

# Laws Against Strikes

The South African Experience  
in an International and  
Comparative Perspective

edited by  
**Bob Hepple**  
**Rochelle le Roux**  
**Silvana Sciarra**

**Labour  
Law**

IN NATIONAL, INTEGRATED AND  
TRANSNATIONAL LEGALS SYSTEMS

Book series founded by Giuseppe Pera  
Edited by Franco Liso, Luca Nogler  
and Silvana Sciarra

**FRANCOANGELI**

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# Labour Law

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TRANSNATIONAL LEGALS SYSTEMS

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The process of integration, triggered by globalisation of financial and capital markets, has led labour law to rethink its values and its legal foundations. The increasing integration between national and supranational legal systems, on the one hand, and the emergence of new transnational relations, on the other, needs to be identified, understood and regulated through binding and non-binding legal instruments.

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In addition, this book series seeks to contribute to a conceptual and intellectual renewal of our discipline, which has been, and remains, at the core of the Italian academic general debate. The editors place a great weight on the quality of the scientific contributions which will be assessed by means of rigorous and impartial criteria of academic excellence.

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This book was peer-reviewed prior to publication by two independent experts in the field of labour law.

*Grafica della copertina:* Elena Pellegrini

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## *Preface*

This book examines the right to strike in periods of socio-economic crisis, and brings together a group of twelve South African, Italian and British legal scholars. The idea for the book was initially conceived during informal conversations at the inaugural conference of the Labour Law Research Network (LLRN) in Barcelona in June 2013. As testament to the objectives of the LLRN, the book brings together different generations of scholars and will be published in time for the second conference of the LLRN, to be held in Amsterdam in June 2015.

While the massacre of 34 mineworkers on 16 August 2012 during strike action at the Marikana platinum mine in South Africa forms the backdrop to this book, this book is not about Marikana. Rather, in this book Marikana represents a tragic metaphor for the need to revisit strike laws, not only in South Africa, but also internationally. Consequently, all the chapters aim to examine the challenges highlighted by Marikana and recent events in Europe from a comparative legal perspective, and in light of the composition of the team of authors, takes particular note of legislative and jurisprudential developments in South Africa and Italy.

The themes pursued in this book were explored and strengthened during a workshop held in Cape Town in November 2014, which most of the authors were able to attend. We thank the authors for their participation and their contributions, and record our gratitude to the University of Cape Town (UCT) Research Committee, the Institute of Development and Labour Law at UCT, and the Dean of the Faculty of Law, UCT for their financial support in realising the workshop. We also thank Drs Emma Fergus, Shane Godfrey and Vimal Ranchhod for their presentations at the workshop, and Ms Faldielah Khan for her administrative support before and during the workshop. Finally, we thank the copy editor, Ms Linda van de Vijver, and the publisher, Franco Angeli, for their assistance and support in finalising the manuscript.

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January 2015



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**Sir Bob Hepple**, QC, FBA is Emeritus Master of Clare College and Emeritus Professor of Law at the University of Cambridge. He was a Fellow of the Stellenbosch Institute of Advanced Study in 2011, and an Honorary Professor of Law at UCT from 1999 to 2005. He has been awarded honorary doctorates in law by the University of the Witwatersrand, UCT, University College London, the University of Kent and the Università degli Studi di Bari. He was a member of the Ministerial Team that drafted the South African Labour Relations Act 66 of 1995.

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## *Abbreviations and Acronyms*

ACHPR	African Commission on Human and Peoples' Rights
AMCU	Association of Mineworkers and Construction Union
ANC	African National Congress
AZR	Reports of federal labour court
<i>BJPolS</i>	British Journal of Political Science
BLLR	Butterworths Labour Law Reports
<i>BOE</i>	Boletín Oficial del Estado
BRICS	Brazil, Russia, India, China, South Africa
BSA	Business South Africa
<i>Canadian Lab &amp; Emp</i>	Canadian Labour & Employment Law
Cass. (Corte di Cassazione)	Italian Supreme Court of Civil Law
Cass.soc	Chambre sociale de la Cour de cassation, Supreme Court, Social Chamber
CC	Constitutional Court
CC.OO	Confederación Sindical de Comisiones Obrera
CCAS	ILO Conference Committee on the Application of Standards
CCMA	Commission for Conciliation, Mediation and Arbitration
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CFA	ILO Governing Body Committee on Freedom of Association
CGIL	Confederazione Generale Italiana del Lavoro / General Confederation of Italian Workers
CISL	Confederazione Italiana Sindacato Lavoratori / Italian Confederation of Workers' Unions

CJEU	Court of Justice of the European Union
CNS	Cartel ALFA Confederația Națională Sindicală 'Cartel ALFA'
CODESA	Convention for a Democratic South Africa
CoG	Commission of Guarantee
Corte cost.	( <i>Corte Costituzionale</i> ) Italian Constitutional Court
COSATU	Congress of South African Trade Unions
CSVR	Centre for the Study of Violence and Reconciliation
<i>D&amp;L</i>	Rivista critica di diritto del lavoro
DGB	German Federation of Trade Unions
DLR	Dominion Law Reports
DLRT	Spanish Legislative Decree on Employment Relations of 1977
EC	European Commission
ECB	European Central Bank
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights 1950 (as amended)
ECR	European Court Reports
ECSR	European Committee of Social Rights
EHRC	Equality and Human Rights Commission
<i>ELL</i>	International Encyclopaedia for Labour Law and Industrial Relations
ESC	Essential Services Committee
ETUC	European Trade Union Confederation
EU	European Union
FFCC	ILO Fact-Finding Conciliation Commission
GENOP	Public Power Company (PPC) Union
<i>Giur Cost</i>	Giurisprudenza costituzionale
GSEE	General Confederation of Greek Workers
HSE	Health and Safety Executive
ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966
ICFTU	International Confederation of Free Trade Unions
ICJ	International Court of Justice
IDLL	Institute of Development and Labour Law, University of Cape Town
<i>IJCLLIR</i>	International Journal of Comparative Labour Law and Industrial Relations

ILC	International Labour Conference
<i>ILJ</i>	Industrial Law Journal (published by Juta, South Africa)
<i>ILJ</i> [UK]	Industrial Law Journal (published by Oxford University Press)
ILLR	International Labour Law Reports
ILO	International Labour Organisation
<i>Int'l Lab Rev</i>	International Labour Review
IMF	International Monetary Fund
IOE	International Organisation of Employers
ITUC	International Trade Union Confederation
<i>JESP</i>	Journal of European Social Policy
Labour AD	AD-Arbedsdomstolens Domar
LAC	Labour Appeal Court
LC	Labour Court
LDTUM	Greek Law regarding Democratisation of Trade Union Movement, n. 1264/1982
LLRN	Labour Law Research Network
LO	Swedish Confederation of Trade Unions
LRA	Labour Relations Act 66 of 1995
LRAA	Labour Relations Amendment Act 6 of 2014
LSD	Romanian Law on Social Dialogue, n. 62/2011
LSSPE	Italian Law on Essential Public Services, n. 146/1990
<i>MGL</i>	Massimario di giurisprudenza del lavoro
NATO	North Atlantic Treaty Organisation
NEDLAC	National Economic Development and Labour Council
NUM	National Union of Mineworkers
NUMSA	National Union of Metalworkers of South Africa
PNO	Panhellenic Seamen's Federation
RDO	Rock drill operator
<i>RDS</i>	Rivista de derecho social
<i>RL</i>	Relaciones laborales
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SANDU	South African National Defence Union
SAP	South African Police (organisational name during apartheid)
SAPS	South African Police Service (organisational name after apartheid)
SCA	Supreme Court of Appeal

SCC	Supreme Court of Canada
S.C.R	Canada Supreme Court Reports
STC	Spanish Tribunal Constitucional
SMU	Social Movement Unionism
TC	( <i>Tribunal Constitucional</i> ) Spanish Constitutional Court
TCO	Central Organisation of Salaried Employees (Sweden)
TCT	( <i>Tribunal Central de Trabajo</i> ) Spanish Central Court of Employment
TFEU	Treaty on the Functioning of the European Union
TS	( <i>Tribunal Supremo</i> ) Spanish Supreme Court of Civil Law
WESoc	Work Employment and Society
UCT	University of Cape Town
UGT	Union General de Trabajadores de España
UIL	Unione Italiana del Lavoro / Union of Italian Workers
UK	United Kingdom
UN	United Nations
US	United States of America
UWC	Ulster Working Council

## *Introduction*

Bob Hepple, Rochelle le Roux and Silvana Sciarra

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 16 August 2012. South Africa's democratic Constitution, which guarantees the right to strike, together with its Labour Relations Act 66 of 1995 (LRA), which gives effect to that right, were generally regarded as a model for democratic societies. After a period of stability and a relatively low level of strikes from 1995 until 2006,<sup>1</sup> there has been a massive resurgence of strike activity, often accompanied by violence on the part of strikers<sup>2</sup> and the use of replacement labour by employers. In 2007, 9 million working days were lost due to strikes, matching the peak of anti-apartheid protest in 1987, when a similar number of working days were lost. The resurgence was largely due to public-sector strikes, including some damaging industrial action in essential services. A decline in strikes in the period 2011 to 2013 proved to be short-lived, with intense and lengthy strikes in a few industries, including platinum mining, engineering and metalworking, in 2014.

Although the immediate issue in 85 per cent of these strikes was the demand for higher wages, most commentators agree that the underlying causes reflect a deep social crisis in the new South Africa. Strikes are often linked to community protests about the failure of government to deliver

<sup>1</sup> H Bhorat and D Tseng 'South Africa's strike date revisited, 2 April 2014' (<http://www.brookings.edu/blpgs/Africa-in-focus/posts/2014/03/31>) found that in the period 1999 to 2008 South Africa ranked third among the BRICS (Brazil, Russia, India, China, South Africa) countries in the number of working days lost per 1,000 workers, and sixth among seven non-BRICS countries with a similar economies to South Africa.

<sup>2</sup> A report by the South African Institute of Race Relations reveals that between 1999 and 2012 there were 181 deaths during strike-related activity, 313 injuries and 3,058 people were arrested for public violence in the course of strikes (<http://irr.org.za/reports-and-publications/media-releases/Strikes%20violence.pdf/at.-download/file>).

public services. Extreme poverty and growing economic inequality persist, despite the end of apartheid.<sup>3</sup> As Gavin Hartford has pointed out, this situation was made intolerable for the low-paid striking rock drill operators (RDOs) in the platinum mines–

by the additional financial and work cycle burdens arising from the migrant labour system. These factors propelled the strike action. Once begun, the institutions of collective bargaining comprising both company and union structures and processes were found wanting in their ability to address the root causes of the social crisis.<sup>4</sup>

The RDOs were in a dispute with their employer, demanding a doubling of their wages, and also in a dispute with their union, the National Union of Mineworkers (NUM). The NUM had resisted a differential increase that would have benefited the RDOs, and had instead agreed upon an 18 per cent increase for higher-paid miners, who were mainly first-line supervisors of mining work teams. The negotiators were themselves well-paid shop stewards and union officials. The RDOs left the NUM and joined the breakaway Association of Mineworkers and Construction Workers Union (AMCU) at the Implats mine and later at the Marikana mine. The strike was not backed by the NUM, which was the recognised union and, like about 50 per cent of all strikes in South Africa, was unprotected by the law. The end result of these disputes, after the deaths of three miners at Implats and 34 miners at Marikana, was that management agreed to increases for the RDOs.<sup>5</sup>

Thomas Piketty comments thus on the Marikana dispute:

This episode reminds us, if we need reminding, that the question of what share of output should go to wages and what share to profits – in other words, how should the income from production be divided between labour and capital? – has always been at the heart of distributional conflict ... The Industrial Revolution exacerbated the conflict between capital and labour, perhaps because production

<sup>3</sup> H Bhorat and C van der Westhuizen 'Economic growth, poverty and inequality in South Africa: The first decade of democracy' ([http://dev.absol.co.za/Presidency/docs/reports/15\\_year\\_review/social/economic\\_pro\\_growth.pdf](http://dev.absol.co.za/Presidency/docs/reports/15_year_review/social/economic_pro_growth.pdf)).

<sup>4</sup> G Hartford 'The mining industry strike wave: What are the causes and what are the solutions?' in T Jika et al *We are Going to Kill Each Other Today: The Marikana Story* (2013) 158 171.

<sup>5</sup> According to the company the average wage of miners was R5,400 per month, and the rise granted was R750 per month [1 ZAR=0.2 Euro]: Lonmin statement 12 August 2012 ([www.lonmin.com](http://www.lonmin.com)). For a fuller account of the events, see Jika et al (n 4). At the time of writing, the report of the Marikana Commission of Inquiry, chaired by Judge Ian Farlam, is awaited.

became more capital intensive than in the past (making use of machinery and exploiting natural resources more than ever before), and perhaps too, because hopes for a more equitable distribution of income and a more democratic social order were dashed.<sup>6</sup>

The Marikana tragedy marks a failure of the new democratic order in South Africa and a failure of voluntary collective bargaining to deliver an equitable distribution. Piketty points out that the violence has precedents in earlier instances in nineteenth-century Europe and early twentieth-century America. He asks, ‘Does this kind of violent clash between labour and capital belong to the past, or will it be an integral part of 21<sup>st</sup> century history?’<sup>7</sup> To answer that question, we need to examine what went wrong with labour relations in South Africa and what can be done to stabilise and improve those relations. Were Webster and Simpson right when they argued in 1990 ‘that attempts to refine collective bargaining so as to institutionalise conflict at the workplace could, at best, only have a limited effect in preventing violence at work if this was not accompanied by the broader empowerment of the black working class communities as a whole’?<sup>8</sup> More broadly, the use of violence as a tactical strategy by strikers ‘underscores the fact that labour is still only marginally incorporated in the polity.’<sup>9</sup>

In the European Union (EU) the right to strike has been at the centre of the complex and controversial case law of the Court of Justice (CJEU), which started with the rulings in *Viking* and *Laval* in 2007.<sup>10</sup> The court held that the right to strike must be balanced against fundamental market freedoms, in particular freedom of establishment and freedom to provide services (now art 49 and art 56 of the Treaty on the Functioning of the European Union (TFEU)). Although violence was not a factor in those cases, underlying issues of social dumping and wage competition revealed widespread social unease, which prompted the organisation of strikes by large and representative trade unions. These actions went beyond mere symbolism. They brought into public focus the problem of disequilibrium between economic freedoms and fundamental social rights.

While the impact of these controversial decisions was still under the lens of commentators, the right to strike was also being reassessed by the

<sup>6</sup> T Piketty *Capital in the Twenty-First Century* (2014) 39.

<sup>7</sup> *Ibid.*

<sup>8</sup> E Webster and G Simpson ‘Crossing the picket line: Violence in industrial conflict – the case of the Afcoll strike’ (1990) 4 *Industrial Relations Journal of South Africa* 11.

<sup>9</sup> D Grant and M Wallace ‘Why do strikes turn violent?’ (1991) 96 *American Journal of Sociology* 1131.

<sup>10</sup> See chapter 1 and also chapter 10.

European Court of Human Rights, which appeared to offer a new broad interpretation of the freedom of association guaranteed by art 11 of the European Convention of Human Rights (ECHR) to include the right to strike. At the same time, the employers' group in the International Labour Organisation (ILO) was calling into question the long-established interpretations by ILO committees of the rights of association and collective bargaining as including the right to strike.<sup>11</sup> This explains the attention we pay in this book to the role played by the expert committees of the ILO and by the courts in interpreting international, regional and national standards. The right to strike and its exercise under different legal regimes continues to be pivotal to understanding the exercise of collective power in redressing social and economic inequalities.

Furthermore, since 2008, there has been a different type of social and economic crisis in Europe, which has also called into question the adequacy of labour laws and revealed the lack of power of organisations representing collective interests to significantly influence macro-economic policy. Countries in the Eurozone had to adopt austerity measures as a condition for bail-outs by the EC-ECB-IMF 'troika'.<sup>12</sup> Countries have put their faith in privatisation, the retrenchment of the welfare state, the decentralisation of wage bargaining and the deregulation of employment rights.<sup>13</sup> The response to the financial crisis, which started in the USA and Britain in 2008, and the sovereign-debt crisis in the Eurozone, which began in 2010 and is still seriously affecting some member states, has been drastic cuts in public expenditure and the introduction of austerity programmes aimed at reducing the deficit. There has been the worst recession since the 1930s, accompanied by workplace closures, freezes or cuts in wages, longer working hours, greater workloads and diminishing job security. 'Emergency' reforms are deconstructing labour law in some parts of the Eurozone.<sup>14</sup>

<sup>11</sup> See chapter 2 and also chapter 10.

<sup>12</sup> See chapter 8.

<sup>13</sup> See K Armingeon and L Baccaro 'The political economy of the sovereign debt crisis: The limits of internal devaluation' (2012) 41 *ILJ* [UK] 254; A Koukiadaki and L Kretsos 'Opening Pandora's Box: The sovereign debt crisis and labour market deregulation in Greece (2012) 41 *ILJ* [UK] 276; and S Dahan 'The EU/IMF financial stabilisation process and its implications for labour law and social policy' (2012) 41 *ILJ* [UK] 305.

<sup>14</sup> See S Clauwaert and I Schömann *The Crisis and National Labour Law Reforms* (ETUI Working Paper 2102.04); M-C Varniol et al (eds) *Quel droit social dans une Europe en crise?* (2012); C Kilpatrick and B de Witte (eds) 'Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges' EUI Department of Law Research Paper No. 2014/05.

It is not surprising, therefore, that after two decades in which the number of working days lost due to stoppages declined dramatically from the high points of the 1970s and 1980s, we have been experiencing general strikes and mass demonstrations from Dublin to Athens, from Brussels and Paris to Madrid and Rome, protesting against austerity measures, cuts to public services, changes in pensions and severe job losses resulting from the financial crisis. As the ideology of market fundamentalism becomes increasingly dominant in the global economy, the right to strike is in danger of being regarded as inferior to the free movement of capital, goods and services in the EU. The decline in collective bargaining and trade unions has led employers to question the place of the right to strike in both international and national contexts. For its part, the European Left, as Alain Supiot points out, has been unable to propose a successful alternative to neo-liberalism. This, he argues, is because ‘the price of employment protection was ... a depoliticisation of work itself.’<sup>15</sup> The focus of the labour movement has been on compensating workers for submitting to managerial control, rather than on changing the nature and organisation of work.

The removal of trade barriers, the digital revolution and the mobilisation of the reserve army of workers from emerging nations have undermined the foundations of the welfare state (including salaried employment and public services) and allowed labour to once again be treated as a commodity. This Industrial Revolution, like the two preceding ones, disarms previous forms of organisation and collective action and requires a new institutional framework to be invented to ensure that technological advances support social progress.<sup>16</sup>

Thus in both a young democracy in a developing country, like South Africa, and in the mature democracies of post-industrial Europe there is a search for new forms of collective solidarity that could reassert countervailing workers’ power, albeit in very different contexts.

These are the reasons why in this book we examine the right to strike in periods of socio-economic crisis, bringing together the contributions of South African, Italian and British legal scholars.

The book aims to contribute to the debates on this issue, by comparing, where appropriate, the operation of the right to strike in South Africa with its operation in countries in the EU. The choice of Italy as the main European comparator is partly dictated by the composition of our group, which includes three Italian legal scholars and five South Africans, and partly by the

<sup>15</sup> A Supiot ‘Towards a European policy on work’ in N Countouris and M Freedland (eds) *Resocialising Europe in a Time of Crisis* (2013) 21.

<sup>16</sup> *Ibid.*