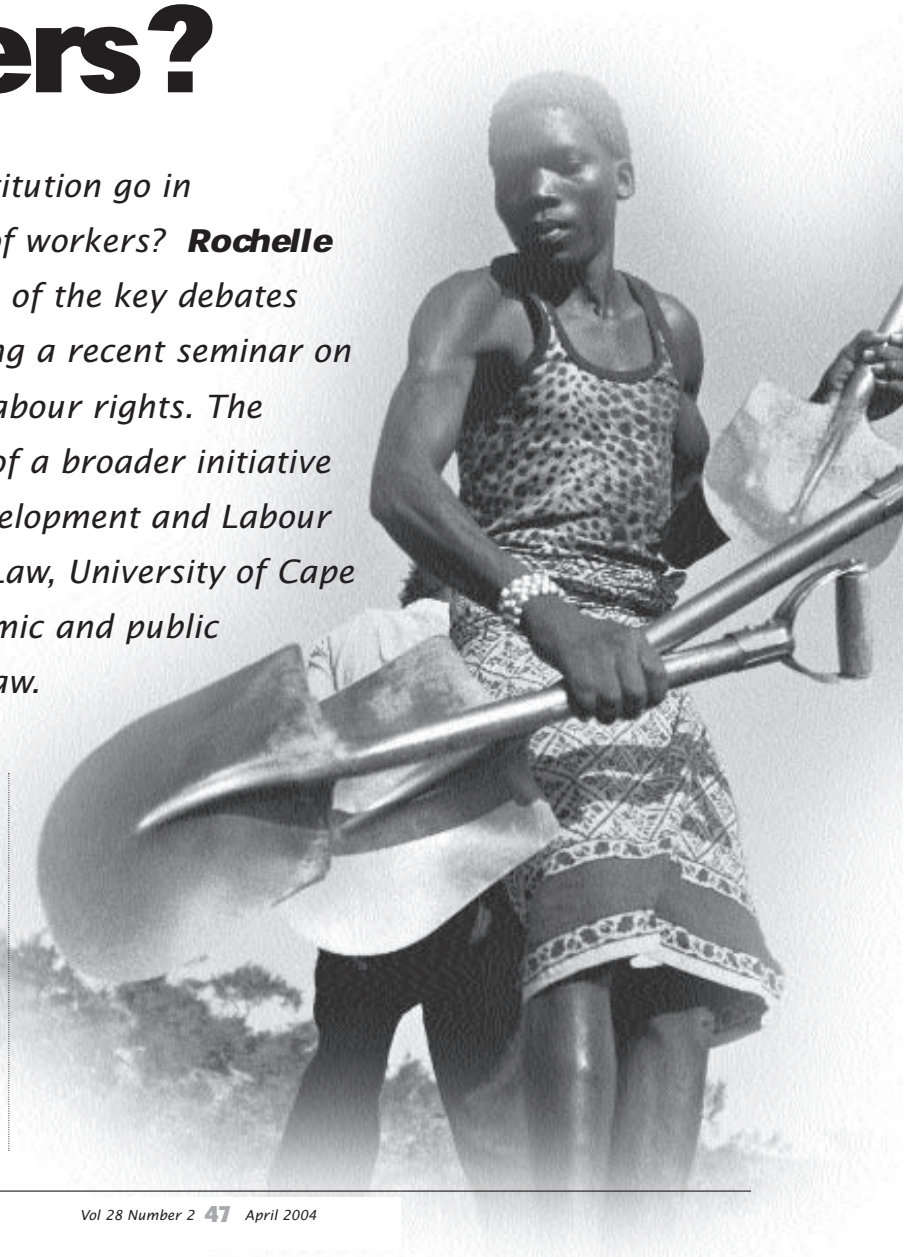
Does the Constitution **fail workers?**

How far can the Constitution go in protecting the rights of workers? ***Rochelle le Roux*** *outlines some of the key debates which took place during a recent seminar on the Constitution and labour rights. The seminar formed part of a broader initiative by the Institute of Development and Labour Law (IDLL) Faculty of Law, University of Cape Town, to revive academic and public awareness of labour law.*



The seminar on 'Constitutionalisation of Labour Rights' was presented by emeritus professor of law and master of Clare College, University of Cambridge Sir Bob Hepple and professor of law and political science. president emeritus, York University, Harry Arthurs.

While Arthurs focused on the role of constitutions in general in the protection of labour rights, using the Canadian Charter as a point of departure, Hepple's presentation

revolved around the right to strike, with specific reference to two recent South African judgements.

Before dealing with their presentations, it is perhaps opportune to refer to a recent comment by Landman J that the Constitutional right to fair labour practices (s 23) is far too wide to be contemplated by a single statute such as the Labour Relations Act 66 of 1995 (the LRA). The Constitution remains the basis upon which relief can be sought in a competent court in instances where the LRA does not give effect to s 23. Both presentations cast a shadow on this belief.

Arthurs expressed extreme scepticism as to whether constitutional adjudication can advance the protection of labour rights. In respect of, for instance, equality in the workplace, he claimed that the significant progress made to address issues of workplace discrimination against women and homosexuals was largely due to changing social attitudes, the mobilisation of political pressure and interventions by human rights agencies and not by constitutional adjudication. With reference to the impact of the Canadian Charter he commented that:
'Some of my recent research suggests that transformation has been quite modest and not always in a positive direction. The wage gap between men and women has been narrowed a little; but very little, the wage gap between recent immigrants and other workers has actually grown. There are a few more women and minority group members in managerial positions, but the percentages are still derisory. Unemployment rates for aboriginal peoples and people of colour remain radically higher than the rates for white workers in virtually all categories of employment. Disabled people continue to suffer discrimination… And so on.'

With reference to South Africa, while acknowledging the different nature of the Canadian Charter, Arthurs argued that the prospects of constitutionalising labour rights in South Africa are no better since a constitution (and judicial proclamations in terms of it) can do very little to transform the deep structures of a political economy. Furthermore, constitutional adjudication is powerless to address the broader social dilemmas behind labour litigation. Instead, labour rights are dictated and shaped, not by the lawyer's constitution, but by a 'real' constitution, which represents the economic realities of the day rather than the social and ethical values embodied in the lawyer's constitution.

The right to strike

Hepple's presentation dealt with the judgements of the Constitutional Court in *Xinwa & others v Volkswagen of SA (Pty) Ltd* and in *National Union of Metalworkers of South Africa v Bader Bop (Pty) Ltd.*

In the former matter, 1 300 employees who participated in a strike in support of shop stewards who had been suspended by their union were dismissed. Their gripe had been with their union and not the employer. On the basis that this action did not fall within the ambit of a strike as defined in s 213 of the LRA, which requires that it must be for purposes of remedying a dispute of mutual interest between the employer and the employees, the 'strike' was not regarded as a strike within the meaning of the definition of s 213. The Labour Court found the dismissals to be substantively fair, but procedurally unfair and ordered compensation (since reinstatement is inappropriate in cases of procedural

unfairness alone). The Labour Appeal Court found the dismissals to be both procedurally and substantively fair and the Constitutional Court, approached by a lone applicant for leave to appeal, dismissed the matter.

Hepple's discontent with this approach is twofold:

Firstly, he expressed surprise that no weight was given to the fact that the internal union dispute was not regarded as a matter of mutual interest between the employer and the employees in view of the fact that the dissent within the union was the result of the union's agreement with the management to accept round-the-clock working six days a week.

Secondly, while he acknowledged that the right to strike for purposes of collective bargaining can be limited by legislation, he was most surprised that the extent to which the right to strike exists beyond collective bargaining was never debated:

' …the comparatist would expect the court to go on to interpret the Constitution to ask whether the Constitution protects the individual in respect of stoppages of work for purposes other than collective bargaining. One relevant argument for a wider interpretation of the constitutional "right to strike" is that the LRA was enacted before the final Constitution, and the final Constitution dropped the reference to collective bargaining. Had the meaning of the "right to strike" in 23(2) of the Constitution been considered as a broader issue, a different outcome may have been reached, or at least a different line of reasoning would have been appropriate.'

The contemplation of a broader approach would have necessitated consideration of international law and, more particularly, conventions of the International Labour Organisation (ILO) such as ILO Convention 87 on Freedom of Association and the Right to Organise and ILO Convention 98 on the Right to Organise and Collective Bargaining, which have been interpreted to recognise strikes not directed at the employer: 'It seems that the Constitutional Court… failed to appreciate this constitutional issue. Had the Court decided that there is a wider right for the individual than that prescribed by the LRA, it would have had to go on to decide whether the employer's response in dismissing the workers was reasonable or justified, or in the ILO's terms was "disproportionate to the seriousness of the violations involved".'

Hepple concluded that the failure by the Constitutional Court and the Labour Courts to consider a broader approach offers the employee no added protection beyond that of ordinary labour law.

Hepple proceeded to consider the use of constitutional principles in *National Union of Metalworkers of South Africa v Bader Bop (Pty) Ltd* to ensure the freedom of trade unions. The question in this case was whether a minority union and its members are entitled to strike lawfully to persuade an employer to recognise its shop stewards. The Labour Court dismissed the application to interdict such a strike, but the Labour Appeal Court granted the interdict. The employer's argument was essentially that a minority union had no right to strike to demand organisational rights, such as the recognition of shop stewards. The Constitutional Court held that this interpretation (by the Labour Appeal Court) constituted a limitation of the constitutional right to strike and set the interdict aside. Hepple's satisfaction with this judgement stems from the approach taken by O'Regan J in consulting international law, and more particularly, ILO Conventions, to establish the meaning of provisions of the LRA where they are capable of more than one interpretation. With the help of ILO Conventions, the judge concluded that there is nothing in the LRA that prevents minority unions from striking in an effort to achieve recognition of shop stewards. However, Hepple was less complimentary about the approach taken by the majority in the Labour Appeal Court: 'The recourse to constitutional principle as an aid to interpretation by O' Regan made it possible to resolve these problems in a more satisfactory way than was done in the tortuous arguments of the majority in the LAC… Although the LAC judges may have been "alert" to the constitutional issue, it is only in the dissent of Davis AJA that we find a clear exposition of the issues of policy.'

Conclusion

While Arthurs questioned the ability of any constitution to adequately protect the rights of employees, Hepple succeeded in bringing this doubt closer to home. Many may say that, despite these misgivings, it is still better to have a constitution than not to have one. Furthermore, ten years of democracy may perhaps be too short a time to judge whether this scepticism has merit, but hopefully the words of the speakers will serve as a timeous reminder to the labour courts and their custodians that they, in the words of Hepple, 'have the unfulfilled opportunity to promote the objectives of the LRA by more robust policy discourse, using the resources of international law and comparative law.'

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