Editorial

This issue of *LDD* is memorable for two reasons. First, it marks the end of our first decade of publication and the start of the second. Much has happened in the field of socio-legal development during this period, and much of it has been reflected in the pages of *LDD*. The articles, many by leading national and international experts, were often of outstanding quality and are being cited with increasing regularity. To make this body of research and analysis more accessible, a ten-year index has been compiled with details of all articles published since the first issue in May 1997. This will be distributed to all subscribers.

Also, two special events have been organised to commemorate our tenth anniversary – the first at the University of Cape Town on 26 July 2006 and the second at the University of the Western Cape on 16 August 2007. Many of those who have been most active in driving and inspiring *LDD* will be present, not only to celebrate but also to reflect on the challenges ahead. We use this occasion to appeal to readers for suggestions for making *LDD* more relevant to their needs – in particular, problems or topics they feel should be addressed. More than ever, *LDD* will focus on its central objective: to

> 'create a forum in which critical aspects of [the evolution and implementation of democracy, good governance practices, human rights and socio-economic development] can be debated by scholars, practitioners and all those concerned with policy-making across the continent'.

The second reason making this issue memorable is that, after ten years of publication by LexisNexis Butterworths, *LDD* will henceforth be published by Juta & Company in Cape Town. Looking back, we would like to express our appreciation to Butterworths for the excellent working relationship we have enjoyed and their support over the years. Looking forward, we believe that our new publishing arrangements will enable us to reach a growing academic and scholarly readership, and therefore a wider range of contributors. This, in turn, will make it possible to offer a journal of higher quality on a more cost-effective basis. Our tenth anniversary celebrations thus serve to relaunch *LDD* into its second decade in what promises to be a highly fruitful partnership with our new publishers.

No review of *LDD*'s first decade will be complete without acknowledging the generous support we have enjoyed from the French Embassy in South Africa in recent years. This has enabled us to distribute *LDD* to law faculties and developmental agencies throughout Africa and beyond. In the process we have taken the important step of publishing the editorial and summaries of articles in every issue in French translation as well as English as a means of introducing the journal to readers in francophone countries. We look forward to developing increasing academic and research cooperation, and set-

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ting new dialogues in motion, on the basis of the links that have thus been established.

The current issue of *LDD* focuses on questions of policy implementation rather than policy development in the broader sense. The article by **John Mubangizi** '"Poverty production" and human rights in the African context', sets the scene. Professor Mubangizi argues that international human rights norms and values – not only socio-economic but also civil and political – should be infused into poverty reduction policies and institutions, which should include a restructuring of the global economic order. In his view this would play an important role in halting the vicious cycle of poverty produced, *inter alia*, by the structural imbalances inherent in globalization poor governance; conflict political strife and social disharmony; ignorance and lack of and inappropriate education; and diseases especially HIV/AIDS.

Daleen Millard's comprehensive examination of the relevant case law in 'Loss of earning capacity: the difference between the sum-formula approach and the "somehow-or-other" approach', reveals abiding uncertainty in the determination of loss of earning capacity. Professor Millard demonstrates that the problems are the result of terminological infelicities, conceptual and evidentiary difficulties. She suggests that social protection measures such as income replacement, pension or welfare benefits might be marshalled to alleviate the problem, indicating that the social protection mooted by Minister Manuel in his budget speech may be the impetus for such a more integrated approach.

Pamhidzai Bamu, **Joachim Schuckman** and **Shane Godfrey** deal with the question whether the new National Credit Act will increase access to credit for small and micro enterprises (SMMEs). The South African government considers the promotion of the SMME sector as a way of mobilising the so-called 'second economy', comprising mostly actors from the excluded 'previously disadvantaged sector', to move closer to the 'first economy'. Access to finance has been identified as one of the most important factors that hamper SMMEs' potential to succeed. Since the late 1960s the regulatory framework for the microfinance sector has been provided by the Usury Act of 1968, as amended. In the view of the authors, this framework has proved inadequate and failed to provide a platform for the development of SMMEs. During the 1990s it became increasingly evident to policy-makers and stakeholders that a new regulatory framework was needed. To this end the National Credit Act was passed in 2005, comprehensively overhauling and providing some innovations in respect of SMMEs. The authors, after outlining the moves to reform the credit industry, focus on the main provisions of the National Credit Act. Finally they provide a critical analysis of the Act and the extent to which it will promote the provision of credit to SMMEs. While acknowledging the importance of the Act, they are of the view that it cannot alone solve the problem of SMMEs' access to credit nor bridge the divide between the first and second economies. The orientation of the Act remains the commercial end of the market rather than developmental credit. In their view, the barriers to lending to unbanked SMMEs are symptomatic of deficiencies in the

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socio-economic environment that cannot be fully addressed by credit policy and legal interventions alone. To ensure that developmental credit gets the attention that it needs, they argue, will require a more holistic and more interventionist approach on the part of government.

Kitty Malherbe examines the legislative and policy developments that led to the enactment of the Older Persons Act 13 of 2006, designed to address the unacceptable levels of abuse and neglect suffered by older persons in residential care as well as in their communities and ensure that they receive the care and protection to which they are entitled. While the Act may have facilitated greater access to services for older persons, it is argued that the focus is still too much on residential services and not enough on older persons living in their communities. The state, however, has made it clear that its duty to provide care applies only to indigent and frail older persons who lack family care. Yet many older persons live with family who cannot cope with the financial burden of caring for them, and community organisations cannot lend the support required without assistance from the state. The Older Persons Act regulates community-based care and support services for older persons as well as residential facilities and broadens the scope of financial assistance to community organisations. The lack of enforcement mechanisms, however, detracts from the advances that have been made, and older persons seeking to enforce their equality rights in terms of section 7 of the Act will have to seek their remedies beyond the Act.

Nomagugu Hlongwane examines how South Africa has dealt with the ongoing problem of pay discrimination among employees doing similar work. Analysing the principle of 'equal pay for work of equal value' in the context of relevant international conventions and foreign law, she notes that the Constitution prohibits pay discrimination when the ground for the differential is listed or unlisted in terms of section 9(3) of the Constitution. The Employment Equity Act (EEA), in giving effect to the constitutional prohibition, is the most important vehicle in achieving pay equity in the workplace. South Africa is moreover a signatory to ILO Conventions advancing equal pay and the EEA must be interpreted in compliance with these Conventions. But, though 'equal pay for work of equal value' is explicitly recognised in the relevant Code of Good Practice[1] and in the Public Service Act Regulations,[2] the legislature has not enshrined it as a principle of law in the EEA. The Act, like the Constitution, only promotes equal pay for work of equal value indirectly by means of its general prohibition of unfair discrimination. In unionised sectors, it is noted, equal pay principles in collective agreements play an important part in eliminating pay discrimination. However, the author argues that the legislature should enact provisions directly regulating unequal remuneration for work of equal value in the EEA, including binding provisions for identifying 'work of equal value' and grounds for the justification for work of unequal value.

1 Code of Good Practice on the preparation, implementation and monitoring of employment equity plans Government Notice R1394 in *Government Gazette* 2026 23 November 1999.
2 GN R1 of 1 January 2001 in terms of Proclamation 103 of 1994;.

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In the *Forum*

The Community Law Centre and the Faculty of Law at the University of the Western Cape have instituted an annual Dullah Omar Memorial Lecture in memory of the Centre's founding director, the late Dullah Omar, who went on to become South Africa's first minister of justice after 1994. The purpose of the lecture series is to promote human rights and democracy through the presentation of public lectures on key issues pertaining to human rights and democracy. The first lecture was given in November 2004 by Mr Bulelani Ngcuka, the second by Minister Bridgette Mabandla in 2005 and the third by former Chief Justice Arthur Chaskalson in June 2006. In celebration of Human Rights Day, the lecture '*The need for a human rights culture*' was delivered by Minister of Finance Trevor Manuel at the 4th Dullah Omar Memorial Lecture on 20 March 2007.

In his lecture, **Minister Trevor Manuel** examines the notions of 'continuity' and 'change' in the human rights context in South Africa's recent history. Dealing with concrete challenges against the backdrop of our constitution, he criticises shortcomings such as corruption and concludes that more must be done to meet those challenges. Minister Manuel also discusses the importance of a culture of human rights, the challenges faced by South Africa in its struggle to build such a culture and advances recommendations on how to achieve these objectives.

In his case study, 'Fair trial rights, freedom of the press, the principle of "open justice" and the power of the supreme court of appeal to regulate its own process', **Wium de Villiers** provides a discussion on the Constitutional Court's upholding of the SCA decision that it would only allow the broadcasting of Mr Shabir Shaik's application for leave to appeal, if it was satisfied that it would not inhibit justice in *SABC Ltd v National DPP and Others*. Professor de Villiers argues that s 12 of the Constitution should be recognised as a generic residual due process right, analogous to that of s 7 of Canada's Charter, which would lead to a substantial reduction in the inconsistencies in the Constitutional Court's jurisprudence revealed by that decision.

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