

BOOK REVIEW

Hepple B, Le Roux R and Sciarra S (eds) *Laws against Strikes – The South African Experience in an International and Comparative Perspective* (Juta Kenwyn 2016)

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Abstract

This contribution reviews the book entitled *Laws against Strikes – The South African Experience in an International and Comparative Perspective* edited by Bob Hepple, Rochelle le Roux and Silvana Sciarra.

Keywords

Labour law, right to strike, South Africa, Italy.

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Review

The first thing that strikes one about this publication is its title. *Laws against strikes?* Really! Do we still have these in our modern society? Is the right to strike not universally accepted and seen as a fundamental right of all employees, workers and labourers?

The introduction to the book states that the "immediate stimulus for this book was the Marikana massacre, during which police shot dead 34 striking miners at a platinum mine in South Africa on 6 August 2012." It goes on to state that the *Constitution of the Republic of South Africa*, 1996 and the *Labour Relations Act* 66 of 1995, which give effect to the right to strike, "were generally regarded as a model for democratic societies" - high praise indeed. Unfortunately Marikana, as well as a substantial increase in strike activity, seems to have dented that perception significantly.

This has caused the authors of this publication to re-consider this fundamental right (the right to strike), and hence the title of the publication. On p.1 the comment is made that the underlying cause of most strikes in South Africa seems to be the existence of a "deep social crisis." At the heart of this crisis is often the violent clash between labour and capital, as was the case at Marikana. This is an issue both young democracies such as South Africa and mature democracies of the post-industrial Europe have to deal with, the authors conclude. South Africa and Italy are then used as examples of the former and the latter (a young democracy and a mature one) for obvious reasons, some of which are practical.

The publication aims to contribute to the debates on the issue of "the operation of the right to strike" in South Africa and Italy (p 5). The authors feel that there are enough similarities between the two countries' constitutional and labour law characteristics to justify such a comparison. This seems to be the case, but the emphasis of the publication is definitely on the South African labour law and constitutional situation, maybe because, as already stated, it has been seen as a model for others but has failed to live up to expectations of it.

It would have prudent then, maybe, if the publication had delved a bit deeper into the very important distinction between a young democracy such as South Africa and a mature democracy such as Italy, since therein might be an answer or two regarding the failure of the ideals and ambitions of the Constitution and the LRA to bring more equity, understanding and even

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clarity to the right to strike and all that it implies. The huge cultural, political and socio-economic differences between the two countries could also have been addressed in more depth, and a chapter just on these two aspects would have enhanced the publication's value, in my opinion. The authors admit that the prevalence of strike action refers to a "deep social crisis"; therefore it would have been sensible to devote at least a chapter to the social issues that drive strike actions, and to discuss these in depth.

However, the publication does do an admirable job in dealing with the right to strike, and Chapter 1, titled "The Freedom to Strike and its rationale," was particularly insightful. This old coat was dusted off and rearranged and offered in a very interesting and thought provoking manner by Bob Hepple. He deals with the so-called "old rationale" for strike action as offered by Kahn-Freund, as opposed to the new rationale – the human rights rationale. This aspect of strike action in itself offers much food for thought and the human rights perspective receives substantial exposure and discussion in this publication. In Chapter 2 Novitz discusses the International and Regional Framework relating to the right to strike, and accuses South Africa of failing to engage with international and regional human rights systems, especially at a time in its history when such engagement is much needed. (Another case of the young democracy vs the mature one, perhaps?) Chapter 3 dwells on the fact that many legislatures have failed to give content to the right to strike and have left this task to the courts. The latter have not always dealt with this matter satisfactorily because they have not fully appreciated the role and function of a strike in collective bargaining and the labour market, according to Cheadle.

The application and impact of representativeness in strike action (with regard to collective bargaining) is dealt with extensively in Chapter 4, and the difference between Italy and South Africa is highlighted again, with South Africa maintaining that workers covered by the agreement cannot strike over issues addressed in the agreement, while Italy oppose this vigorously, as Corazza and Fergus point out. The role of trade unions is also inspected and the conclusions are drawn that collective actions (which are at the core of trade unions) should be adapted to accommodate social changes, and that the trade unions are pivotal in this process. Rycroft refers to "responsible trade unionism" (p 107) and emphasises its importance, while suggesting that the South African labour situation, due to its lack of the institutionalisation of strike law, allows strikes to commence and continue outside the scope of the law, and thus compromises accountability and predictability – thought-provoking indeed.

Chapter 9, which features the policing responses to strike violence, offers a welcome insight into strategies to deal with a physical strike action, a topic

that needs to be discussed and debated in more detail, especially in the light of the Marikina incident. (Interestingly enough, a huge difference between strike action in South Africa and Italy seems to be that the former is often accompanied by violence and the latter rarely. Is this a social or a political phenomenon?) The publication also suggests that South Africa should lean more on international legal sources in order to address its labour law situation.

In conclusion, the publication reiterates the value of the right to strike as a way in which to address "the aspirations of weaker parties ... and modify the equilibrium of countervailing power." (p 200) This, which seems very much an economic goal, should not detract from the fact that the right to strike remains a fundamental human right. However, it is a right that has to be exercised with caution and should lead to economic and political emancipation without impinging on democratic values. The authors call for strikes to be protected, delimited and consensually regulated in order for them to be able to reach their political and social goals.

The right to strike is accepted and promoted in a democracy, be it a young democracy or a mature one. The publication does well to investigate the rationale behind the right, and especially the human rights rationale behind it. The publication dissects the role of unions and other representatives involved in strike action and highlights the importance of international and regional legislative frameworks within the South African labour law context. Labour law scholars should benefit from reading this publication – and it should stimulate further discussion regarding the very topical issue of the right to strike and all the various facets of this fundamental human right.