relations the actions taken by the company amounted to an unfair labour practice.<sup>38</sup> The excavation of the text can proceed even further: it should be noted that the 'attitudes' of one of the parties played a role

---

<sup>35</sup> At 150E-F. Emphasis added.

<sup>36</sup> At 151D. Emphasis added.

<sup>37</sup> The divergence between a reliance on the rules of legality (the archive of the law) and a reliance on the archive of equity (fairness) becomes an *iterable* structure of the archive itself, most clearly formulated as follows: ' . . . the submission that an unfair labour practice cannot include or refer to a lawful exercise of rights by an employer is not supported by the wording of the relevant provisions, or by the authority to which I have referred or by the patent intention and underlying philosophy of the Act. That submission is also without merit.' *Marievale Consolidated Mines Ltd v The President of the Industrial Court & Others* (1986) 7 ILJ 152 (T) at 167B. In this quote appears another enigma, namely the reliance (for legitimacy) on the 'philosophy' of the Labour Relations Act: a trope that is not discussed, but simply and axiomatically relied upon. See, similarly, *Natal Die Casting Co (Pty) Ltd v President, Industrial Court & Others* (1987) 8 ILJ 245 (D) at 250-251. As to the 'philosophy' of the legislation in question, see below, 13.4.

<sup>38</sup> Through being classified as an unfair labour practice, of course, a certain set of actions are devalued as being in non-compliance with a certain normative paradigm. These actions fell short of the normative system (signified by 'sound industrial relations'), and must therefore be struck down, disqualified, devalued.

not without significance. This would seem to mean that the focal concept of 'fairness' relies not only on an objective determination of the facts, but also a *subjective determination of the attitudes of the parties*. Fairness, according to the logic of the text, would then lie not only in the actions of the parties, but also their frame of mind at the time of their actions.

Another key factor in the juridification process underway here is the explicit introduction of the meta-juridical, namely the 'sound industrial relations'. The normative paradigm represented by the phrase 'sound industrial relations' is in effect a structuring element of the key to the archive of fairness: as the actions of the party in question did not promote 'sound industrial relations', their actions were regarded as being unfair.<sup>39</sup>

### **13.2 LAWS FOR FAIRNESS**

In terms of the normative paradigm established in the *Raad van Mynvakbonde* decision, the legality of the strike (in other words, whether or not there had been compliance with the provisions of section 65 of the Labour Relations Act of 1956) was but one of the factors to determine whether or not the dismissal of the striking employees amounted to an unfair labour practice.<sup>40</sup>

The force and power of the archive of equity was challenged when it was called upon to structure a response to an illegal strike. An illegal strike (a strike that did not comply with the provisions of section 65 of the Labour Relations Act) was, in terms of the statute, a criminal offence. Apart from the common law consequences that attach to any strike (the archive of legality, as discussed above), the archive of equity was now confronted by patent illegality. The challenge, quite simply, was so see whether the archive of equity (fairness) had sufficient strength to overrule the illegality.

An initial response creates the impression that the illegality of the industrial action would be sufficient to breach the integrity and the application of the archive of equity:

'As a matter of *public policy* I do not believe that a court should order the reinstatement of an employee who admits or is found to have participated in an illegal strike. . . . In

---

<sup>39</sup> It is not meant to say that the 'sound industrial relations' concept is the only structuring element of the archival key of fairness. No doubt there are other factors which also structure the pivotal 'fairness' concept. It suffices for present purposes to establish that an explicitly meta-juridical normative consideration (sound industrial relations) enters into consideration in structuring the normative paradigm of fairness. The reliance on the meta-juridical should not be regarded, in this context, as an innovation. Already in *George Divisional Council v Minister of Labour & another* 1954 (3) SA 300 (C), reliance was placed on 'inequity' and the possibility of 'industrial strife'.

<sup>40</sup> See, for example, *Black Allied Workers Union & Others v Asoka Hotel* (1989) 10 ILJ 167 at 174B: 'The court . . . bears in mind that the strike was a legal strike. That is an important factor. . . . [T]he legality/illegality of a strike is not the sole factor which determines the fairness or otherwise of dismissal.'

other words, [the employee] has not come to court with clean hands, as it were, and in my judgment I should not exercise my discretion in favour of that applicant.<sup>41</sup>

This passage is an expression of another (unstated) normative consideration, namely the meta-juridical consideration of 'public policy'. The consideration of public policy constrained the choice of normative paradigm, and, in a wider analysis, also determined the choice of the archive. It is important to note that the choice of archive is, to a much greater extent, foregrounded in this passage: here is it called the 'exercise of discretion'. This phrase is the name for a choice that had to be made between the archive of equity and the archive of the law.

But this was at an initial stage only, and an important shift soon occurred. In *SACWU & Others v Pharma Natura (Pty) Ltd*,<sup>42</sup> the issue of morality returned in the form of casting blame and searching for those with 'unclean hands':

'I do not believe that it is correct to say that this court [Industrial Court] will never grant relief to employees who participate in an illegal strike. . . . It seems to me that if a proper basis is laid, *almost*, as it were, on the grounds of *necessity*, circumstances could well be such that the court could come to the assistance of such applicants [employees]. Necessity in this sense would have at least the following elements:

- the relevant circumstances giving rise to an illegal strike must not have been caused by the employees;
- the employees must have been faced with such conditions that their resultant strike was their only reasonable option;
- all other reasonable avenues must have been closed to them.'<sup>43</sup>

This passage signifies a subtle but pivotal shift within in the archive and in the relationship between the archives of legality and fairness. It goes further than the mere restoration of the primacy of the archive of equity, a primacy that is already apparent from the examinations of texts performed above.

From this passage it is clear that the illegality of the strike will not, in itself, deprive employees dismissed for striking of relief. However, now more pertinently than ever the question is a *moral* (or meta-juridical) question: at whose door must the fault for the strike be laid? If the facts yield something '*almost of necessity*', the choice of archive may be determined by morality (that is to say the relative cleanliness of hands).

---

<sup>41</sup> *Tshabalala & Others v Minister of Health & Welfare & Others* (1986) 7 ILJ 168 (W). It is important to note that this was not a decision of the Industrial Court, but of the Witwatersrand Local Division of the Transvaal Provincial Division of the Supreme Court (as it then was). The Industrial Court did not have jurisdiction to hear the matter. Emphasis added.

<sup>42</sup> (1986) 7 ILJ 696 (IC).

<sup>43</sup> At 697B-E. Emphasis added.

If the employer bears the blame for the strike (in essence the sum of the three considerations outlined in the passage above), that very (moral) blameworthiness may determine the selection (exercise of discretion) of the archive.

As indicated earlier, the application of the archive of equity becomes dependent upon a *moral determination*, a set of facts that 'almost' (but not quite?) amounts to 'necessity', facts which succeed in toppling the employer from its moral higher ground in the matter. Once it has been established that the actions of the employer contributed to the strike (and that the employer is, by implication, at fault -- in a moral sense), the employer loses all sympathy.<sup>44</sup>

### **13.3 FUNCTIONALITY AS TRANSCENDENT SIGNIFICATION (the system strikes)**

#### **13.3.1 The rise of functionality as normative paradigm**

It is also in the context of the illegality of the strike (and the consequences that this fact would have for the choice of applicable archive) that the use of a series of names arose: 'acceptability', 'functionality' and 'legitimacy':

*'In determining whether illegal strikers should be protected some decisions have utilized the concepts of "acceptability", "legitimacy", or "functionalit". The dismissal of illegally striking employees would be regarded as unfair if, notwithstanding the illegality of the strike, it was, in the eyes of the court, a legitimate or functional strike. This would, for example, be the case where the illegal strike was preceded by genuine bargaining (thus fulfilling one of the most important policy requirements of the Labour Relations Act) or where the strike was provoked by the employer or could be justified on the grounds of necessity.'*<sup>45</sup>

The normative paradigm shrouded by the names 'legitimacy', 'acceptability' or 'functionalit' was soon to become the dominant discursive structure in the archive of equity. The mere consideration of 'fairness' took a subordinate position (as one normative paradigm moved into the background while normative considerations of 'functionalit' and its manifestations took prime position): what soon became important was determining what appears to be a broader morality of the strike. It is only once a broader (and unnameable) moral judgment of the strike has been made that it can be

---

<sup>44</sup> '... there are numerous decisions where illegal strikers were held to have been unfairly dismissed on the basis that the strike was provoked by the employer, where it could be justified on the basis of necessity, or where the dismissals were held to be unfair because the employer had acted overhastily and had not given a proper ultimatum.' PAK le Roux & André van Niekerk *The South African Law of Unfair Dismissal* (1994) 303-4.

<sup>45</sup> Le Roux & Van Niekerk *op cit* note 44 at 304.. Emphasis added.

established whether the archive of equity finds application (and that the employees who had been dismissed for participating in a strike were to be granted relief in terms of the remedial structures of the archive).<sup>46</sup>

The passage quoted above contains, also, an important initial structural trace: the position attributed to the functionality construct, namely a construct sufficiently powerful to obliterate the stigma of the illegality of the strike. The functionality construct is applied ('utilized') when it has to be determined whether illegal strikers should be protected or not.<sup>47</sup> Once the requirements of 'functionality' (compliance with the principle of 'genuine' collective bargaining) have been complied with, the moral force consequent upon that very compliance with the normative requirements of functionality is sufficient to enable (and indeed to inform) the application of the archive of equity. Fairness, in this context, is dependent upon functionality (only what is functional is fair).<sup>48</sup>

The clearest expression of the functionality construct may be found in the following passage:

---

<sup>46</sup> 'In deciding whether to "condone" the strike (and thus grant protection to the dismissed strikers) the essential question before the court is whether the strike can be regarded as "legitimate" or "acceptable". . . The most important factor to be taken into account in this regard is undoubtedly the fundamental purpose of the Act which is the promotion of collective bargaining with a view of maintaining industrial peace. In other words, *a strike becomes acceptable or legitimate by reason of the fact that it may be regarded as functional to the process of collective bargaining.*' Per D A Basson AM in *Koelatsoeu & Others v Afro-sun Investments (Pty) Ltd t/a Releke Zezame Supermarket* (1990) 11 ILJ 754 (IC) at 756B-C. Emphasis added.

<sup>47</sup> ' . . . the court is of the opinion that it could protect strikers who embark upon an illegal strike provided that it could be shown that the strike, notwithstanding the failure to make use of the collective bargaining mechanisms of the Act, still complies with the principles of genuine collective bargaining. The first principle of genuine collective bargaining is certainly the fact that bona fide negotiations should precede the (illegal) strike.' *Koelatsoeu & Others* (note 46) at 756G-H.

<sup>48</sup> The construct of functionality presents a major structural challenge in reading the archive. The essential problem relates to whether the functionality construct breaches the archive of equity or whether it contributes to the coherence of the archive. This approach implies that an attempt must be made to link the normative structures of the 1984 *Raad van Mynvakbonde* decision to the functionality construct, and thereby indicate that the normative approach to the application of the archive has remained coherent and consistent. According to this approach, the reading must attempt to show that the basic building-blocks and foundation of the construct of functionality is already contained within the discourse of the archive at an earlier point, and that the expression of the functionality construct does not constitute a breach of the archive or the transgression of the discursive structures. Another reading is, however, possible, a reading which concentrates not on the purported coherence and integrity of the archive, but seeks to excavate the silences and unnamings taking place (and structuring) that archive. This approach would imply (mis)reading the archive to show that the integrity, coherence and consistency of the archive is arguable only if the turning points (or nodes) of discursive change are ex-nominated. Instead of seeking to prove or document the integrity of the archive, then, this approach seeks to trace the silent operations of the archive. This latter approach is, for the purposes of this instant text, preferable.

'The right to strike is important and necessary to a *system* of collective bargaining. It underpins *the system* -- it obliges the parties to engage thoughtfully and seriously with each other. It helps to focus their minds on the issues at stake and to weigh up carefully the costs of a failure to reach agreement. If an employer facing a strike could merely dismiss the strikers from employment by terminating their employment contracts then the strike would have little or no purpose. It would merely jeopardize the rights of employment of the strikers. *The strike would cease to be functional to collective bargaining* and instead it would be an opportunity for the employer to take punitive action against the employees concerned.'

The [Labour Relations] Act contemplates that the right to strike should *trump concerns for the economic losses* which the exercise of that right causes. That is because collective bargaining is *necessarily a sham and a chimera* if it is not bolstered and supported by the ultimate threat of the exercise of economic force by one or the other of the parties, or indeed, by both.'<sup>49</sup>

It is more difficult than it may at first appear to isolate the principles contained in this passage.

It is clear, *firstly*, that the exercise of power (the strike) is linked, in the vision expressed, to collective bargaining. *Secondly*, the exercise of power (in the form of the strike) is regarded as a foundation of collective bargaining (it 'underpins' the 'system' -- it serves literally as the foundation of the 'system').<sup>50</sup> As a manifestation of real power, *thirdly*, it serves the collective bargaining system (which is an engagement in a process) by forcing the parties to test their bargaining positions.

The implication of this textual logic is that the strike has (or should have -- a moral pronouncement) *no meaning* outside the context of collective bargaining: while it is

---

<sup>49</sup> *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 ILJ 963 (LAC) at 972B-E. Emphasis added.

<sup>50</sup> It is interesting to note that there is no discussion of the 'system'. There is no indication of the structure and/or the nature of the collective bargaining system. By what textual economy can it therefore be said that collective bargaining is a system? What are the system-mechanics that drive the heart of the collective bargaining system? What are the components of the collective bargaining system? The conceptualisation of collective bargaining not purely as a power-exchange or temporary bargaining phenomenon is important, because the use of the term 'system' implies the existence of something more permanent. A system is a coherent whole, and, usually, a mechanism that processes either physical objects or information. If collective bargaining is to be regarded as a system of information processing, it becomes clear that, like any other servo-mechanical system, it is correcting itself through feedback. In this manner, collective bargaining would dismiss as dysfunctional any aspect that did not accord with its own normative paradigm. Aspects that did not comply with its own normative paradigm (such as the exercise of power) either has to be harnessed into the normativity of the system, or it is to be discredited and rejected. In this sense, then, the concept 'collective bargaining' as used here can be regarded as a type of normative feedback instrument, determining what structures and aspects are to be approved into the system and which are to be rejected.

'necessary' to collective bargaining, it is, by implication 'unnecessary' in any other context.<sup>51</sup>

The next part of the passage quoted above relates to the termination of employment and the strike. It is vitally important to note that no mention is made in the passage of fairness or equity. For the purposes of this pivotal passage, then, the dismissal of the employees is not a matter of fairness, but it is still to be seen, exclusively, in the context of collective bargaining (which was earlier described as a 'system'). The logic of the text is that a system of collective bargaining would not be served if the employer were to be allowed to dismiss employees merely for participating in a strike. The strike would have 'no purpose' (the purpose being related to collective bargaining) if the employer could simply dismiss, and because the dismissal would not be 'functional' in the context of collective bargaining (a privileged concept in the logical ordering being performed by the text) it should not be allowed. In its function of information processing, therefore, the system of collective bargaining rejects dismissal due to participation in a strike: it does not serve the system, and the feedback rejects the construct as being in non-compliance with itself (or dysfunctional).

What is clear from the passage cited is the extraordinarily privileged position of collective bargaining ('the system') and, as such, the system deserves close analysis in terms of the textual logic of the passage quoted above.

- The system of collective bargaining would be a 'sham' and a 'chimera' if not supported by power. It would not be 'genuine' collective bargaining. By implication therefore, the system depends for its efficacy on power.
- Normatively, the collective bargaining system as the justification for the strike is sufficiently privileged to 'trump' the economic damage suffered by the employer.
- The 'system' of collective bargaining also offers transcendental signification (it provides meaning to aspects of itself and aspects outside itself). As phenomena, for example, strikes and economic losses have no discursive meaning; it is only when structurally justified by the 'collective bargaining system' that they *obtain* meaning. Meaning is obtained by and from the system. Once they appear out-

---

<sup>51</sup> This is not an ontological statement, but an epistemological one. The strike does exist outside the context of the collective bargaining system, but in this contra-textual wilderness, the strike is dismissed as being dysfunctional, and it is likely to be met with the full force of legal remedies. In order for the strike to have an 'approved' meaning (and the meaning is 'approved' by the 'system'), it must comply with the normativity of the system itself. As the 'system' has to evaluate the phenomenon of the strike before it, it will determine the legal acceptability of that phenomenon by having recourse to certain archival principles.

side the zone of structural justification (and transcendental signification) of the 'system' of collective bargaining, therefore, they would have to be struck down as being unjustified.<sup>52</sup>

- Once the privileged concept of the collective bargaining system has been established as the source of discursive meaning for the strike, it also, necessarily, becomes subject to its own built-in limitation (not only of the strike). The 'system' is finite, it has limits. Once the strike, for example, moves beyond the normatively-sanctioned zone generated by the 'system' of collective bargaining, it would lose its meaning and protection as 'functional'. If a strike therefore causes or appears to be likely to cause 'irreparable economic hardship upon an employer', the strike would no longer be functional, and the employees who were dismissed for participating in the strike would not enjoy protection.<sup>53</sup>

### **13.3.2      The limits of functionality**

In the *Blue Waters* decision quoted above, the following passage appears:

'The limits on the right to strike concern essential services or *irreparable economic hardship upon an employer*. The precise definition of such hardship need not be determined in order to decide this case.'<sup>54</sup>

A process of limitation is taking place here, namely a process of limiting the zone within which the strike will be functional. If a strike falls outside the scope of the functional zone (that is, the strike relates to essential services or it causes irreparable economic hardship to an employer) the strike is dysfunctional. Functional strikes are those

---

<sup>52</sup> An example of the transcendental signification appears shortly before the passage quoted above: 'A lawful strike is *by definition* functional to collective bargaining.' *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel* at 971J. Emphasis added. It is important to note that according to this process, nothing more need be said about the functionality of a legal strike, because it is '*by definition*' functional. In other words, the functionality is the standard which determines the permissibility (morality) of the strike. Because the legal strike complies with requirements of collective bargaining (in other words, the normative paradigm of the system has been complied with), the legal strike, without any further investigation, is accorded the (approved) status of being '*functional*'.

<sup>53</sup> '... the limits on the right to strike concern essential services or irreparable economic hardship upon an employer. *The precise definition of the extent of such hardship need not be determined in order to decide this case*. That is because no evidence of any significance was presented by the respondent [employer] to establish economic hardship. The respondent appears to have suffered nothing more than some inconvenience on account of the strike.' *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 ILJ 963 (LAC) at 972I-973A. Emphasis added.

<sup>54</sup> At 972J-973A. Emphasis added.

strikes that are sanctioned by the system of collective bargaining (but only if the strike complies with the normative requirements of the system) and that do not transgress the limitations (essential services, economic harm) of the 'system'.

This brief passage reveals the trace of dialecticity of the 'system': the system of collective bargaining not only justifies the strike (and thereby imparts a meaning, a significance, to the strike), but it also establishes the normative limitations on the strike (those areas in which a strike will fall foul of the normative sanction of the system, or where the strike moves beyond the legitimatory and significatory force of the 'system').

In other words, two motions to the process of signification take place here: the system (collective bargaining) provides the phenomenon (the strike) with its normative meaning (why the strike is allowed, what role it plays), and at the same time (and in the same motion) it determines the limits to the normative justification the system offers.

In this dialectic process, the enigmatic system reveals ever more information about itself. The most important piece of information gleaned at this point is that the system (the transcendental signifier) has a limitation. Once beyond the limit, the system is *incapable* of providing normative protection (justification) to the phenomenon. The system, in other words, has a limit to its power (the sphere of normative influence of the system is therefore finite).

In the brief passage setting out the limits to the normative justification for the strike, the nature, scope and location of the limits are left open. The text does not reveal where the limits lie: the limit are not defined. Yet these very limitations of the 'system' prove to be elusive:

'My difficulty with "*irreparable economic hardship*" as a limitation on the right to strike is that it would in many cases be *impossible to determine* whether the stage of irreparable hardship had been reached at the time when dismissal of strikers is being considered. One would obviously not have to wait until irreparable economic hardship had already occurred before insisting upon the right to dismiss strikers if it were obvious that irreparable economic hardship would ensue if the strike were to continue. Is it fair to an employer to insist that the stage be reached where irreparable harm has or is about to occur before the employer is entitled to protect his interest for his own and his employees' benefit? I would prefer to hold that the likelihood of *substantial economic loss* would entitle an employer to say: "I must protect my business by exercising my right to dismiss strikers". *Whatever the true test may be*, I am satisfied that on the material presented in this case the respondent [employer] had indeed reached a stage where it was suffering *real economic hardship* such as to entitle it to exercise the right of dismissal.'<sup>55</sup>

This passage alludes to some important aspects and shifts taking place within the archive. It may be impossible to determine where the limit (called here 'irreparable

---

<sup>55</sup> *National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd* (1994) 15 ILJ 1005 (LAC) at 1011J-1012C. Emphasis added.

economic loss') lies, and once it has become impossible to determine where that limit lies, the limit cannot be applied. Because of its indeterminacy, the limit is fully rejected as irrelevant. The rejected limit is, however, replaced with a 'limit' that appears, on the face of the name it is given, to be less indeterminate: 'substantial economic loss'. There is a significant difference between 'irreparable economic harm' (the rejected limit of normative protection) and 'substantial economic loss'. The economic loss need not be 'irreparable'; instead, the requirement is now simply that the economic loss must be 'significant'. It is no longer required that there must be 'harm' to the employer, but only that the employer suffer 'loss'. Undoubtedly, it could be argued that any 'loss' also amounts to 'harm', but an 'irreparable harm' (damage that cannot be repaired, permanent damage) is not the same as 'substantial economic loss').

This shift within the structure of the archive does not, however, render the limit less indeterminate, as the limit still finds no application. The limitation upon the construct of functionality is impliedly admitted to be indeterminate: '*whatever the true test may be . . .*' Regardless of the 'true test', in other words, the text proceeds to excavate another limit on functionality, named, this time, '*real economic hardship*'. Again, a subtle shift has taken place: the hardship suffered by the employer must be 'real'; presumably in the sense that it must be objectively determinable and not subjective. The employer, in other words, must be able to prove objective facts leading to a conclusion of 'economic hardship'. But here indeterminacy still reigns, for there is no indication of a normative paradigm which would structure a conclusion of 'economic hardship'. There is no indication of the 'true test' for economic hardship. The limit remains unfindable and unknowable.

In view of the stated unreliance (and implicit admission of the indeterminacy) of the 'true test', it appears that there is another normative structure which determines whether or not the strike is functional. In order to determine whether a strike has reached or transgressed the limits of functionality an *unnamed* or silent archive is operating: the 'true test' is rejected as being unfindable ('regardless of the true test') and therefore irrelevant, in favour of a normative structure that operates beyond the text.

#### **13.4 THE RETURN OF FAIRNESS (fairness dictates)**

It is necessary, at this point, to reconsider the position that the construct of functionality, itself relying on the concept of a 'system' of collective bargaining, occupies in the present discourse.

Initially functionality served as a legitimisation construct to enable the selection of an archive (namely the archive of equity -- the unfair labour practice jurisdiction) as against the archive of legality. This selection became problematic when there was a clear contravention of the archival rules of the archive of legality; in other words, when

the strike was illegal. Functionality proved to be sufficiently powerful, through its reliance on the 'system' of collective bargaining, to structure an obliteration of the archive of legality and thereby render the archive of legality inapplicable. Even where the strike was illegal, the force of the functionality construct was sufficient to 'trump' the application of the rules of the archive of legality.

In structuring the construct of functionality, the 'system' of collective bargaining, as norm construct, played a pivotal part. It would be no exaggeration to say that, without its link to the 'system' of collective bargaining, functionality would not have displayed the same discursive force. In establishing the discursive force of the functionality construct, then, it is important to bear in mind that this force depends not on the cogency of the concept itself, but on the force and legitimacy of the archival constructs on which it depends.

There can be no doubt that the concept of a 'system' of collective bargaining, and the normative associations of this concept have played a fundamental role in the archive presently under examination. The force of the concept of a collective-bargaining system can be analysed in the following terms:

- Collective bargaining is the basic normative (transcendental) signifier of the Labour Relations Act. This is a dominant discursive figuration: in many decisions the Appellate Division (now the Supreme Court of Appeal) had held the entire 'philosophy' of the Act (in other words, the normative archival structures that underpin the entire Labour Relations Act) to be the concept of collective bargaining.<sup>56</sup>
- Collective bargaining, as such, still requires normative sanction. It is not an end, but a means to an end. The end, of course, is the maintenance of industrial peace.<sup>57</sup> In this manner, the collective bargaining 'system' derives its moral force (as well as its legitimization, and its signification) from the normatively charged construct of 'industrial peace'.
- Industrial peace, axiomatically, is beneficial. The normative force of this 'good' is sufficient to render legitimate the 'system' and everything that the 'system' in

---

<sup>56</sup> 'The fundamental philosophy of the [Labour Relations] Act is that collective bargaining is the means preferred by the legislature for the maintenance of good labour relations and for the resolution of labour disputes.' *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Others* (1996) 17 ILJ 455 (A) at 475F. See also *SA Commercial Catering & Allied Workers Union v OK Bazaars* (1929) Ltd (1995) 16 ILJ 1031 (A). See also above, chapter 5.

<sup>57</sup> 'The primary object of the Act is to promote collective bargaining in order to foster industrial peace.' *NUMSA v Vetsak* (supra) at 475G.

turn legitimises. The concept of 'industrial peace' also acts as a transcendental signifier: it provides meaning (a purpose, in this case) to the 'system' of collective bargaining.<sup>58</sup>

As the dominant signifier in a dominant discourse, sanctioned by the highest institution in the system (the Appellate Division), the construct of collective bargaining, perforce, has to be seen as the most powerful concept in the archive. Once the strike is functionally linked to so powerful an archival structure, and indeed becomes a determinant for that archival structure, even the concept of the strike, in spite of its negative connotations, becomes a concept with a powerful normative charge:<sup>59</sup>

'The freedom to strike is *integral* to the *system of collective bargaining* -- the withholding of their labour is a *legitimate weapon* available to workers seeking to achieve rational demands through *lawful* means. If workers were not free to strike, their bargaining power would lack substance and credibility. It follows that care should be taken not to disparage or undermine the freedom to strike *lawfully*'.<sup>60</sup>

This passage illustrates the link between the strike and the 'system' of collective bargaining. Firstly, the strike is 'integral' to that 'system'.<sup>61</sup> It is not clear what this means: does it mean that the strike is a part of the system, or does it mean that the strike is a determinant of the system (in other words, that the strike determines the efficiency of the system). In view of the fact that the 'substance and credibility' of 'bargaining power' depends on the strike, it is clear that the strike is not to be regarded as a part of the system, but rather as a determinant of the efficiency of the system. Without the strike, the system would not work. The system's efficacy and functioning is determined by the strike.

---

<sup>58</sup> By implication, therefore, collective bargaining that does not serve the maintenance of 'industrial peace' would not be normatively sanctioned. This is why bargaining in bad faith, which is still a form of bargaining, but one which does not seek the maintenance of industrial peace, has received the full force of normative disqualification. This form of bargaining is not 'genuine' -- see above, note 47. All courts (the Industrial Court, the Labour Appeal Court and the Appellate Division) have expressed the normative disqualification of bargaining in bad faith, also through the application of and reliance on the unfair labour practice construct.

<sup>59</sup> The normative charge of the strike is indicated by, for example, the term 'legitimate weapon' - even though a weapon, its use is seen as 'legitimate'. The strike also deserves protection and it should not be undermined or disparaged. Once infused with the normative sanction of the system, in other words, the strike is rendered normatively unobjectionable, and, further, normatively unassailable (it should not be disparaged or undermined).

<sup>60</sup> *NUMSA v Vetsak* (supra) at 475G-H. Emphasis added.

<sup>61</sup> There is still no indication, in this passage, as to what is meant by the 'system' of collective bargaining.

Secondly, the strike, as determinant of the system's efficiency, deserves protection: like the dominant concept of the collective bargaining 'system' itself, the strike deserves protection, and should not be undermined. The strike partakes in the protection given to the dominant signifier (collective bargaining). As a function of the system, the component of the system is treated as privileged as well.

Striking in the passage quoted above is, however, the subtle return of the archive of legality. The strike is a weapon for the achievement of aims 'through lawful means'. The freedom to strike 'lawfully' should not be undermined. Does this mean that an illegal strike would not be functional to collective bargaining in the same way? Is only the legal strike functional to the 'system' of collective bargaining, and therefore deserving of protection? If the functionality construct has its origins, as outlined above, in the context of the illegal strike and the protection of the illegal strike, then it appears that an important shift has taken place: only the lawful (legal) strike is conducive to collective bargaining.

This re-appearance of the archive of legality is prevalent in another expression of the archival principles, and here again appear traces or indications of the relationship between the archive of equity and the archive of legality:

'The fact that a worker is engaged upon a *lawful strike* does not per se render any consequent dismissal *unfair*. Within the context of lawful strike action an infinite variety of situations can arise, and one must needs have regard to the relevant circumstances of each particular case in order ultimately to determine whether any resultant dismissal was fair or not. [reference omitted]

Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. *In judging fairness a court applies a moral or value judgment to established facts and circumstances. . . . And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act.* In my view it would be unwise and undesirable to lay down, any universally applicable test for deciding what is fair. To revert to the facts.<sup>62</sup>

This passage is rich with a number of traces. Four nodes of textual logic must be excavated here with due care.

The *first node* of the textual logic relates to the archive of legality. Again, the archive of legality plays a subordinate role, as the text makes it clear that compliance with the normative rules of the archive of legality does not pre-determine the outcome of an evaluation in terms of the archive of fairness. Legality, in other words, does not determine fairness: fairness must be judged in its own terms. What is striking about this first point is the fact that the construct of functionality seems to have disappeared

---

<sup>62</sup> Per Smallberger JA in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Others* (1996) 17 ILJ 455 (A) at 476B-E. Emphasis added.

entirely. It should be borne in mind that a 'lawful' strike has been held 'by definition' to be functional to collective bargaining.<sup>63</sup> The implication now is that dismissals consequent upon a functional strike may also be fair. The archive of fairness, it appears, is no longer determined by functionality: regardless of the functionality of the strike, a dismissal has to be evaluated in terms of the normative paradigm of the archive of equity. In evaluating the strike against the normative paradigm of the archive of equity, naturally, due regard must be had to the facts (one has to 'revert' to the facts).

The *second node* of textual logic relates to the nature of fairness. In this, the text relies on the following statement: 'Fairness is a *broad concept in any context*. . . . It means that the dismissal must be *justified according to the requirements of equity* when all the relevant features of the case -- including the action with which the employee is charged -- are considered.'<sup>64</sup> It is in this sense, then, that the text (the passage from *NUMSA v Vetsak* quoted above) claims that fairness includes the consideration of the interests of both the employer and the employee 'in order to make a balanced and equitable assessment'. The implications of this second node of logic are significant: fairness is a broad concept, a concept virtually without meaning. The broadness (or contentlessness) of the concept of 'fairness' (the name of an archive) is not context-dependent: regardless of the context, fairness remains broad and vague. Yet the meaning ('it means . . .') is a deductive process: once a dismissal is justified (the conclusion of the argument) according to the 'requirements of equity' (premiss of the argument). If a dismissal complies with the 'requirements of equity', in other words, the dismissal will be justified (and necessarily, according to the logic of the text, fair). The construct 'requirements of equity' implies that the pivotal concept of 'equity' has its own normative paradigm or set of norms: before something can be regarded as being 'equitable' (and therefore justified and therefore fair), there are 'requirements' that have to be met. Yet these 'requirements' are ex-nominated: they are not (and can not) be named. The most that can be said about 'the requirements of equity' is that all relevant 'features' of the case (the facts of the case) are considered? This is the operation of a fully ex-nominated archive: once the facts of the case are considered, these facts must be measured against the normative rules (the paradigm) or the 'requirements' of 'equity'. Apart from considering the facts of the case, then, there is no indication of the contents of this normative paradigm of equity: it is totally hidden behind its own rhetoric, the logic of which assumes that the common understanding of 'equity' (the archive) is sufficiently well developed that an expression of the 'requirements' (or the normative paradigm) of that archive will appear to the observer upon an evaluation of the facts.

---

<sup>63</sup> 'A lawful strike is by definition functional to collective bargaining.' Per Combrinck J in *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel* at 971J.

<sup>64</sup> E Cameron, H Cheadle & C Thompson *The New Labour Relations Act* (1989) at 144-5. Emphasis added.

The *third node* of the discursive logic apparent from the extract from *NUMSA v Vetsak* as quoted above is vital for present purposes, as it appears to render the archive of equity (fairness) finally beyond the grasp of any epistemology. The text states clearly and unequivocally that a determination of fairness rests upon a 'moral judgment'.<sup>65</sup> The most important implication of this node is an implication relevant to juridification, namely the introduction of a meta-juridical paradigm. The argument of the text is that a determination of whether or not an action amounts to an unfair labour practice is dependent upon a 'moral' or 'value' judgment. This is clearly the introduction of a meta-juridical standard, the application of which rests on a moral paradigm, a value judgment, the structure of which is both unknowable and unfindable. By definition, the 'moral' or 'value' judgment is dependent and structured upon a normative paradigm which is either only partly based on legal considerations, or not at all. Here the concept of 'fairness' is denuded of its cognitive value, as it is rendered structurally dependent on that which lies outside the law, namely morality or values.

This is immediately qualified by the *fourth node* of the textual logic contained in the extract from *NUMSA v Vetsak*, namely a structuring of the meta-juridical with the juridical. The text makes it clear that, in making the moral or value judgment, due and proper regard must be had to the objectives sought to be achieved by the Labour Relations Act. The normative paradigm is, in other words, at least partly structured by a legal consideration, namely the 'objectives' of the Act. It is, however, clear from the text that the objectives of the Act are not the only consideration relevant to making the 'moral' judgment: these objectives need to be given due and proper regard, but there is no indication that they are exclusive and decisive considerations.

It is clear from the archive itself that the standard 'interpretation' of the 'objectives' or 'philosophy' of the Act is the promotion of collective bargaining, itself a means to the end of the maintenance of industrial peace. And in this manner, the construct of functionality comes into play, in a most contradictory manner. The contradiction can be highlighted in the following manner: In deciding whether or not a dismissal for striking is fair, the tribunal makes a moral judgment. This moral judgment is structured (at least in part) by the objectives of the Act. The objectives of the Act are to maintain industrial peace by means of collective bargaining. Conflated, this yields the following: the moral judgment depends on whether there has been compliance with the normative paradigm entailed in the 'collective bargaining system'. This in turn yields a statement that comes as no surprise: a finding of an unfair dismissal depends on whether there has been collective bargaining -- a restatement of the construct of functionality.

---

<sup>65</sup> 'In finding an unfair labour practice the tribunal concerned is expressing a moral or value judgment as to what is fair in all the circumstances.' Per Nienaber JA in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Others* at 459E-F.

Now it has also been held that a lawful strike is 'by definition' functional to collective bargaining. In terms of the normative force of the 'collective bargaining system', it would appear that any dismissal consequent upon a functional strike would amount to an unfair labour practice. Yet (and here the contradiction arises), this very passage from *NUMSA v Vetsak* begins (the first node) by denying that very conclusion: the fact that a strike is lawful (and by definition functional) does not itself render the dismissal unfair. In other words, a fair dismissal can follow even upon a functional (legal) strike. Does this mean that the construct of functionality has lost its force? Can it be argued at this point, that functionality has lost its power to provide meaning for the strike and for the subsequent dismissal consequent upon that strike? If a functional strike can also give rise to a fair dismissal, it would appear that the reliance of the archive upon the construct of functionality has diminished, if not disappeared altogether.

But this shift in the normative structure of the archive has its own textual economy, namely a return to unknowability: the text refuses to establish its own operations as a normative paradigm, by stating that '... it would be unwise and undesirable to lay down any universally applicable test for deciding what is fair'. Here is a return, then, to the meta-juridical, as the text refuses to become determinist about its own operations and refuses to elevate those operations into a normative paradigm, thereby in turn stripping the text of its iterability on this point.

The upshot of the reading of this text, at this point, is that a determination of fairness and a resultant application of the archive of equity is dependent not upon any legal principle, but upon an ex-nominated meta-juridical paradigm that cannot be laid down, that cannot be named, that cannot be iterated and applied in subsequent texts. The logic of the text breaks down to an extent sufficient to argue that the application of the archive of fairness has, at this point in the act of reading, become a-rational (if the 'moral' or 'value' is regarded here as being irrational as distinguished from rational normativity).

The irrationality of the paradigm which structures the application of the archive of equity and the normative paradigm of that archive does not, however, entail non-reliance on that paradigm. In *National Union of Mineworkers v Black Mountain Mineral Development Company (Pty) Ltd*,<sup>66</sup> one single sentence confirms an utter reliance upon this irrational normative system: 'A stage is reached when *fairness dictates* that dismissal is justifiable'.<sup>67</sup> The essence of the reliance is contained in the verb 'to dictate'. If fairness can 'dictate' it would mean that 'fairness' has a set of prescriptions, a normative structure that could be relied upon, structures that could be *read* (or

---

<sup>66</sup> Case 705/94, as yet unreported. Decision by the Appellate Division, as it then was (per Scott JA). Date of decision: 25 March 1997.

<sup>67</sup> At 30 of the typewritten judgment. Emphasis added.

accessed in some manner) and applied (these structures, the normative paradigm of the archive of equity, would be iterable).

A final blow is dealt to the once-powerful construct of functionality:

'The inquiry is not whether one or other course may have been more successful in resolving the dispute or *whether the employer could have endured the strike for longer*; the inquiry is whether in all the circumstances (including, for example, the duration of the strike and the extent of the measures actually taken by the parties to resolve the dispute) the dismissal can be said to have been unfair.'<sup>68</sup>

This may appear, on the face of it, to be a re-affirmation of the functionality-construct and its role in the determination of the fairness of the dismissal. If it is borne in mind that 'economic harm' or 'real economic loss' is the limitation of the functionality construct, then it is clear that by rejecting the inquiry 'whether the employer could have endured the strike for longer', both the limit of the functionality construct and the construct itself suffers rejection.

Instead of the functionality construct, there is a return to the irrational (unreadable, unknowable) normative paradigm that hides behind the names 'fairness' or 'equity': the question is whether 'in all the circumstances' the dismissal gives the impression (for fairness dictates) that the dismissal was unfair. In spite of its irrationality and the fact that the normative paradigm which would yield a conclusion of 'fair dismissal' or 'unfair dismissal' cannot be written or uttered, the sense of reliance upon that irrationality is undiminished.

### **13.5 WITHIN THE SILENCE (JURIDIFICATION)**

This extended excavation of a series of texts has yielded a number of strange results: the continued clash between the archive of legality and the archive of equity (the most important consideration here being the normative paradigm or set of rules which determines which archive is to apply), the manner in which the archive of legality persists in contaminating the archive of equity by refusing to relinquish its role in the determination of fairness, thereby ensuring its own (subordinate) place within the normative paradigm of the archive of equity. The result of the clashes of the archives can rightly be called an artefact, a creation marked by its artificiality. In the final analysis, the selection of the archive is determined not by recourse to any iterable normative paradigm, but that determination is, instead, dependent upon recourse to a paradigm that, even though irrational, ('moral' or 'value judgment') retains its role as a structuring normative paradigm. It is a paradigm that persists in 'dictating' decisions, choices and applications of principle.

---

<sup>68</sup> *NUM v Black Mountain* (supra) at 30-31 of the judgment. Emphasis added.

Should one be called upon to name the artefact, it would not be inappropriate to call it the 'right to strike.' From the earliest text within the archive excavated here (and appearing in many of the extracts contained in this act of reading), it has been a theme of the archive that there is a freedom/right to strike. This freedom/right was constructed in the absence of any statutory or constitutional basis for claiming it to be either a freedom or a right. But the legitimising and significatory forces of the various constructions in the archive, most notably the functionality construct, was of sufficient force to enable the expression of 'freedom' or 'right'.

Yet a broader economy of silence remains, the silence encapsulated by the 'unfair labour practice' and its essential lack of content and structure. It is only within the space created by this silence that the meta-juridical (and, eventually, irrational) could be developed into a normative paradigm for determining how the archive is to respond to the phenomenon of the strike. From the void emerges the irrational, that unknowable and unfindable normative paradigm that dictates what is fair or unfair.

# 14

## ENDGAME (COUNTING THE SPACES)

### MOMENTS OF SILENCE

---

' "You're thinking about something, my dear, and that makes you forget to talk. I can't tell you just now what the moral of that is, but I shall remember it in a bit."

"Perhaps it hasn't one," Alice ventured to remark.

"Tut, tut, child!" said the Duchess. "Everything's got a moral, if only you can find it."

-- Lewis Carroll *Alice's Adventures in Wonderland* (1865) (Everyman's Library Edition 1992) 107-8

---

#### [THIS IS . . . (Discourse of Order Series 2 Part 8

The machine does not count the words . . . it counts the spaces between the words.

With what expectation does this text approach its own end or ending? What does the archive of the convention within which this text is presented (if any) demand: a closure of the text, a final interpretation, a summary, rendering the reading (*ex post facto*) that has taken place redundant?

For if the end of the text is to be a 'conclusion', would it not present an interpretation of the reading, would it not present a reading of itself, a reading that would, by its very position (at the end of the text) obtain the force of the closure of the meaning the text has disseminated throughout? Can the conclusion, the end of the text, also be the final closure of the text, or is it merely a mark, a point (an arbitrary point) that marks the end of an act of reading, and which marks, at the same time, the beginning of another, the reading of the reading, the interpretation of the reading (a making-sense of that which has been read). This cannot be the end of the text, but it is a play between the text that has been read, the reading of the reading (the 'interpretation' of the reading), the reading of the texts within which this text finds itself (the context, the contra-text) and the texts which begin after the last word of this text, after the completion of this act of reading.

Because this text has been, throughout, a play between the readings of the 'other' text (the text that is not there) and the text (that *is* there) this is the end-game, which is also the beginning of the game: the beginning of the reading -- from this point on, the reading of the text (this text, that text, those texts oracularly presented in quotes, in parables . . . )

Additionally, the expectation is that there must be moral: there must be a point to these thousands of words. This is the expectation with which the end(game) is approached: deliver the moral -- provide the act of patient reading with a transcendental signifier which renders whole and coherent these many thousands of words.]

This has been a study of silences; throughout this text, a writing about reading (reading written), the operations of silence have appeared.

In order to make sense of the argument, it is convenient to re-visit some of the moments of silence that have appeared in the process of reading.

As a metaphysics or grand narrative of the law, juridification (as presented in terms of its own discourse, its own series of texts and within its own context) relies on a process of active silencing, the silencing of the law into a document of juridification (the legal text as 'proof' of juridification'). In order to escape this silencing, this violence upon the law-as-text, it is necessary to obliterate the procedures of juridification in order to restore the law-as-text as a 'monument', as signification in-itself and for-itself. This manner of reading (itself reliant upon a silencing of the procedures contained in the canonical texts of juridification) or 'excavation' would resort to a non-allegorical reading of the law-as-text. A diachronic analysis of the archive (a series of discourses) would not be an excavation, but, more ambitiously, an archaeology of the archive of the law-as-text. Within the canon of the texts of juridification, the key movement or gesture is the shift from the legal 'norm' (in terms of a conception of normative closure of the legal system) towards the meta-juridical, that which lies outside the law. It is here that the stated normative closure of the legal system experiences a crisis, and it is here that juridification unfolds its full force.

As this text is characterised by a comparative approach, it was necessary to consider the canonical methodology of the comparative method. Yet again, the programme of the canonical comparative texts is silent at those essential points within its own programme, leaving indeterminate and indeterminable the 'context' which the programme of comparative methodology insists; simultaneously, the programme of comparative labour law dismisses its own textuality, claiming that language is a burden, an 'instrument' that stands between a reality and the understanding of that reality. But an analysis of the canonical texts indicates that, instead of accessing the 'reality' that is purportedly 'outside' the text, the rhetoric of those canonical texts folds in upon itself to reaffirm its own textual nature and own textuality, from whence it cannot escape.

An excavation of the canon of comparative labour law does not entail that the programme must be dismissed out of hand, but that the silences within the programme must be filled, and, for this purpose, the presentation of the 'context' is limited to identifying the dominant discourses within the archive 'labour law' in the three countries under consideration, as well as the institution-as-function within those countries. For it is only within the context (contratext) of the dominant discourses in

the archives, that the act of reading proceeds, it cannot (unless it were to be incomprehensible) be satisfied with a mere presentation of the reading without an indication of the context (contratext) within which that reading takes place.

Because the ultimate aim of the text is a reading of three archival discourses (the 'industrial action jurisprudence'), that reading must disclose the context within which it takes place -- this does not imply a mere blind acceptance of the context (that would be a silencing, a closure), but a recognition of the problematic nature of the context which is being presented.

The context presented in this study, then, is limited to presenting the relevant institutions-as-function (the labour courts or civil courts) as well as the dominant discourses within which those institutions-as-function operate. This, then, is why it is necessary to present some information on the German court system (the 'agent' of the archive) and the dominant discourse (*Tarifautonomie*) within which that agent operates; the same considerations apply to Great Britain and South Africa -- in the latter case, it is necessary to have some understanding of the jurisdiction of the Industrial Court as well as the dominant discourse of fairness within which that institution exercised its function. This must not be seen as being unproblematical, for the archaeologies presented later problematise those very dominant discourses: while collective *laizzes faire* is the dominant discourse in British labour law, the manner in which the British courts have reacted to the phenomenon of the strike indicates the problematic nature of that dominant discourse, and the threat under which that dominant discourse finds itself.

In returning the gaze to the institution-as-function, the concept of the 'labour judiciary' appears, for it is these institutions-as-function that perform the role of agents in the excavations which form the second part of this text.

Yet again, silence soon proves to be pervasive as an examination of what is normally understood under 'the labour judiciary' indicates that, firstly, the origins of these institutions-as-function do not fit into any rigidly historical determinist scheme -- these institutions-as-function may, according to the literature, be the response to certain needs, but the nature of these needs remains indeterminate and indeterminable. The historical factors which appear to have given rise to these institutions, at least in some cases, appear to be determined by chance: the Napoleonic conquest of the west bank of the Rhine; the munitions requirements of the First World War. . . .

It is furthermore, in this respect, to no avail to attempt a distinction between the labour judiciary and the 'ordinary' judiciary (the 'ordinary' civil courts), because the concept of 'court' (which is also the *genus* of the labour judiciary) soon proves to be as indeterminable as the origin of the labour judiciary. In having to determine whether or not an institution-as-function is a 'court' or not, the law turns silent, and structures its response to the question in terms of an 'impression', the evaluation of facts -- there being no general test to determine, in terms of a positive discourse, what is a 'court' and what is not a 'court'. In this pivotal aspect too, then, the discourse of the law is rendered silent by the task and the challenge with which it is confronted.

How is the 'law', the 'legal system', or the discourse of the law to respond to the phenomenon of industrial action? It is clear that, at least initially, there is a distinct antipathy towards the strike (a theme that appears again and again in the course of the readings in the second part of this text) -- that there is a relationship of *versus*, of the law 'against' the strike. It is only once the law can obliterate or silence this antipathy that the law can accommodate the phenomenon of industrial action and, in doing so, establish a normative image of itself: because the law accommodates the strike, the law is 'democratic' -- the accommodation of the strike is seen as the distinguishing feature of a 'democratic' legal system.

In shifting the antipathy of the law towards an accommodation (which is more than a sympathy) industrial action has to rely on certain discursive narratives (stories) -- tales that must be told to the law as industrial action stands before the law, and seeks the accommodation (and resultant protection offered by the law).

The second part of this study is devoted to an excavation of texts: it is, in a sense, therefore, a reading of the telling of tales by industrial action in order for the law to accommodate and accept industrial action. The second part of this test is a reading, a close and forensic reading of the canonical texts within a 'jurisprudence' -- the pivotal and archival texts within a sequential series of texts, a discourse.

These readings yield again the operation of a number of silences: generally, it can be said (at the risk of closing the reading of those readings) that, at the pivotal point in the 'jurisprudence' a silencing takes place, as the institution-as-function, in accommodating industrial action within its own archive, has to displace and silence various other archives and normative paradigms. The silence is at the heart of the breach within the archive: as the archive shifts and strains to accommodate a phenomenon (that appeared, initially, to be 'repugnant' to the law, as a British court stated as late as 1980) -- it is indeed the silence that makes possible the very breaches of the archive. Predicated as it is upon its own coherence and integrity, the archive is incapable of structuring a full breach with itself -- it is only possible to breach the archive, to change the rules and to introduce a new normative paradigm within the frame of silence which stands at the heart of the process: German law could respond to the phenomenon of industrial action only by silencing an extended archive of illegality, of breach of contract. South African law, relying on an indeterminate concept of 'fairness' in terms of a statutory empowerment (and this aspect of power should not be disregarded) was in a position to silence the operation of an archive of legality and structure an archive of equity with a normative paradigm sufficiently powerful to obliterate or silence the archive of legality. Time and again, the British courts obliterate the policy of legislation (through processes of reading, of interpretation) to accord with their own vision of what form the accommodation of industrial action in the law should take: for British law there has never been an archival structure sufficiently powerful enough to obliterate the power-effect of the common law (the strike as a breach of contract). But in the creation of various torts

the British courts in part obliterate not only the archive of the common law (precedent) but also the policy considerations which motivated legislation. Also apparent from the jurisprudence of the British courts is the reaction against power: power exercised by a limited number of people, or collective power exercised by a large number of people. In accommodating the exercise of power within the structures of the archive, the law itself expresses its own concern for its own powers -- the respect for the law, the continued public confidence in the judiciary.

Silences also stand at the nodes of shifts taking place within the archival discourses: as the discourse of the law (as it responds to the strike) shifts and changes, there are again silences that make possible those breaches within the archive itself. Silence therefore enables not only the obliteration of an anti-strike archive (the archive of legality, the archive of the common law), but also the shifts within the discursive logic of the archive itself: as the legitimization of industrial action shifted from proportionality, for example, it became predicated upon a contentless concept of *Tarifautonomie*, a concept which the archive from which it is taken (like the other indeterminate nominations that appear) is not in a position to define.

This links to another concern, namely the limit, the margin, and the silence which lies beyond that limit. The concept of *Tarifautonomie* has no apparent limits, it is flexible in the extreme (a consequence of the concept's indeterminacy) -- it can serve as the ground of legitimization for any number of various forms of strikes and lock-outs, and, by implication, any potential number of shifts within the archive. So, too, the concept of functionality, similarly a transcendental signifier, attempts to posit limits, margins, borders, only to have the archive respond to that attempt by retreating into an irrationality of morality, of value-judging . . . .

(Is this the moral of the story?)

These, then, have been the discourses of silence, the archives that, instead of relying on a positive rationality (that which is, axiomatically, *there*), has to rely upon a silence to breach that rationality, to make possible a displacement of that rationality, to enable a shift, a change . . . . This is the result of the reading, a reading not of the metaphysics that render the law-as-text an allegory of another, but, instead, an archaeology, a series of excavations of texts, focusing (not exclusively) on the judicial responses to industrial action. In a nutshell (is this the moral of the story?): an archaeological reading of the archives (judicial responses to industrial action) yields not a positive result, but can trace only the trace (the *présence* of an absence, a silence) . . . the trails of the powerful silences that determine the archives, their shifts, changes, permutations.

As a process, juridification depends on the silence, on the absences, on the nothingness within the archive: it is only once the positive rationality of the legal archive has been shattered that the meta-juridical can, through that silence, and through the force of the ex-nomination, be imported into the discourse of the law-as-text. It is only once the normative paradigms contained within the archive of the law-as-text has been

obliterated through an un-naming that the meta-juridical can inform the shift in the archive, the change in the archive. Juridification, then, is an importation of the meta-juridical into the positive rationality of the law-as-text, from which point on the archive closes (with varying degrees of success) around the newly-imported normativity and makes it part of the archive: the principle becomes the law.

For the purposes of this process, the most important aspect is the un-naming, the silencing of the archive or parts of the archive that would not allow that importation: the obliteration through un-naming of that which is there in order to make possible the introduction of that which is, endlessly, beyond the law-as-text, but, by being processed through the juridification process, becomes *of the law*: the meta-juridical structures the archive, lends the archive its force, its power, its flexibility.

Within the rational archive of the law, juridification represents the introduction, ironically, of that which lies, forever, 'beyond' the text -- juridification, using the powerful instrument of ex-nomination and predicated upon the availability of a discursive space (a structural silence within the archive), imports into the rationality of the law the meta-juridical . . . that which makes good industrial relations sense, which is proportional, that which is subjective (the exercise of power), the morality, the value . . . It is by means of the ex-nominations, the unwritings, the obliterations and the silencing of the discourse of the law that juridification unfolds its full force, as it breaches the rational normative closure of the law, to enable the importation of the irrational.

Juridification is the confluence of these forces: the silencing, the obliterations, the unnamings of things, the creation of the space (like the spaces between the[se] words) -- spaces into which meaning can seep and through which signification, in endless chains, can reach -- a silencing which makes possible the breach of normative closure of the law, the contamination of the discursive rationality with that which cannot be, and which does not let itself be 'read' (because it is forever silent, it is endlessly 'beyond'). But this is more than a problem of perception, more than a mere inability to read, because this is the silence at the heart of the discourse, that not only refuses to be 'read', but, invariably beyond the rationality, refuses to be written (*es lässt sich nicht schreiben*).

**[Discourse of Order Series 2 Part 9**

This, then, is the 'end' of the actual text: everything that appears after this point is not *of* the text; prompted by the institutional frame within which this text is offered, it is, to a greater or lesser degree, *posttext.*]

## BIBLIOGRAPHY

- Aaron, B 'Settlement of Disputes over Rights' Chapter 16 in R Blanpain (ed) *Comparative Labour Law and Industrial Relations* 3 ed (Kluwer, Deventer, 1987)
- Alderson, B  
Foreman, M *The Arabian Nights or Tales told by Sheherezade during a Thousand Nights and One Night* (Victor Gollancz Ltd, London, 1992)
- Andrews, N *Principles of Civil Procedure* (Sweet & Maxwell, London, 1994)
- Bader, P;  
Friedrich, H W;  
Leinemann, W;  
Stahlhache, E;  
Wenzel, L *Gemeinschaftskommentar zum Arbeitsgerichtsgesetz* (Luchterhand, Neuwied, 1992)
- Bailey, S H and Gunn, M J *Smith and Bailey on the Modern English Legal System* (Sweet & Maxwell, London, 1991)
- Baker, J H *An Introduction to English Legal History* 3 ed (Butterworths, London, 1990)
- Balkin, J M 'Deconstructive Practice and Legal Theory' (1987) 96 *Yale Law Journal* 743
- Barthes, R 'The Death of the Author' in R Barthes *Image Music Text* (Fontana Press, London, 1977)
- Barthes, R 'Introduction to the Structural Analysis of Narratives' in S Sontag (ed) *A Roland Barthes Reader* (Vintage Books, London, 1982)
- Barth, J 'Lost in the Funhouse' in J Barth *Lost in the Funhouse: Fiction for print, tape, live voice* (Secker & Warburg, London, 1969)
- Bendix, S *Industrial Relations in South Africa* 2 ed (Juta & Co, Kenwyn, 1992)

- Benjamin, P 'Legal Representations in Labour Courts' (1994) 15 *Industrial Law Journal* 250
- Benjamin, P 'Making Amends: The 1991 Labour Relations Amendment Act' (1991) 12 *Industrial Law Journal* 239
- Benjamin, P 'Panel Discussion on the Role of the State in the Regulation of Industrial Agreements' in A Rycroft (ed) *The Private Regulation of Industrial Conflict: Proceedings of the Labour Law Conference 1989* (Juta & Co, Kenwyn, 1990)
- Blankenburg E and Rogowski R 'German Labour Courts and British Industrial Tribunal System: A Social-Legal Comparison of Degrees of Judicialisation' (1986) 13 *Journal of Law and Society* 67
- Blanpain, R 'Comparativism in Labour Law and Industrial Relations' Chapter 1 in R Blanpain (ed) *Comparative Labour Law and Industrial Relations* 3 ed (Kluwer, Deventer, 1987)
- Brand, A 'Ethical Rationalization and "Juridification" -- Habermas's Critical Legal Theory' (1987) 4 *Australian Journal of Law and Society* 103
- Cameron, E; Cheadle, H; and Thompson, C *The New Labour Relations Act* (Juta & Co, Kenwyn, 1989)
- Cameron, E 'Overview of the Industrial Court' in P Benjamin, R Jacobus & C Albertyn (eds) *Strikes, Lock-outs & Arbitration in South African Labour Law* (Juta & Co, Kenwyn, 1989) 11
- Cheadle, H; Le Roux, PAK; Thompson, C; and Van Niekerk, A *Current Labour Law 1994* (Juta & Co, Kenwyn, 1994)
- Cheadle, H 'The New Industrial Court' (1980) 97 *South African Law Journal* 137
- Clark, J 'Towards a Sociology of Labour Law: An Analysis of the German Writings of Otto Kahn-Freund' Chapter 4 in K W Wedderburn, R Lewis and J Clark (eds) *Labour Law and Industrial*

- Relations: Building on Kahn-Freund* (Clarendon Press, London, 1983)
- Däubler, W *Das Arbeitsrecht* Vol 1 (Rowohlt, Reinbeck bei Hamburg, 1990)
- Davies, P and Freedland M *Kahn-Freund's Labour and the Law* (Stevens, London, 1983)
- Davies, P and Freedland, M *Labour Legislation and Public Policy: A Contemporary History* (Clarendon Press, Oxford, 1993)
- Derrida, J 'Before the Law' in D Attridge (ed) *Acts of Literature* (Routledge, Chapman & Hall Inc, New York, 1992)
- Derrida, J 'Cogito and the History of Madness' in *Writing and Difference* (trans A Bass) (Routledge & Kegan Paul, London, 1978)
- Derrida, J *Dissemination* (transl B Johnson) (The Athlone Press Ltd, London, 1981)
- Derrida, J *Of Grammatology* (The John Hopkins University Press, Baltimore, 1974) (First published in French in 1967)
- Donovan Commission Royal Commission on Trade Unions and Employer Associations *Report Cmnd 3623* (HM Printing Office, London, 1968)
- Egan, B *The Industrial Tribunals Handbook - Fighting your case at the Industrial Tribunals* (The New Commercial Publishing Company Ltd., London, 1978)
- Eribon, D *Michel Foucault* (trans B Wing) (Faber & Faber, London and Boston, 1991)
- Flew, A *A Dictionary of Philosophy* (St Martin's Press, New York, 1979)
- Flynn, T 'Foucault's Mapping of History' in G Gutting (ed) *The Cambridge Companion to Foucault* (Cambridge University Press, Cambridge, 1994)
- Foucault, M *The Archaeology of Knowledge* (Tavistock Publications, London, 1972)

- Foucault, M *Madness and Civilisation: a history of insanity in the Age of Reason* (Routledge, New York, 1961)
- Foucault, M 'The Order of Discourse' in R Young (ed) *Untying the Text* (Routledge & Kegan Paul, Boston, 1981)
- Foucault, M 'What is an Author' in Rabinov, P (ed) *The Foucault Reader* (Penguin Books, Harmondsworth, 1984)
- Frank, M 'On Foucault's concept of discourse' in T J Armstrong (transl) *Foucault Philosopher* (Harvester/Wheatsheaf, Hemel Hempstead, 1992)
- Gabriel, P and Anderson, L 'Excellent Birds' from *Mister Heartbreak* (Warner Brothers Records, New York, 1984)
- Gentz, M 'Zur Verhältnismäßigkeit von Grundrechtseingriffen' (1968) 21 *Neue Juristische Wochenschrift* 1600
- Germelmann, C-H; Matthes, H C and Pröttig, P *Arbeitsgerichtsgesetz* (CH Beck, München, 1990)
- de Givry, J 'Labour Courts as Channels for the Settlement of Labour Disputes: An International Review' (1968) 6 *British Journal of Industrial Relations* 346
- Goodrich, P *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Macmillan Press, Basingstoke, 1987)
- P Grunow and F Hegner 'Sozialpsychologische Konsequenzen der Verrechtlichung: Alltagskontakte mit der Verwaltung' in R Voigt (ed) *Verrechtlichung: Analysen zu Funktion und Wirkung von Parlamentarisierung, Bürokratisierung und Justizialisierung sozialer, politischer und ökonomischer Prozesse* (Athenäum Taschenbücher, Königstein Taunus, 1980)
- Grunsky, W *Arbeitsgerichtsgesetz* 6 ed (Verlag Franz Vahlen, München, 1990)

- Habermas, J *The Theory of Communicative Action Vol 2: Lifeworld and System: A Critique of Functionalist Reason* (Polity Press, Cambridge, 1987)
- Hanau, P 'Arbeitsgerichtsbarkeit -- Anspruch und Wirklichkeit' *Neue Zeitschrift für Arbeits-und Sozialrecht* (1986) 809
- Hand, G J and Bentley D J (eds) *Radcliffe and Cross The English Legal System* 6 ed (Butterworths, London, 1977)
- Harris, J W *Legal Philosophies* (Butterworths, London, 1980)
- Hentschel, V *Geschichte der deutschen Sozialpolitik* (Edition Suhrkamp, Frankfurt am Main, 1983)
- Hepple B A 'Labour Courts: Some Comparative Perspectives' (1988) 41 *Current Legal Problems* 169
- Hepple, B A and Kahn-Freund, O *Laws against Strikes* (Fabian Society, London, 1972)
- Hueck, A *Lehrbuch des Arbeitsrecht* 6 ed (Vahlen Verlag, Berlin und Frankfurt am Main, 1959)
- Hueck, A (founding eds) Nachschlagewerk des Bundesarbeitsgerichts *Arbeitsrechtliche Praxis* (CH Beck, München, looseleaf, first published 1955)
- Ingman, T *The English Legal Process* 4 ed (Blackstone Press, London, 1992)
- Ingram, D 'Foucault and Habermas on the Subject of Reason' in G Gutting (ed) *The Cambridge Companion to Foucault* (Cambridge University Press, Cambridge, 1994)
- Jauernig, O *Zivilprozeßrecht* 23 ed (CH Beck, München, 1991)
- Joachim, H G 'Ist der Grundsatz der Verhältnismäßigkeit ein geeignetes Kriterium für die rechtliche Erfassung des Phänomens "Arbeitskampf"' in M Kittner (ed) *Streik und Aussperung* (Protokoll der wissenschaftlichen Veranstaltung der

- Industriegewerkschaft Metall von 13. bis 15. September 1973 in München) 27
- McKee, J 'Legalism in Industrial Tribunals' (1986) 15 *Industrial Law Journal (UK)* 110
- Kahn-Freund, O 'Hugo Sinzheimer 1875-1945' Chapter 2 in R Lewis and J Clark (eds) *Labour Law and Politics in the Weimar Republic* (Basil Blackwell, Oxford, 1981) 73
- Kahn-Freund, O 'Legal Framework' Chapter 2 in A Flanders and H Clegg (eds) *The System of Industrial Relations in Great Britain* (Oxford University Press, Oxford, 1954)
- Kahn-Freund, O 'On Uses and Misuses of Comparative Law' (1974) 37 *The Modern Law Review* 1
- Kahn-Freund, O 'The Role of the Courts in the Development of English Labour Law' (1961) 1 (Nuova Serie) *Rivista di Diritto Internazionale e Comparato del Lavoro* 172
- Kearney, R *Dialogues with Contemporary Continental Thinkers: The Phenomenological Heritage* (Manchester University Press, Dover, 1984)
- Kessler, S and Bayliss, F *Contemporary British Industrial Relations* (Basingstoke, Hampshire, 1992)
- Körner-Damman, J M *Bedeutung und faktische Wirkung von ILO-Standards* Nomos Verlagsgesellschaft, Baden-Baden, 1991)
- Kornhauser, A; Dubin, R & Ross, A M (eds) 'Problems and Viewpoints' in Kornhauser, Dubin & Ross (eds) *Industrial Conflict* (McGraw-Hill Book Company, Inc., New York, 1954)
- Lacey, A R *A Dictionary of Philosophy* 2 ed (Routledge & Kegan Paul, London, 1980)
- Landman, A A 'The Industrial Court and the Labour Appeal Court: A Note on some Aspects of the Labour Relations Amendment Bill' (1988) 10 *Modern Business Law* 102

- Leich, S and Lundt, A 'Zur Geschichte der Berliner Arbeitsgerichte' in *60 Jahre Berliner Arbeitsgerichtsbarkeit* (Berlin Verlag, Berlin, 1987) 39
- Le Roux, P A K 'Strikes and Lockouts -- a Reassessment' (1986) 8 *Modern Business Law* 99
- Le Roux, PAK 'Substantive Competence of Industrial Courts' (1987) 8 *Industrial Law Journal* 183
- Le Roux, P A K and van Niekerk, A *The South African Law of Unfair Dismissal* (Juta & Co, Kenwyn, 1994)
- Lewis, R 'The Historical Development of Labour Law' (1976) 15 *British Journal of Industrial Relations* 1
- Löwisch, M *Arbeitsrecht* 3 ed (Werner Verlag, Düsseldorf, 1991)
- Löwisch, M 'Das Übermaßverbot im Arbeitskampfrecht' (1971) 2 *Zeitschrift für Arbeitsrecht* 319
- Löwisch, M 'Fragen zum Arbeitskampfrecht nach dem Beschuß des Großen Senates des Bundesarbeitsgerichts vom 21. April 1971' (1972) 23 *Gewerkschaftliche Monatshefte* 271
- Luhman, N 'The Self-Reproduction of Law and its Limits' in Gunther Teubner (ed) *Dilemmas of Law in the Welfare State* (Walter de Gruyter, Berlin, 1986) 111
- McCarthy, W 'The Case for Labour Courts' (1990) 21 *Industrial Relations Journal* 98
- McCarthy, W 'The Rise and Fall of Collective Laissez Faire' Chapter 1 in W McCarthy, W (ed) *Legal Intervention in Industrial Relations: Gains and Losses* (Blackwell, Oxford & Cambridge, 1992)
- McIlroy, J *Industrial Tribunals - How to Take a Case, How to Win it* (Pluto Press, London, 1983)
- Meyer, J A E 'Von der "sozialen Adequanz" zur "Verhältnismäßigkeit der Kampfnahmen"' (1974) 7 *Zeitschrift für Rechtspolitik* 253

- Michel, B 'Der Kampf der Gewerkschaften um die einheitliche Arbeitsgerichtsbarkeit' in Feser et al (eds) *Arbeitsgerichtsprotokolle* (Luchterhand, Neuwied & Darmstadt, 1982)
- Mischke, C 'The Inseparability of Powers: Judge-made Law in the German Legal System (1992) 7 SA *Publiekreg/Public Law* 253
- Müller, G 'Fragen zum Arbeitskampfrecht nach dem Beschuß des Großen Senates des Bundesarbeitsgerichts vom 21. April 1971' (1972) 23 *Gewerkschaftliche Monatshefte* 271
- Munday, R 'Tribunal Lore: Legalism and the Industrial Tribunals (1981) 10 *Industrial Law Journal* (UK) 1
- Mureinik, E 'Unfair Labour Practices (update)' 1 *Industrial Law Journal* (1980)
- Norris, C *Derrida* (Methuen, London & New York, 1987)
- O'Hare, J & Hill, R *Civil Litigation* 5 ed (Longman, London, 1990)
- Pannick, D *Judges* (Oxford University Press, Oxford, 1987)
- Piron, J and Le Roux, P A K 'South Africa' in R Blanpain (ed) *International Encyclopedia of Laws* (Kluwer, Deventer, 1993)
- Poolman, T *Equity, the Court and Labour Relations* (Butterworths, Durban, 1988)
- Pynchon, T *Vineland* (Secker & Warburg, London, 1990)
- Raiser, T *Rechtssoziologie* (Alfred Metzner Verlag, Frankfurt am Main, 1987)
- Reichman, A and Mureinik, E 'Unfair Labour Practises' (1980) 1 *Industrial Law Journal* 1
- Reidegeld, E 'Vollzugsdefizite sozialer Leistungen: Verrechtlichung und Bürokratisierung als Grenzen der Sozialpolitik in R Voigt (ed) *Verrechtlichung* (1980)

- Rideout, R W *Rideout's Principles of Labour Law* 5 ed (Sweet & Maxwell, London, 1989)
- Rogowski, R 'Rechtsgläubigkeit oder die Anticipation vermuteter Rechtsfolgen' in R Voigt (ed) *Verrechtlichung* (1980)
- Rose, G *Dialectic of Nihilism: Post-Structualism and Law* (Basic Blackwell, Oxford, 1984)
- Rubin, G R 'Labour Courts and Proposals of 1917-19' 14 *Industrial Law Journal* (UK) (1985) 33
- Rubin, G R 'The Origins of Industrial Tribunals; Munitions Tribunals during the First World War (1977)' 6 *Industrial Journal* (UK) 149
- Rubin, G R *War, Law, and Labour: The Munitions Acts, State Regulation and the Unions* (Clarendon Press, Oxford, 1987)
- Rycroft, A and Jordaan, B *A Guide to South African Labour Law* 2ed (Juta & Co, Kenwyn, 1992)
- Rycroft, A (ed) *The Private Regulation of Industrial Conflict* (Juta & Co, Kenwyn, 1990)
- Säcker, F J 'Zu den rechtspolitischen Grundlagen der Arbeitskampf-Entscheidungen des Bundesarbeitsgerichts vom 21. April und 26. Oktober 1971' (1972) 23 *Gewerkschaftliche Monatshefte* 287
- Schaub, G *Arbeitsrechtliche Formularsammlung und Arbeitsgerichtsverfahren* 5 ed (CH Beck, München, 1990)
- Schregle, J 'Comparative Industrial Relations: Pitfalls and Potential (1981)' 120 *International Labour Review* 15
- Schwerdtfeger G 'Die Koalitionsfreiheit des Arbeitnehmers in der Bundesrepublik Deutschland' in Max-Planck-Institut für ausländisches öffentliches Recht und Volkerecht *The Freedom of the Worker to Organize: Comparative Law and International Law* (Springer Verlag, Berlin & Heidelberg, 1980)
- Seegert, C *Die Formierung des Streikrechts: Arbeitgerichtbarkeit und Koalitionsrecht im Prozeß gesellschaftlicher Restauration 1946 bis 1955* (Campus Verlag, Frankfurt, New York, 1985)

- Sinzheimer, H 'Der Tarifgedanke in Deutschland' (1915) in H Sinzheimer *Arbeitsrecht und Rechtssoziologie: Gesammelte Aufsätze und Reden* (O Kahn-Freund and T Ramm (eds) Vol 1 (Europäische Verlagsanstalt, Frankfurt am Main & Köln, 1976)
- Sinzheimer, H 'Die Neuordnung des Arbeitsrecht' (1919) in H Sinzheimer *Arbeitsrecht und Rechtssoziologie: Gesammelte Aufsätze und Reden* (O Kahn-Freund and T Ramm (eds) Vol 1 (Europäische Verlagsanstalt, Frankfurt am Main & Köln, 1976)
- Spivak, G 'Translators' Preface' to J Derrida *Of Grammatology* (The Johns Hopkins Press, Baltimore, 1974)
- Teubner, G 'Juridification -- Concepts, Aspects, Limits Solutions' in G Teubner (ed) *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate, Antitrust and Social Welfare Law* (Walter de Gruyter, Berlin, 1987)
- Teubner, G 'Preface' in G Teubner (ed) *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate, Antitrust and Social Welfare Law* (Walter de Gruyter, Berlin, 1987)
- Van der Merwe, D 'Es läßt sich nicht lesen -- Reflections on the status and continued relevance of the South African common law' (1994) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 660.
- Venter, F;  
van der Walt A J *Regsnavoring: Metode en Publikasie* (Butterworths, Durban, 1990)
- Vidal, G 'How to Find God and Make Money' in *The Second American Revolution and Other Essays* (Random House, New York, 1976-1982)
- Voigt, R (ed) *Verrechtlichung: Analysen zu Funktion und Wirkung von Parlamentarisierung, Bürokratisierung und Justizialisierung sozialer, politischer und ökonomischer Prozesse* (Athenäum Taschenbücher, Königstein Taunus, 1980)

- Voigt, R 'Vorwort des Herausgebers' (Editor's Preface) in R Voigt (ed) *Gegentendenzen zur Verrechtlichung* (1983) IX *Jahrbuch für Rechtssoziologie und Rechtstheorie*
- von Hoyningen-Huene, G *Betriebsverfassungsrecht* (CH Beck, München, 1990)
- Wacks, R 'Judges and Injustice' (1984) 101 *South African Law Journal* 266
- Walker, R J and Ward, R *Walker & Walker's English Legal System* 7 ed (Butterworths, London, 1994)
- Weber, M *Economy and Society* (University of California Press, Berkely, 1978)
- Wedderburn, K W 'Labour Law: From Here to Autonomy?' (1987) 16 *Industrial Law Journal* (UK) 1
- Wedderburn, K W 'Labour Law Now -- A Hold and a Nudge' (1984) 13 *Industrial Law Journal* (UK) 73
- Wedderburn, K W 'The Social Charter in Britain -- Labour Law and Labour Courts' (1991) *The Modern Law Review* 1
- Wedderburn, K W *The Worker and the Law* 3 ed (Penguin Books, Harmondsworth, 1986)
- Weiss, M 'Labour Dispute Settlement by Labour Courts in Germany' (1994) 15 *Industrial Law Journal* 1
- Wenzel, L '75 Jahre deutsche Arbeitsgerichtsbarkeit' (1965) 20 *Juristenzeitung* 697
- Young, R 'Post-Structuralism: An Introduction' in R Young (ed) *Untying the Text* (Routledge & Kegan Paul, Boston, 1981)

## TABLE OF CASES

### DECISIONS OF GERMAN COURTS

BAG AP Nr 2 on § 56 BetrVG (1956)  
BAG AP Nr 5 on Art 9 GG (1963)  
BAG AP Nr 2 on § 56 BetrVG (1956)  
BAG AP Nr 5 on Art 9 GG (1963)  
BAG AP Nr 1 on Art 9 Basic Law (Industrial Action) (1955)  
BAG AP Nr 11 on Art 9 Basic Law (Industrial Action) (1960)  
BAG AP Nr 24 on Art 9 Basic Law (Industrial Action) (1963)  
BAG AP Nr 31 on Art 9 Basic Law (Industrial Action) (1963)  
BAG AP Nr 39 on Art 9 Basic Law (Industrial Action) (1968)  
BAG AP Nr 43 on Art 9 Basic Law (Industrial Action) (1971)  
BAG AP Nr 64 Art 9 Basic Law (Industrial Action) (1980)  
BAG AP Nr 65 Art 9 Basic Law (Industrial Action) (1980)  
BVerfG AP Nr1 on 1 MitbestG (1976)  
BVerfGE 84, 212

### DECISIONS OF SOUTH AFRICAN COURTS

*Anglo American Farms t/a Boschendal Restaurant v Komjwayo* 13 ILJ 573 (LAC)  
*Black Allied Workers Union & Others v Asoka Hotel* (1989) 10 ILJ 167 (LAC)  
*Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 ILJ 963 (LAC)  
*BTR Dunlop Ltd v National Union of Metalworkers of SA* (1989) 10 ILJ 181 (IC)  
*Commercial Catering & Allied Workers Union v OK Bazaars* (1929) Ltd (1995) 16 ILJ 1031 (A)  
*Consolidated Frame Cotton Corporation v President of the Industrial Court and Others* 1986 (3) SA 786 (A)  
*Die Raad van Mynvakbonde v Die Kamer van Mynwese van Suid-Afrika* (1984) 5 ILJ 344 (IC)  
*Food & Allied Workers Union v Spekenham Supreme* (2) (1988) 9 ILJ 628 (IC)  
*George Divisional Council v Minister of Labour & Another* (1954) (3) SA 300 (C)  
*Hlatswayo v Sub-Nigel Gold Mining Co Ltd* (1994) 15 ILJ 431 (IC)  
  
*Koelatsoeu & Others v Afro-sun Investments (Pty) Ltd t/a Releke Zezame Supermarket* (1990) 11 ILJ 754 (IC)  
*Marievale Consolidated Mines Ltd v The President of the Industrial Court & Others* (1986) 7 ILJ 152 (T)

- Media Workers Association of SA & Others v The Press Corporation of SA Ltd* (1992) 13 ILJ 1391 (A)
- Medupe & Others v Golden Spur* (1987) 8 ILJ 376 (IC)
- Metal and Allied Workers Union & Others v Barlows Manufacturing Co Ltd* (1983) 4 ILJ 283 (IC)
- Metal and Allied Workers Union v Hart Ltd* (1985) 6 ILJ 478 (IC)
- Natal Die Casting Co (Pty) Ltd v President, Industrial Court & Others* (1987) 8 ILJ 2245 (D)
- National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Others* (1996) 17 ILJ 455 (A)
- National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd* (1994) 15 ILJ 1005 (LAC)
- National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd* 705/94 (A) Unreported
- National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 ILJ 1221 (A)
- National Union of Mineworkers v Gold Fields of SA Ltd & Others* (1989) 10 ILJ 86 (IC)
- National Union of Mineworkers v Marie Consolidated Mines Ltd* (1986) 7 ILJ 123 (IC)
- Ngewu v Union Co-op Bark and Sugar* 1982 (4) SA 390 (N)
- R v Smit* (1955) (1) SA 239 (C)
- SACWU & Others v Pharma Natura (Pty) Ltd* (1986) 7 ILJ 696 (IC)
- SA Laundry, Dry Cleaning, Dyeing & Allied Workers Union & Others v Advance Laundries Ltd t/a Stork Napkins* (1985) 66 ILJ 544 (IC)
- SA Technical Officials' Association v President of the Industrial Court* (1985) 6 ILJ 186 (A)
- TATU & Others v Spoornet* (1993) 14 ILJ 1056 (IC)
- Trident Steel (Pty) Ltd v John NO & Others* (1987) 8 ILJ 27(W)
- Tshabalala & Others v Minister of Health & Others* (1986) 7 ILJ 168 (W)
- WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* [1997] 2 BLLR 124 (LAC)

## DECISIONS OF BRITISH COURTS

- Attorney-General v British Broadcasting Corporation* [1980] 3 All ER 161 HL
- Crofter Hand Woven Harris Tweed Company Limited and Others v Veitch and Another* [1942] AC 435 HL
- Duport Steels Ltd and Others v Sirs and Others* [1980] 1 All ER 529 HL
- Express Newspapers Ltd v MacShane and Another* [1980] 1 All ER 65 HL
- Hornby v Close* [1867] 2 QBD 153
- Lonrho v Shell Petroleum No 2* [1982] AC 173 HL
- Mogul Steamship Co v McGregor Gow & Co* [1889] 23 QBD 598
- NWL Ltd v Woods, NWL v Nelson and Another* (1979) 3 All ER 614 HL

*Quinn v Leathem* [1901] AC 495 HL

*Rookes v Barnard* [1964] AC 1129 HL

*Stratford J T & Son Ltd v Lindley and Another* [1965] AC 269 HL

*The Taff Vale Railway Company v The Amalgamated Society of Railway Servants*  
[1901] AC 426 HL

*Thomas Francis Allen v William Cridge Flood & Walter Taylor* [1897] AC 1 (HL)

*Torquay Hotel Co v Cousins and Others* [1969] All ER 522 CA