

Comments regarding the

Labour Relations Amendment Bill [B 32 – 2017]

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A) INTRODUCTION

About the Centre for Applied Legal Studies

1. CALS is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand. CALS is committed to the protection of human rights through the empowerment of individuals and communities and the pursuit of systemic change.
2. CALS' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. CALS practices human rights law and social justice work with a specific focus on five intersecting programmatic areas, namely Basic Services, Business and Human Rights, Environmental Justice, Gender, and the Rule of Law. It does so in a way that makes creative use of the tools of research, advocacy and litigation, adopting an intersectional and gendered understanding of human rights violations.

Summary of submissions

3. In these submissions we will argue that proposed amendments to the Labour Relations Act, 66 of 1995 ('the Act') contained in the Labour Relations Amendment Bill [B 32 – 2017] ('the Bill') entail a significant restriction of the right of workers to strike and for trade unions to determine their own administration, programmes and activities guaranteed in Sections 23 (2) (c) and (4) (a) of the Constitution of South Africa respectively. We will, first, set out the significance of the right to strike for the Constitutional imperative of transformation. In so doing we show, with reference to the anti-apartheid struggle and the global history of democratisation, that firstly, the strike lies at the centre of workers' power and secondly, that the challenge posed by workers' struggles played an instrumental role in democratisation. Secondly we shall illustrate that regulation of the right to strike and particularly the requirement for a secret ballot has been a part of efforts to reduce the power of organised labour through increasing the barriers to strike action. Thirdly we shall examine the effect of the restrictions on the right to picket on the right to protest. Fourthly we shall argue that a restriction of the right to strike could have a disproportionately negative impact on women.

B) THE RELEVANT PROVISIONS

Secret ballot for strikes

4. Clause 8 of the Bill provides for the insertion of subsection 95 (9) which provides that 'for the purposes of subsection (5) a ballot includes any system of voting by members that is recorded in secret.' The effect is to introduce a requirement of a secret ballot prior to any decision by a trade union to embark on strike action.

Regulation of picketing

5. Clause 4 of the Bill seeks to regulate picketing by amending Section 69 of the Act. The effect is to prohibit picketing in the absence of picketing rules. These rules may be developed by collective agreement, an agreement during the process of conciliating a dispute or in the absence of an agreement, by the CCMA commissioner when they issue a certificate of an unresolved dispute in terms of section 64 (1) (a) of the Act.

C) THE IMPORTANCE OF THE RIGHT TO STRIKE IN THE REALISATION OF TRANSFORMATION

6. Section 23 of the South African Constitution guarantees everyone the right to fair labour practices. This crucially includes the right of every worker to strike as well as the right of each trade union to 'determine its own administration, programmes and activities.' The significance of this right will be outlined in the following paragraphs.
7. The Constitutional imperative of transformation, as defined by Albertyn & Goldblatt and endorsed by the former Chief Justice, the late Justice Pius Langa, is 'a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines.'¹ In the context of South Africa this means the dismantling of the legacy of colonialism and apartheid which was founded upon the exploitation of workers as well as conquest and dispossession of land.
8. The right to strike is pivotal to the realisation of the transformation imperative. The starting point is that in a capitalist society, such as South Africa, in which production is organised into a class of owners (employers) and wage labourers (workers), there is an inherent imbalance of power between employers on the one hand and workers on the other. However workers have at their disposal a powerful bargaining tool, namely the ability to take a collective decision to withdraw their labour, thereby bringing production to a halt (the strike).²
9. Workers exercise this power to ensure improved wages as well as fairer conditions of employment. Better wages can in turn translate into the realisation of multiple other rights guaranteed in the Constitution including the right to equality, access to adequate housing, and healthcare, food and water contained in Sections 9, 26 and 27 respectively.
10. Further, greater power in the workplace and improved wages translates into greater social and political power. Successes achieved by trade unions will lead to growing membership and therefore increased ability to shape public opinion and policy. In a society characterised by class, race and gender inequalities, of which workers are on the receiving end, a strong labour movement is vital to overcoming these inequalities. Increasing the hurdles to strike action reduces the future prospects for a strong labour movement.

¹ C Albertyn & B Goldblatt 'Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 SAJHR 248, 249. Cited with approval in Justice Pius Langa 'Transformative Constitutionalism' (2006) 17 Stellenbosch LR 351, 352.

² V Chibber 'Why the Working Class' *Jacobin* 13 March 2006.

11. There is historical evidence that power to strike, together with the broader social bargaining power afforded to workers as a class, has translated into workers, through trade unions and/or workers' political parties, playing a significant role in transforming societies in a socially just manner. For example, there is a significant body of literature showing a link, across jurisdictions, between the pressure for social change brought by trade unions and parties and the realisation of universal adult franchise.³
12. The contribution of workers and trade unions to the defeat of apartheid exemplifies this role. This includes the role played during the last period of apartheid. The regeneration of black workers' activity following state repression began in the 1970s and by the 1980s manifested in heightened organisation, including the formation of COSATU, and strike action.⁴ One of the most important events was the mineworkers organised by the National Union of Mineworkers (NUM) in which around 360 000 mine workers downed tools for three weeks in what was the longest wage strike to date.⁵ The growth in strike action, together with growing resistance by black communities, convinced the business sector in particular that the maintenance of apartheid was impairing profitability, and laid the groundwork for the negotiations process and the transition to a constitutional democracy.

D) THE AMENDMENT BILL IMPAIRS THE RIGHT TO STRIKE

13. The combined effect of the amendments is to reduce the autonomy of trade unions as well as to make it more burdensome to hold a protected strike and picket.
14. Of particular significance is the introduction of a requirement that the vote by the members of trade unions on whether to embark on strike action be by secret ballot. This represents an incursion into the organisational autonomy of trade unions. It undermines the open, deliberative and collective nature of decision-making in the trade union movement. It provides an additional legal ground employers can use to deny the protected nature of the strike and initiate the retrenchment of striking workers. As Runciman writes, the introduction of the amendments will effectively:

‘delay and inhibit the rights of workers to embark on protected strike action, the compulsory introduction of secret ballots individualises an otherwise collective decision, furthermore, it provides employers with the opportunity to interdict strikes before they have even begun, based on legal challenges to the reason for which the secret ballot was conducted’⁶

³ Examples of this literature include: ‘A Przeworski ‘Conquered or granted? A History of Suffrage Extensions’ (2009) 39 *British Journal of Political Science* 291; G Therborn, ‘The Rule of Capital and the Rise of Democracy’ (1977) 103 *New Left Review* 3.

⁴ H Marais *South Africa: limits to change: the political economy of transition* 2nd ed (2001) 50.

⁵ South African History Archive ‘the National Union of Mineworkers start South Africa’s longest wage strike’ accessed at <http://www.sahistory.org.za/dated-event/national-union-mineworkers-start-south-africa%26atilde%3B%C3%82%C2%A2%C3%83%C2%A2%C3%82%E2%80%9A%C3%82%C2%AC%C3%83%C2%A2%C3%82%E2%80%9E%C3%82%C2%A2s-longest-wage-strike>.

⁶ C Runciman ‘New Amendments to Labour Legislation are Likely to Increase Unprotected Strikes’ *Businesslive* (8 February 2018). Available at <https://www.businesslive.co.za/bd/opinion/2018-02-08-new-amendments-to-labour-legislation-are-likely-to-increase-unprotected-strikes/>.

15. There is historical precedent for the use of secret strike ballots as part of a campaign to weaken trade unions. The Conservative Party government headed by former United Kingdom Prime Minister Margaret Thatcher, sought to weaken the trade union movement in the country, an intention which is documented in cabinet papers released in 2013.⁷ One of the measures taken by the government was the requirement of secret strike ballots, in the Trade Union Act of 1984.⁸
16. We therefore anticipate that the Bill, if it becomes law, will be used by employers to take punitive action against workers for embarking on strike action. This could have a chilling effect on the exercise of the right to strike. The effect could be the weakening of the bargaining power of workers, and ultimately the hampering of the Constitutional imperative of transformation.

E) THE AMENDMENT BILL IMPAIRS THE RIGHT TO PROTEST

17. Section 17 of the Constitution provides that everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions. Further, there is legislation that gives effect to this constitutional right, including the Regulation of Gatherings Act⁹ ('the RGA') and the Labour Relations Act¹⁰ ('the LRA'). The purpose of the RGA is to regulate the holding of public gatherings and demonstrations at certain places whilst the LRA regulates the right to strike, in conformity to the Constitution.
18. In a recent 2018 judgment, *Mlungwana and Others v The State and Others*, the Western Cape High Court held that the criminalisation of a gathering of more than 15 people on the basis that no notice was given, violates section 17 of the Constitution as it deters people from exercising their fundamental constitutional right to assemble, peacefully unarmed.¹¹ Essentially, the arguments that were made in favour of this ruling is that the procedural requirement (i.e. submitting a notice prior to gathering) and the fear of contravening those provisions, ultimately deters people from exercising their constitutional right to protest. We submit that the proposed amendments to the LRA, in particular the provisions on the suggested procedures on picketing and striking, has the same effect of deterring people from exercising their right to protest.
19. The justification that the Department of Labour provides for the amendments to the LRA is that strike action and, particularly, violent and protracted strike action is at an all-time high.¹² This however is contested. Figures from the department's annual Industrial Action reports show that, over a 10-year period, there has been a decline in the number of working days lost, even including the number of working days lost during the 2010 public

⁷ 'National archives: Margaret Thatcher wanted to crush power of trade unions' *The Guardian* 1 August 2013. Accessed at <https://www.theguardian.com/uk-news/2013/aug/01/margaret-thatcher-trade-union-reform-national-archives>.

⁸ Sections 10 and 11 of the Trade Union Act. Accessed at <http://www.legislation.gov.uk/ukpga/1984/49/enacted>

⁹ Regulation of Gatherings Act, 1993 (Act No. 205 of 1993).

¹⁰ The Labour Relations Act (LRA), Act 66 of 1995.

¹¹ (A431/15) [2018] ZAWCHC 3 (24 January 2018).

¹² Runciman (note 6 above).

sector strike and the 2014 platinum strike.¹³ Further research shows that between 1997 and 2013, 86% of all labour-related protests were orderly.¹⁴ It cannot be that there can be such amendments to the LRA (with the effect of further limiting the exercise of the right to protest), if they are premised on contested or inaccurate information.

20. This is a principle that was echoed in *South African Transport and Allied Workers Union and Another v Garvas and Others*¹⁵ where the court held that

*“[f]reedom of assembly is no doubt a very important right in any democratic society. Its exercise may not, therefore, be limited without good reason. The purpose sought to be achieved through the limitation must be sufficiently important to warrant the limitation.”*¹⁶

F) DISPROPORTIONATE IMPACT ON WOMEN OF RESTRICTING RIGHT TO STRIKE

21. The restriction of the right to strike is likely to have a disproportionate impact on women as it could hamper the pursuit of gender equality and contribute to the further silencing of women.

22. According to the International Labour Organisation, collective bargaining is essential for gender equality in the workplace.¹⁷ Traditional collective bargaining issues such as; equal pay, hours of work, leave, maternity leave and dignity in the workplace are issues that should be assessed from a gender perspective.¹⁸ In order for women workers to effectively participate in collective bargaining, they depend on associations such as trade unions.¹⁹

23. The International Monetary Fund acknowledges that suppressing rights to picket leads to increased inequality.²⁰ Here the Fund is speaking of the inequality of earnings but this inequality does not only operate between employers and employees but is gendered in so far as it will increase the inequality of women workers and male counterparts as well as women workers and employers. This is not only isolated to less earnings²¹, but also to increased violence and harassment in the workplace and less avenues to have these issues being heard and dealt with adequately in terms of the law. In light of this CALS will argue below that the limitation of the rights to strike and picket in fact further subjugates and silences women workers.

¹³ Ibid; Department of Labour annual Industrial Action Reports (2006-2016).

¹⁴ Runciman (note 6 above).

(2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC).

¹⁶ Ibid at para 33.

¹⁷ ABC of women workers' rights and gender equality. Accessed at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_087314.pdf.

¹⁸ Runciman (op cit).

¹⁹ Ibid.

²⁰ Ibid.

²¹ A Bosch 'Women are Still Paid Less than Men in South African Companies' *The Conversation* (11 August 2015). Accessed at <https://theconversation.com/women-are-still-paid-less-than-men-in-south-african-companies-45782>.

24. According to Nyman '[w]omen form a large proportion of the most vulnerable and marginalised of workers, being concentrated in non-permanent, part-time and seasonal jobs... Their income is seen as supplementary to their fellow male workers.'²² Nyman made this observation in 1997, just over 20 years ago, yet the vulnerability and marginalisation of women in general and in the labour sector specifically, has not changed.²³ Many struggles women experience in the workplace are arguably not experienced by men (or at least not to the same degree). This includes physical, emotional and economical violence (which remains rife despite provisions in our law dealing with work place harassment and sexual violence)²⁴, unequal pay, maternity leave issues and ignorance around women's unpaid care in the home.²⁵ When systems within the workplace fail women, such as failure of workplaces to provide a safe working environment free from violence, women become the victims. The experience of violence in this regard is two-fold as it comprises of the initial experience of the act of violence and secondly the violence a woman endures when she is not listened to or heard and nothing is done to remedy the situation.
25. Strike action or picketing remains a fundamental instrument for women to assert their agency and be heard in their plight for a change in intolerable working circumstances.

G) CONCLUSION

26. CALS thanks the portfolio committee for the opportunity to submit written comments. We would welcome further engagement on the Bill. For queries please contact Robert Krause on Robert.Krause@wits.ac.za or 011 717 8615.

²² R Nyman 'Labour Reform: Addressing Women's Needs?' (1997) 35 *Agenda* 6, 12.

²³ T Hochfeld et al 'How to make South Africa's public works programme work for women' *The Conversation* (14 June 2017). Available at <https://theconversation.com/how-to-make-south-africas-public-works-programme-work-for-women-79049>.

²⁴ Section 6(3) of the Employment Equity Act and SORMA. On the failure to act to prevent violence or remedy violence already committed, Lisa Vetten an independent gender researcher has stated that "few cases (of sexual harassment) have gone to the Commission for Conciliation, Mediation and Arbitration (CCMA) or the Labour Court. It seems that most women tolerate it or get a transfer". See T Davis 'South Africa: Even the Workplace is not Safe for Women' *GenderLinks* (8 December 2015). Available at <http://genderlinks.org.za/news/south-africa-even-the-work-place-is-not-safe-for-women-2015-12-08/>.

²⁵ Ferrant et al state that around the world women spend 2 to 10 times more time on unpaid care work than men. See G Ferrant 'Unpaid Care Work: The Missing Link in the Analysis of Gender Gaps in Labour Outcomes' (2014) *OECD Development Centre*, 1. Available at https://www.oecd.org/dev/development-gender/Unpaid_care_work.pdf.