On Collective Bargaining, Advisory Arbitration and Legal Intervention: The *1995 Labour Relations Act* as a Product of Criticism of the 1956 *Labour Relations Act*

W Germishuys-Burchell*

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Author

Wilhelmina Germishuys-Burchell

Affiliation

University of South Africa

Email

germiw@unisa.ac.za

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Abstract

The *Labour Relations Act* 66 of 1995 (hereafter the 1995 LRA) is a product of criticism of the *Labour Relations Act* 28 of 1956 (hereafter the 1956 LRA). While there were also other points of criticism of the 1956 LRA, those of particular importance for the current discussion included that it allowed for too much legal intervention in collective bargaining (after the fact) and that the system provided too great a scope for third-party discretion in the resolution of collective bargaining disputes. Aiming to address these weaknesses, the 1995 LRA promised "to achieve certainty and to leave as little as possible to the discretion of administrators and adjudicators." It is against this background that this article focusses on advisory arbitration in the public interest as provided for in section 150 and 150A-D of the 1995 LRA. It considers the extent to which the collective bargaining model under the 1995 LRA – as a product of criticism of the 1956 model – continues to be grounded on the legislative policy consideration of voluntarism when viewed against the extent to which the legislature by way of reactive amendments to the 1995 LRA over the three decades since its enactment has once again increased the scope provided for third-party intervention and third-party discretion in collective bargaining.

Keywords

Advisory arbitration in the public interest, section 150 of the 1995 LRA; section 150A–D of the 1995 LRA; collective bargaining; voluntarism; third-party intervention; third-party discretion; duty to bargain in good faith; *Labour Relations Act* 28 of 1956.

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1 Introduction

Collective bargaining is generally seen as a "voluntary" process that should not as a rule allow for extensive intervention by either the legislature or the judiciary.[1] While voluntarism, as an important policy consideration underlying the *Labour Relations Act* 66 of 1995 (hereafter the 1995 LRA), dictates minimal intervention by third parties in the process of collective bargaining, the recent amendments to the 1995 LRA, read with the *Accord on Collective Bargaining and Industrial Action* and the *Code of Good Practice: Collective Bargaining, Industrial Action and Picketing*, seem to indicate a move in the opposite direction.[2] This includes the resurgence of the once strongly criticised duty to bargain in good faith.[3] While this is true in different contexts,[4] the scope of this article is limited to the specific approach of the 1995 LRA to advisory arbitration in the public interest, provided for in section 150 and 150A-D. These recently amended (and added) sections have significant implications for the regulation of the process of collective bargaining and the related policy choice of voluntarism underlying the 1995 LRA.

Of particular interest in this regard is that the 1995 LRA is a product of criticism of the *Labour Relations Act* 28 of 1956 (hereafter the 1956 LRA)[5]

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* Wilhelmina Germishuys-Burchell. BCom LLB (UP) LLM (Unisa) LLD (SU). Senior Lecturer, School of Law, University of South Africa (Muckleneuk Campus), South Africa. E-mail: germiw@unisa.ac.za. ORCID: 0000-0003-3160-7705. I should like to thank Prof CJ Garbers and Prof KB Calitz for their comments on earlier versions of this research, which also formed part of my LLD research at Stellenbosch University, and Chantelle Hough Louw for her editorial assistance and technical support.

1 See Kahn-Freund *Selected Writings* 9 reprinted from Kahn-Freund "Labour Law". Collective *laissez-faire* as Kahn-Freund put it, is "the retreat of the law from industrial relations and of industrial relations from the law."

2 See the *Code of Good Practice: Collective Bargaining, Industrial Action and Picketing* (GN R1396 in GG 42121 of 19 December 2018) with Annexure A: Good Faith Declaration and Annexure 2: Accord on Collective Bargaining and Industrial Action. The recent amendments extended the scope for third-party intervention in collective bargaining in a number of ways. This includes amendments aimed at softening the blow of majoritarianism (s 21(8A)-21(8D)) and facilitating the resolution of disputes where strikes become dysfunctional, violent and/or unduly protracted (s 150A-150D).

3 As evidenced by the *Code of Good Practice: Collective Bargaining, Industrial Action and Picketing* (GN R1396 in GG 42121 of 19 December 2018) with Annexure A: Good Faith Declaration and Annexure 2: Accord on Collective Bargaining and Industrial Action.

4 This includes, for example, awarding organisational rights to a minority union to which, given both voluntarism and majoritarianism as characteristics of the *Labour Relations Act* (LRA), it would not have been entitled to, prior to the amendments. In this regard, see s 21(8A)-21(8D) of the *Labour Relations Act* 66 of 1995 (1995 LRA).

5 GN 97 in GG 16259 of 10 February 1995 (*Explanatory Memorandum to the Draft Negotiating Document in the Form of a Labour Relations Bill*) (hereafter the

that it allowed for too much legal intervention in collective bargaining (after the fact) and that the system provided too great a scope for third-party discretion in the resolution of collective bargaining disputes, in particular.[6]

It is with reference to the specifically mentioned sections that regulate advisory arbitration in the public interest that this article considers the extent to which the collective bargaining model under the 1995 LRA – as a product of criticism of the 1956 model – continues to be grounded on the legislative policy consideration of voluntarism.[7] This is considered in view of the extent to which the legislature by way of reactive amendments to the 1995 LRA over the three decades since its enactment has once again increased the scope provided for third-party intervention and third-party discretion in collective bargaining.

All of this takes place in the context of a growing realisation that we need to prevent labour unrest and re-align the functionality or "meaningfulness" of the collective bargaining process, a realisation that has resulted in an extension of the scope for judicial intervention in collective bargaining.[8] Put differently, the 2015 amendments (introduced by the *Labour Relations Amendment Act* 6 of 2014) constitute an attempt both to curb strike violence and to avoid unnecessary (prolonged) strikes.[9] Among the 2019 amendments to the LRA and in a further attempt to curb strike violence, damage to property, and strikes that are no longer "functional to collective bargaining", the LRA now provides in detail for an increased measure of third-party intervention to facilitate the resolution of collective bargaining

Explanatory Memorandum); ILO *Prelude to Change* 739; Du Toit *et al Labour Relations Law* 5, 20, 23; Mischke 1995 *JBL* 58; Saley and Benjamin 1992 *ILJ* 731-739. See Mboweni "New Era for Labour Relations" referred to in Du Toit 1995 *ILJ* 785, 792.

6 *Explanatory Memorandum* 278.

7 *Explanatory Memorandum* 278; ILO *Prelude to Change* 739; Du Toit *et al Labour Relations Law* 20; Mischke 1995 *JBL* 58; Saley and Benjamin 1992 *ILJ* 731-739. See Mboweni "A New Era for Labour Relations" referred to in Du Toit 1995 *ILJ* 792. Du Toit *et al Labour Relations Law* 5, 23.

8 See, for example, the addition to the 1995 LRA of s 21(8A)-21(8D); the recently added s 150A-150D; the insertion of s 189A in 2002; and the deletion of s 189A(19) with effect from January 2015.

9 Le Roux 2017 *CLL* 29; Rycroft 2012 *ILJ* 821; Rycroft 2014 *IJCLLIR* 199; Ngcukaitobi 2013 *ILJ* 836; Myburgh 2018 *ILJ* 703; Manamela and Budeli 2013 *CILSA* 321.

disputes in the public interest.[10] This was done by inserting section 150A–150D into the LRA.[11]

In the light of the above, this article seeks to show that the very criticism of the 1956 LRA (that it allowed for too much legal intervention in collective bargaining and too great a scope for third-party discretion in the resolution of collective bargaining disputes) that the 1995 LRA sought to address[12] today seems to be just as valid as criticism of the 1995 LRA itself. In fact, as this article shows, the LRA today allows for intervention in collective bargaining to an extent much greater than its purportedly overly interventionist predecessor.

2 On legal intervention and the 1995 LRA as a product of criticism against the 1956 LRA

Voluntarism and autonomy were among the ideals informing the original regulation of collective bargaining,[13] and the idea of voluntarism or collective *laissez-faire* retains a significant measure of ideological force to this day.[14]

However, a growing realisation over time that absolute voluntarism and autonomy were inadequate in addressing the imbalance in bargaining power in the employment relationship has led to an increase in legal intervention in the employment relationship.[15] This trend is also evident in South African labour law on collective bargaining under the 1956 LRA and its definition of unfair labour practice, with strong support for pluralism and the duty to bargain, as developed by the Industrial Court.[16] However, with the 1995 LRA the legislature took a different approach to voluntarism, amongst others, by abandoning the duty to bargain and providing strong

10 The notion that a strike should be "functional to collective bargaining" has its origin in industrial court jurisprudence under the *Labour Relations Act* 28 of 1956 (1956 LRA). Also see Rycroft 2014 *IJCLLIR* 199; Fergus 2016 *ILJ* 1537.

11 See, for example, *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd*; *and In re Universal Product Network (Pty) Ltd v National Union of Beverage Wine Spirits & Allied Workers* 2016 37 ILJ 476 (LC). See also Rycroft 2014 *IJCLLIR* 199. For examples of such proposals, see Tenza 2015 *LDD* 211; Myburgh 2013 *CLL* 1.

12 *Explanatory Memorandum* 278.

13 Davis and Le Roux 2012 *Acta Juridica* 316. Also see Davies and Freedland *Kahn-Freund's Labour and the Law* 19, 69; Rycroft and Jordaan *Guide to South African Labour Law* 88-89.

14 Dukes 2009 *MLR* 220, 221; Simpson 2000 *ILJ* 193-222.

15 *Trident Steel (Pty) Ltd v John* 1987 8 *ILJ* 27 (W) 39A-D (hereafter the *Trident Steel* case); D'Art 2020 *Irish Jurist* 99-100; Dukes 2008 *ILJ* 267.

16 See in general Thompson 1987 *ILJ* 1, also referred to by the Industrial Court in *Paper Wood & Allied Workers Union v Summit Associated Industries* 1987 8 ILJ 691 (IC) 703 (hereafter the *Paper Wood* case). Also see Basson 1992 *Stell LR* 32.

support for majority trade unions. Ironically, these policy choices of both voluntarism and majoritarianism, once seen to represent a necessary (and clear) break from the previous system, have been identified as factors that might contribute to the challenges experienced in the current regulation of collective bargaining in South Africa.[17]

While the notion of fairness was the catalyst for increased intervention, it was not explicitly acknowledged in South African law until the right to fair labour practices was recommended by the Wiehahn Commission and adopted through amendments to the *Industrial Conciliation Act* 28 of 1956, which became the 1956 LRA.[18] The 1956 LRA established the Industrial Court, which, through its unfair labour practice jurisdiction, developed a duty to recognise and bargain (in good faith) with a trade union as representative of its constituents in a bargaining unit. As such, the pre-1995 model of the recognition of trade unions was based on an explicit link between fairness and collective bargaining.[19]

The definition of unfair labour practice in the 1956 LRA was designed to serve the fundamental purpose of the 1956 LRA by promoting collective bargaining to reduce industrial conflict and settle industrial disputes.[20] In the light hereof it has been argued that the court should be concerned with the manner in which the demand is prosecuted rather than with its content.[21]

It was accepted as essential for the proper functioning of collective bargaining that the parties participate in the process or be compelled to do so, should they refuse.[22]

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17 The tensions that exist between the purpose of collective bargaining and the fundamental values underlying the LRA have been at the centre of industrial conflict. It has been acknowledged by both the legislature and the judiciary that the strict application of the principle of majoritarianism may have a serious impact on unions' seeking recognition from employers. See Le Roux 2018 *CLL* 72; Van Eck and Newaj 2020 *CCR* 331-351; Theron, Godfrey and Fergus 2015 *ILJ* 853; Botha and Germishuys 2017 *THRHR* 365-369; Ngcukaitobi 2013 *ILJ* 836; Corazza and Fergus "Representativeness and the Legitimacy of Bargaining Agents" 87; Friedman 2014 *Dispute Resolution Digest* 50-53; Brand 2014 *Dispute Resolution Digest* 55; Anstey 2013 *South African Journal of Labour Relations* 138; Kruger and Tshoose 2013 *PELJ* 289 with reference to Bendix *Industrial Relations* 253.

18 Germishuys-Burchell *Legal Regulation of Trade Union Recognition* 4.

19 Germishuys-Burchell *Legal Regulation of Trade Union Recognition* 4.

20 The 1956 LRA as amended by the *Labour Relations Amendment Act* 83 of 1988.

21 Cameron, Cheadle and Thompson *New Labour Relations Act* 72.

22 Brassey *et al New Labour Law* 151. Also see Wedderburn, Lewis and Clarke *Labour Law and Industrial Relations* 216-217. See in general Thompson 1987 *ILJ* 1, also referred to by the Industrial Court in the *Paper Wood* case 703.

The 1956 LRA was seen to entrench the voluntary core of collective bargaining, but through the endeavours of the Industrial Court this Act ultimately did so within a coercive framework aimed at ensuring self-governance in compliance with the rules and principles of collective bargaining and preventing either party from acting in a way so as to subvert the continued or effective functioning of the collective bargaining process.[23] In guarding against too much of an interventionist approach, the court's concern was with the process by which the parties resolved their disputes rather than with the substantive outcome thereof.[24] Put differently, jurisprudence under the 1956 LRA depicts the process of collective bargaining as compulsory (the existence of a duty to bargain), while the role of voluntarism is confined to the substantive outcome thereof.[25]

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23 *MWASA v Argus Printing & Publishing Co* 1984 5 ILJ 16 (IC). See, for example, *United African Motor Allied Workers Union v Fodens (SA) (Pty) Ltd* 1983 4 ILJ 212 (IC) (hereafter the *Fodens* case); *Metal & Allied Workers Union v Stobar Reinforcing (Pty) Ltd* 1983 4 ILJ 84 (IC); *Shezi v Consolidated Framed Cotton Corporation Ltd* 1 1984 5 ILJ 3 (IC); *National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd* 1985 6 ILJ 369 (IC); *National Union of Mineworkers v Marievale Consolidated Mines Ltd* 1986 7 ILJ 123 (IC); *Metal & Allied Workers Union v Natal Die Casting Co (Pty) Ltd* 1986 7 ILJ 520 (IC) (hereafter the *Natal Die Casting* case); *Food & Allied Workers Union v Spekenham Supreme (2)* 1988 9 ILJ 628 (IC) (hereafter the *Spekenham Supreme (2)* case).

24 Brassey *et al New Labour Law* 259. This was most often seen in the form of orders compelling the parties to resume negotiations with one another, commonly ordered to happen within a certain timeframe. In *SA Electrical Workers' Association v Goedehoop Colliery (Amcoal)* 1991 12 ILJ 856 (IC) 860-862. Also see *Corobrik Natal (Pty) Limited and Construction and Allied Workers' Union* 1991 12 ILJ 1140 (Arb) 1146. See, for example, *Buthelezi v Labour for Africa* 1989 10 ILJ 867 (IC) 870D (hereafter the *Buthelezi* case). In *Sentraal-Wes (Koöperatief Bpk) v Food & Allied Workers Union* 1990 ILJ 977 (LAC) 992A; *SA Clothing & Textile Workers Union v Maroc Carpets & Textile Mills (Pty) Ltd* 1990 11 ILJ 1101 (IC) (hereafter the *Maroc Carpets* case) 1104H; *SA Commercial Catering & Allied Workers Union v Southern Sun Corporation (Pty) Ltd* 1991 12 ILJ 835 (IC) 842F-843B; *SA Woodworkers Union v Rutherford Joinery (Pty) Ltd* 1990 11 ILJ 695 (IC) 700C-I.

25 Through jurisprudence under the 1956 LRA it became well established that the notion that collective bargaining should be voluntary, not only in its substantive outcome, but also in its inception, no longer appeared to be in favour. See the *Spekenham Supreme (2)* case 636J-637C. In its decision, the Industrial Court adopted Kahn-Freund's analysis of collective bargaining but rejected the relevance of voluntarism in the South African context. Also see Wedderburn, Lewis and Clarke *Labour Law and Industrial Relations* 216-217; *Bleazard v Argus Printing & Publishing Co Ltd* 1983 4 ILJ 60 (IC) 77H; the *Fodens* case 226D; the *Natal Die Castings* case 538D; the *Buthelezi* case 869G; *Black Allied Workers Union v Umgeni Iron Works* 1990 11 ILJ 589 (IC) 591A; and Brassey *et al New Labour Law* 151 and 259: "Its concern should be how the parties resolve their differences as opposed to what the outcome is or should be." See Davis 1990 *Acta Juridica* 45, 58. The *Maroc Carpet* case 528C-D supported the approach in the *Spekenham Supreme (2)* case, but with some reservations. Also see Rycroft 1988 *ILJ* 204. Also see the *Trident Steel* case 35. Basson 1992 *Stell LR* 43-44.

In all of this, and in an essentially market-orientated economy, the view prevailed that the substantive outcome of collective bargaining (the content of collective agreements) should be left for determination by market forces.[26] The eventual agreement must reflect the relative economic strengths of the parties if it is to endure.[27] In this regard, the guiding principle that delineates the area of autonomous collective bargaining was described to be "legitimate when the parties have bargained in good faith to impasse", and that "[b]efore that point, economic action is premature and the court should intervene to safeguard the negotiating process; thereafter, such action is often part of the resolutive process, and the court should be conspicuous by its absence."[28] The extent to which legal intervention in collective bargaining was allowed under the 1956 LRA was focussed on getting the parties to the negotiating table to engage in the process of collective bargaining up to impasse, but where the dispute had been conciliated the Industrial Court would abstain from the process of legitimate industrial strife that followed it.

As is pointed out below, currently third-party intervention under the 1995 LRA may occur even after the parties to the dispute have exhausted the statutory conciliation procedure to allow for another attempt by a second commissioner to conciliate between the parties, even during a strike for which all procedural requirements have been met.[29]

The 1956 model provided for by the 1956 LRA was explicitly replaced by a different regulatory model as provided for by the 1995 LRA, with its strong support for voluntarism. As mentioned, among other good reasons for change – including our new constitutional dispensation – the 1995 LRA and its approach to regulating collective bargaining is also a product of criticism against the 1956 LRA.[30]

The key points of contention in response to the *Labour Relations Amendment Bill* at the National Economic Development and Labour Council

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26 Cameron, Cheadle and Thompson *New Labour Relations Act* 99.

27 Cameron, Cheadle and Thompson *New Labour Relations Act* 99.

28 Cameron, Cheadle and Thompson *New Labour Relations Act* 99 with reference to ILO *Digest of Decisions and Principles* para 419.

29 In the case of s 150 the director may appoint a commissioner who has already conciliated that dispute.

30 *Explanatory Memorandum* 278; ILO *Prelude to Change* 739; Du Toit *et al Labour Relations Law* 20; Mischke 1995 *JBL* 58; Saley and Benjamin 1992 *ILJ* 731-739. See Mboweni "New Era for Labour Relations" referred to in Du Toit 1995 *ILJ* 792. Du Toit *et al Labour Relations Law* 5, 23.

(NEDLAC) related to the proposed regulation of collective bargaining.[31] In particular, there was trade union opposition to the removal of the duty to bargain.[32] The 1995 LRA sought to address the shortcomings of the previous system while also aiming to build on its strengths. In this regard, the fundamental problem with the 1956 LRA was described as a lack of conceptual clarity regarding the structure and functions of collective bargaining, resulting in a patchwork approach to legislation and its amendment.[33] The *Explanatory Memorandum to the Draft Labour Relations Bill* describes the 1956 LRA as "the product of numerous ad hoc amendments over the years", resulting in a "complex statute with an intricate web of cross-referencing".[34] While there were also other points of criticism against the 1956 LRA,[35] those of particular importance for the current discussion included perceived contradictions in policy caused by layer on layer of amendments and "the extensive discretion given to administrators and adjudicators" to intrude in the bargaining relationship.[36] The 1995 LRA sought to "achieve certainty and to leave as little as possible to the discretion of administrators and adjudicators."[37]

It is against this background that the regulation of advisory arbitration in the public interest provided for in section 150 and 150A–D, is considered below.

3 On advisory arbitration and third-party intervention in collective bargaining under the 1995 LRA

At the time when the current LRA came into effect, as far as legal intervention is concerned, section 150 provided no more than that once the Commission for Conciliation, Mediation and Arbitration (CCMA) becomes aware of a dispute that has not been referred to it, and if the resolution thereof would be in the public interest, the CCMA may offer to appoint a commissioner to attempt to resolve the dispute through conciliation.[38] This

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31 Cosatu, Nactu and Fedsal "Proposals on the Draft Labour Relations Bill" 7, 12 referred to by Du Toit *et al Labour Relations Law* 24-25.

32 See Du Toit *et al Labour Relations Act* 14. See Du Toit *et al Labour Relations Law* 21.

33 *Explanatory Memorandum* 282-283.

34 *Explanatory Memorandum* 291, 282-283.

35 Other points of criticism included the reliance of the pre-1995 model on after-the-event rulemaking by courts under the unfair labour practice jurisdiction, and the "unacceptably high incidence of strikes". See the *Explanatory Memorandum* 282-284 and 291.

36 *Explanatory Memorandum* 282-283.

37 *Explanatory Memorandum* 291.

38 Section 150(1) as it read since the enactment of the 1995 LRA until just prior to the *Labour Relations Amendment Act* 6 of 2014.

was possible only if all the parties to the dispute consented to such a commissioner's being appointed.[39]

In *Dairybelle (Pty) Limited v Lupondwana*,[40] decided prior to the 2002 amendments to the LRA, it was held that a dispute may be referred to conciliation only once. If conciliation fails, it may be referred to arbitration, adjudication or industrial action, but the 1995 LRA at that stage made no provision for a dispute to be conciliated more than once/a second time.

In 2002 the scope for intervention under section 150 was broadened to provide for the possibility of appointing a commissioner to assist the parties in resolving the dispute through further conciliation.[41] This was possible where the dispute had already been conciliated and in respect of which either a certificate of non-resolution had been issued or 30 days had lapsed since the referral thereof.[42] Again, the CCMA could appoint such a second conciliating commissioner only with the consent of all the parties to the dispute.[43]

In this light, as the article shows, there is a growing disconnect between the legislature's intention at the time of drafting the LRA which replaced the 1956 LRA and developments over the almost 30 years since the enactment of the LRA. This is true particularly in as far as the notion of voluntarism is concerned. Of particular importance in this regard is the extent to which the current regulatory regime allows for third-party intervention in the regulation of collective bargaining.

As part of its intervention aimed at addressing the high levels of violence and other unlawful acts that occur, often during prolonged strikes, the legislature in 2015 amended section 150 as follows. The director of the CCMA may now appoint one or more commissioners who must attempt to resolve the dispute through conciliation, whether or not that dispute has been referred to the CCMA or a bargaining council.[44] This (despite voluntarism as a fundamental value underlying the LRA) is possible with or without the parties' consent. In the absence of their consent, the director may do so if he believes it is in the public interest to do so and after he has

39 Section 150(2) as it read prior to the *Labour Relations Amendment Act* 12 of 2002 (hereafter the 2002 LRAA).
40 *Dairybelle (Pty) Limited v Lupondwana* 2001 7 BLLR 741 (LC) para 13.
41 Regarding conciliation in the public interest, Also see s 72(9) added in 2019.
42 Section 150(2) of the 1995 LRA as replaced by s 35(*a*) of the 2002 LRAA.
43 Section 150(3) of the 1995 LRA added by s 35(b) of the 2002 LRAA; *SA Post Office Ltd v Communication Workers Union* 2010 31 ILJ 997 (LC).
44 Section 150(1) of the 1995 LRA.

consulted both the parties to the dispute[45] as well as the secretary of a bargaining council with jurisdiction over the parties to the dispute (if applicable).[46] The director may appoint a commissioner who has already conciliated that dispute.[47] In addition, to assist a commissioner appointed in terms of this section, the director may appoint—

> (a) one person from a list of at least five names submitted by the representatives of organised labour on the governing body of the Commission; and
>
> (b) one person from a list of at least five names submitted by the representatives of organised business on the governing body of the Commission.[48]

Unless the parties to the dispute agree otherwise, the appointment of a commissioner in terms of section 150 does not affect any entitlement of an employee to strike or an employer to lock-out, as acquired in terms of chapter IV of the LRA.[49]

As part of the 2019 amendments to the LRA (introduced by the *Labour Relations Amendment Act* 8 of 2018) and in a further attempt to address strike violence, damage to property and strikes that are no longer "functional to collective bargaining", the LRA now provides in detail for an increased measure of third-party intervention to facilitate the resolution of collective bargaining disputes in the public interest.[50] This was done by the insertion of section 150A–150D into the LRA.

Apparent from these sections is not only the increased scope allowed for third-party discretion but also the obligation that is placed on such a third party to deal with the substantial merits of the dispute.

Furthermore, after hearing the merits of the competing (collective bargaining) contentions, the commissioner must step into the collective bargaining arena to consider and pronounce on a substantive issue – the "reasonableness" of the union's demand. This seems to create an exception

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45 Section 150(2)(a) of the 1995 LRA. To be noted here is that consultation, as a rule, is a process associated with the retrenchment process rather than with the process of collective bargaining.

46 Section 150(2)(b) of the 1995 LRA as amended by s 24 of the 2002 LRAA. Also see s 150A-150D of the 1995 LRA.

47 Section 150(3) of the 1995 LRA.

48 Section 150(4) of the 1995 LRA.

49 Section 150(5) of the 1995 LRA.

50 The notion that a strike should be "functional to collective bargaining" has its origin in industrial court jurisprudence under the 1956 LRA. Also see Rycroft 2014 *IJCLLIR* 199; Fergus 2016 *ILJ* 1537.

to the general rule against third-party intervention that goes beyond procedural issues in the context of collective bargaining. Notable from the above is that the LRA enjoins conciliating commissioners to adopt a more interventionist approach in collective bargaining.[51] This leaves commissioners with the responsibility and wide discretionary powers to refine the regulation of disputes where the public interest is concerned by making value judgements about the fairness of a party's bargaining conduct in case of such disputes. Pronouncements such as the latter about the reasonableness of demands – as a rule, left to economic muscle – may influence the outcome of collective bargaining.

The provisions dealing with the effect of the award are criticised for being poorly drafted, but it has been suggested that the essence thereof seems to be the following: "The award is only binding on a party to the dispute if the party accepts the award or is deemed to have accepted the award, and provided further that at least one other party on the other side accepts the award."[52] Furthermore, the relevant bargaining council may apply to the Minister to have the award extended as provided for in section 32 of the LRA even to persons who have rejected the award in terms of section 150C(5)(c).[53] Given that section 65(3) of the LRA states that no person may take part in a strike or lock-out if that person is bound by any arbitration award or collective agreement that regulates the issue in dispute, the only logical conclusion seems to be that a party that is bound by the award (and its members), as well as any other person to whom the award has been extended, may not strike or implement a lock-out about the subject matter of the award.[54] Although this is not specifically stated in the section, this approach seems necessary. Otherwise the purpose of the newly added section 150A-150D would largely be defeated. Arguably, this position is supported by both the wording of the sections and the purpose behind it.

The recent amendments extended the scope for third-party intervention in collective bargaining in a number of ways. These include amendments aiming to facilitate the resolution of disputes where strikes become dysfunctional, violent and/or unduly protracted.[55]

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51 For a discussion on the better utilisation of advisory arbitration awards, see Coetzer 2014 *ILJ* 880.

52 Le Roux 2017 *CLL* 27, 29.

53 Section 150D(3) of the 1995 LRA.

54 Le Roux 2017 *CLL* 29. Also see Cheadle *et al Strikes and the Law* 124.

55 See s 150A-D of the 1995 LRA.

Apart from the greater scope for (third-party) discretion, specifically as far as it might affect the public interest, another noteworthy feature is the legislature's greater reliance on independent third-party intervention in the substance of collective bargaining.[56]

In its original version the 1995 LRA provided for the CCMA, only if the dispute had not been referred to it before, to offer to appoint a commissioner to attempt to resolve the dispute through conciliation. A dispute could not be conciliated twice,[57] and the commissioner could be appointed only with the consent of the parties to the dispute.[58]

After the 2019 amendments the director of the CCMA may in certain circumstances be forced to appoint a (senior) commissioner who has possibly already conciliated the dispute – with an assessor from each party.[59] Even if one or both parties to the dispute refuse(s) to appoint an assessor and refuse(s) to participate in proceedings, the commissioner may appoint a representative on their behalf and proceed with the arbitration. The commissioner must, even without the consent of the panel, make the advisory award, in which the commissioner must deal with the substantial merits of the dispute and propose motivated recommendations to resolve the dispute. A party who fails to indicate and motivate its acceptance or rejection of the award will (in contrast to the notion of voluntarism) be deemed to have accepted the award. Furthermore, third-party intervention is not limited to the advisory arbitration panel but is possible on application by community member(s) who are not party to the dispute,[60] non-strikers, the Minister of Labour, the Labour Court and, where no application is received, by the director of the CCMA on own volition.

The 1995 LRA, after its amendment and if in the public interest, provides for the appointment of a commissioner or an advisory arbitration panel even where no party to the dispute is interested.[61]

While an advisory award is not binding on the parties and arguably places no obligation on the parties, both the 2015 and the 2019 amendments to the LRA seem to indicate a move in the opposite direction by obliging parties

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56 See s 150A-150D of the 1995 LRA. Advisory arbitration in the context of "refusal to bargain" disputes (s 64(2) of the 1995 LRA) and advisory awards in the public interest (s 150 of the 1995 LRA).

57 See *Dairybelle (Pty) Limited v Lupondwana* 2001 7 BLLR 741 (LC) para 13 which was decided before the 2002 amendments to the 1995 LRA.

58 Section 150(2) of the 1995 LRA as it read prior to the 2002 LRAA.

59 Section 150(2)(a) of the 1995 LRA now provides for further conciliation.

60 See s 150A(1)-150A(4) of the 1995 LRA.

61 Sections 150 and 150A-150D of the 1995 LRA.

who choose not to accept awards issued in terms of the new provisions to motivate their rejection in the prescribed manner.[62]

The amendments brought about by section 150A-150D are far from the original proposed amendments emanating from some employer quarters to combat strike violence. According to PAK le Roux,[63] "[u]nion opposition as well as constitutional restraints to limiting the right to strike resulted in this compromise".[64] The amendments stop short of allowing a strike to be prohibited against the will of the union or workers involved, but they do everything short of this by providing a process for fashioning an acceptable resolution and by allowing pressure to be placed on trade unions and strikers to abide by the resultant award.[65]

The fact that trade unions (and employers' organisations) would now have to conduct their deliberations in the court of public opinion may well translate into pressure on trade unions (and employers) and their members not to stand in the way of a resolution intended (or regarded by an independent third party) to be fair.[66]

All of this takes place in the context of a growing realisation that we need to prevent labour unrest and to re-align the functionality or "meaningfulness" of the collective bargaining process, a realisation that has resulted in an extension of the scope for judicial intervention in collective bargaining.[67] Nevertheless, what also appears from these developments is that section 150A to 150D of the LRA that allows for intervention in the collective bargaining context does so in a reactive manner and only once a violation of constitutional rights, violence and/or damage to property occurs, or the imminent threat thereof is already present. It is submitted that a proactive approach might have been more appropriate in this regard.

4 Conclusion

This article (with its focus on section 150 and 150A-D) has considered the extent to which the regulation of collective bargaining under the 1995 LRA

62 Section 150C(5) and 150C(6) of the 1995 LRA.
63 Le Roux 2017 *CLL* 29.
64 Le Roux 2017 *CLL* 29.
65 See Cheadle *et al Strikes and the Law* 124.
66 See Cheadle *et al Strikes and the Law* 124.
67 See, for example, the addition of s 21(8A)-21(8D); the recently added s 150A-150D of the 1995 LRA; the insertion of s 189A in the 2002 LRAA and the deletion of s 189A(19) with effect from January 2015.

– as a product of criticism against the 1956 LRA – continues to be grounded on the legislative policy consideration of voluntarism.

This was done in the light of two specific points of criticism against the 1956 LRA. First, "the contradictions in policy introduced by layer after layer of amendments, year after year", and second, "the extensive discretion given to administrators and adjudicators" to intrude in the bargaining relationship.[68] Aiming to address these weaknesses, the 1995 LRA promised "to achieve certainty and to leave as little as possible to the discretion of administrators and adjudicators."[69]

Apart from a steep increase (over a relatively short period) in the scope allowed by the 1995 LRA for third-party intervention in collective bargaining, another noteworthy feature is the legislature's greater reliance on independent third-party intervention also in the substantive outcome of collective bargaining.[70] Apparent from the above and despite voluntarism as the policy choice of non-intervention in collective bargaining, there are instances in which the notion of sheer voluntarism in collective bargaining – generally understood so as not to allow for legal intervention – is increasingly becoming more apparent than real. That said, perhaps the time has come to rethink how the collective bargaining process is regulated with a view to better aligning the relevant sections of the LRA and the legislative policy choices underlying the 1995 LRA. Until that takes place, the specific points of criticism against the previous LRA, including perceived contradictions in policy caused by "layer after layer of amendments" and "the extensive discretion given to administrators and adjudicators"[71] to intrude in the bargaining relationship, will continue to seem to be just as valid against the current LRA itself. In fact, the 1995 LRA intrudes to a greater extent than its purportedly too-invasive predecessor.

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70 Section 150A-150D of the 1995 LRA.
71 *Explanatory Memorandum* 281, 291.

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List of Abbreviations

1956 LRA	Labour Relations Act 28 of 1956
1995 LRA	Labour Relations Act 66 of 1995
2002 LRAA	Labour Relations Amendment Act 12 of 2002
CCMA	Commission for Conciliation, Mediation and Arbitration
CCR	Constitutional Court Review
CILSA	Comparative and International Law Journal of Southern Africa
CLL	Contemporary Labour Law
IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
ILJ	Industrial Law Journal
ILO	International Labour Organisation / Office
JBL	Juta's Business Law
LDD	Law, Democracy and Development
MLR	Modern Law Review
PELJ	Potchefstroom Electronic Law Journal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg