

# Editorial

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The first issue of *Law, Development & Democracy (LDD)* is devoted to a subject that has been extensively debated over the last two years – the Labour Relations Act of 1995 (LRA). Is there anything to add to what has already been said?

As this is our first issue, a word or two about the contribution we hope to make and the approach we intend to follow – both in relation to this Act, and in future issues – might be in order.

*LDD* is a legal journal, but not in the black-letter tradition. It sees law as a social process. Specifically, it sets out to examine the way in which law regulates, promotes or impedes the building of democracy and socio-economic reconstruction in South Africa. And it seeks to do so critically – that is, in a spirit of testing existing knowledge, seeking to stimulate new insights and providing a forum for debate.

It follows that *LDD* is neither a general law journal nor specialised in any single branch of the law. It will have recourse to other disciplines which help to explain the operation of the law in a developmental context. It is, in short, issue-driven rather than discipline-bound – bringing together findings of research and experience from different disciplines, which may be relevant to them all.

This broad-based approach is not intended merely to break new theoretical ground. Our focus will be very much on practical legal problems thrown up in the process of reconstruction and development amidst present-day South African and global realities. Studying them in a multi-faceted way makes for a more thorough understanding.

As such, we hope it will be challenging and useful to all lawyers – practitioners and academics alike – as well as non-lawyers involved in socio-economic research or policy-making, whether in preparing an argument or writing a thesis.

From this standpoint, the new LRA is an appropriate and timely subject. It is a major piece of socio-economic engineering, closely tied to the assumptions and objectives which inform the new South Africa. Its wide-ranging provisions engage with different branches of the law – for example, constitutional law and company law – as well as other disciplines – for example, sociology and economics. Inevitably, it has given rise to much debate. It is not proposed to revisit these debates or seek to analyse the Act as a whole. Rather, this issue of *LDD* highlights a number of questions that have received less public attention thus far, but nonetheless go to the heart of the new labour dispensation.

## SYNOPSIS OF ARTICLES

In "Collective bargaining under the new LRA: The resurrection of freedom of contract" Barney Jordaan examines the way in which the Act set out to extend the democratic principles of the interim Bill of Rights (largely reproduced in the current Bill of Rights) to the inherently unequal relationship between employer and employee. Collective bargaining remains the principal means of regulating terms and conditions of employment. Rather than relying on the labour court to supervise the process, the new Act establishes a framework of organisational rights and duties within which employers and unions are left to bargain freely. Where disputes arise about the interpretation of collective agreements, Jordaan argues, it is incumbent on arbitrators to give effect to the intention of the parties rather than seek to order just outcomes. While this may place limits on the promotion of social equity where management is strong and labour is weak, it is inherent in the model of industrial relations which has been adopted.

In "Trade unions and the law: Victimisation, organisation and remedies of self-help" Jan Theron critically examines the historical process leading up to the enactment of the LRA with specific reference to the protection of trade unionists against victimisation. Whereas collective action and legal action are widely regarded as being complementary, Theron argues that in practice they tend to be mutually exclusive. The major organisational rights achieved by trade unions were secured by collective action whereas the industrial court, while often recognising such rights, at the same time limited them. Referring to parallel experiences in the USA, Theron analyses the process by which trade unions nevertheless came to rely on court action rather than collective action in defending labour rights. In the new LRA, he points out, the jurisdiction of the courts over such rights has been entrenched.

"Industrial democracy in South Africa's transition" by Darcy du Toit considers another paradigm shift contained in the new Act: from the traditional model of employer-employee relations towards more participative forms of management, as embodied in the provision for workplace forums. The article considers worker participation as an aspect of democratisation in accordance with the new constitutional order and examines the extent of the powers given to workplace forums. It also views workplace forums in relation to trade unions and collective bargaining. Noting the conflicting analyses developed by leading commentators, it argues that the LRA preserves the primary role of trade unions in representing labour interests.

The next two articles, both written from a sociological perspective, deal with groups whom some consider to have been marginalised in the new dispensation: small employers and small unions. The Act upholds freedom of association but, as Ian Macun points out in "Does size matter? The Labour Relations Act, majoritarianism and union structure", at the same time favours bigger trade unions. While majority trade unionism has important advantages, small unions may in some cases serve the interests of their members as well or even better. Given South Africa's topography of industrial relations, Macun argues that increased co-operation between

unions rather than the emergence of monolithic industrial unions is likely to be the outcome.

In "Small enterprises, the Labour Relations Act and collective bargaining in South Africa" Melvin Goldberg considers the way in which the LRA deals with small enterprise. Questioning the widely-held belief that the small business sector is the engine of employment growth, he argues that this has more validity in the informal sector than in the formal sector. The current policy emphasis on small business promotion in the formal sector may therefore be misplaced. Turning to the provisions in the LRA aimed at accommodating small business within the bargaining council system, Goldberg suggests that these are likely to have little effect and that collective bargaining at this level will continue to be dominated by major employers and major unions.

In conclusion, we publish a document from the USA which offers a challenging framework for evaluating the debate surrounding the LRA and other labour statutes in this country. The author is Karl Klare, an eminent labour law scholar and one of the originators of the critical legal studies tradition in the USA. The document is a slightly shortened version of his submission to the Dunlop Commission, appointed by President Clinton to investigate the future of management-labour relations in the USA. Critically reviewing the development of the US system of collective bargaining, Klare elaborates a more general analysis of the role of labour law at the close of the 20th century. From a South African perspective, it highlights the advances in labour rights embodied in the LRA, but also helps to identify areas where further innovation may be called for.

## THE NEXT ISSUE

Our second issue, due in six months' time, will be dedicated to the new Constitution. It will focus not only on questions of human rights, which have been and will no doubt continue to be analysed extensively in other publications but, more specifically, on the way in which the exercise of political power and economic rights is regulated. The division of power and resources between central, provincial and local government, and the role of each tier in giving effect to the developmental objectives of the Constitution, will form a central theme. Contributions by readers on any of these topics will be welcome, as well as responses to the present issue.