Editorial

This edition of Law, Democracy and Development covers a wide range of topics, from the principles applicable to the international transfer of children via the adoption process, to the balancing of a mortgagee's security interest with a homeowner's security of tenure. The diversity of sources of law covered in the articles is remarkable, including the African Commission on Human and Peoples' Rights, the South African Constitution, international conventions in respect of children's rights, national legislation, and decisions of the South African Constitutional Court and the Supreme Court of Appeal as well as other courts in Africa. The policies that guide these laws or flow from them are also closely examined in the articles. In addition, there are articles of a primarily theoretical nature.

The diversity of the articles in this issue reflects a new phase in the progress of *Law, Democracy and Development*. Whereas in its first ten years the journal tended to produce theme-specific editions, often drawing on papers from a particular conference or event, it is now getting submissions from a wide pool of academics and researchers in South Africa and Africa. This is a positive development and one that the editors of the journal intend to build on, although it does not rule out the possibility of special-theme editions in future. The number of articles being received from outside South Africa is particularly pleasing and it is hoped that contributions will continue to increase.

SYNOPSIS OF ARTICLES

Lilian Chenwi deals with the need for an approach to housing that is also special needs oriented. There are millions of people in South Africa who do not have access to adequate housing. Among these are individuals and households who require special approaches to housing to assist them to deal with their special needs. South Africa has been hailed for its progressive housing laws, jurisprudence, policies and programmes. However, an examination of the housing policies that come close to dealing with special needs housing shows that the policy environment in this area is poorly developed and certainly inadequate in addressing the housing needs of those with special needs. This could partly be attributed to the fact that they were not specifically designed for special needs housing. Considering that there is a legal and socio-economic basis for special needs housing, the author concludes that the absence of a comprehensive and coherent policy on special needs housing at the national level as well as in those provinces where it does not exist constitutes a *prima facie* violation of the right to have access to adequate housing. To take those with special housing needs from the doldrums of neglect, the author recommends that the national government and, where applicable, provincial governments develop and implement appropriate, com-

prehensive and coherent policies on special needs housing.

Usha Jivan explores the nature of legal discourse about equality, in particular homosexual equality, and illustrates how this discourse has traversed through sites that may be labelled condemnation, compassion, condonation and celebration. Much of the discussion focuses on the progress that has been made to bring same-sex relationships into the realm of legal regulation. In South Africa, legal discourse about equality for gays and lesbians at the first three sites has been largely successful and contention remains at the site of celebration. In the pre-democratic era, the question of homosexuality was dealt with in the harshest manner. Since the introduction of the new Constitution, new approaches from the law and courts, in particular, provided protection to individual relationships via a series of cases. These have included claims to decriminalize sex between men, claims to allow people in same-sex life partnerships to be treated the same as spouses for the purpose of residency in South Africa, adoption of children, benefits under medical aids, pensions, the road accident fund, *in vitro* fertilization, and inheritance. In all of these cases the courts have shown compassion for, and condoned same-sex life partnerships where such couples have conducted themselves in ways that replicate the qualities of heterosexual marriage. The reason for this is that the courts have recognized a long history of discrimination against gay and lesbian people in the law and in society as a whole. Profound shifts took place in our legal landscape in the form of a demand for the right to same-sex marriage as a means of celebrating their unions. This resulted in the passing of the Civil Union Act of 2006 which provides for the solemnization and registration of civil unions, *by way of either a marriage or civil partnership,* between *two persons*. However, it is the author's submission that the Act is nothing more than an attempt to pacify the gay and lesbian movement by affording them the option of calling their union a marriage should they so wish. A compromised solution falls short of true celebration and hence, full equality.

Anel Boshoff seeks to explore the tension between the law's response to so-called self-evident 'evil', on the one side, and its commitment to a new 'moral and ethical direction the nation has identified for its future' (*per* judge Mahomed in *S v Makwanyane*), on the other. The point of departure is that any reflection on this paradoxical position needs a rigorous and critical perspective on the uses of the concept 'ethics'. The modernist/metaphysical concept of ethics – tying 'what to do' with 'what one knows', is problematised with reference to Derrida's critique of subjectivity and Laclau's distinction between ethics and morality, thus situating ethical acts in the singular, in the unprecedented and unrepeatable situations of individual lives. The ethics of alterity, associated with Lévinas, is critically examined with reference to Badiou's statement that the ethical dominance of the other is entirely bound up with a religious axiom. In a discourse without piety (Badiou's 'decomposed religion'), theories and strategies such as 'recognition/respect of the other', 'ethics of differences' and 'multiculturalism' become diluted and ultimately meaningless. More often than not this turns out to be an insincere strategy at maintaining identity thinking and remaining within a theoretical framework that can only cope with the assimilated or 'good' other. Turning

the focus back to our court's dilemma with 'evil' – how to maintain a non-violent relationship with the violent – is a reminder that, difficult as it might be, one cannot avoid acting and that despite rigorous critique, one also cannot proceed with no ideas and no concepts. The provisionalness of ethical rules, however, demands suspicion and demands that one suspects that after a certain point every good idea becomes inflexible and, at the end, repressive. In constantly reimagining ourselves and our world, we need an ethics that distrusts everyone who wants to save the world – everyone who wants to save us and give us foundations.

According to **Jeannie Van Wyk**, land use planning and environmental issues do not and cannot exist independently of one another. Many examples exist of proposed developments where both these issues are relevant in making decisions on whether or not to permit the development. In South Africa different statutes set out different procedures to obtain permission to proceed with a proposed development. This results in uncertainty as to which legislation and, therefore, which procedures are applicable in a particular case. In the face of the different sectoral statutes as well as the resultant differing procedures and authorities which must deal with applications, the question can be asked whether it is not desirable to make any investigation into the impact of development on the environment part of the process of integrated development planning. An examination is made of some of the statutes which regulate aspects of both development and the environment. The different procedures are set out and an indication given of which authorities are involved. Aspects of cooperative government are touched on and a vision for integration set out. The conclusion is reached that an integrated, holistic approach which harmonises all the planning processes and institutions is more desirable than the fragmented, sectoral approach that is largely being followed at present. Such an integrated approach could be part and parcel of integrated development planning.

Julia Sloth-Nielsen and Benyam Mezmur, provide a detailed discussion on the decision of the Supreme Court of Appeal (SCA) in *De Gree v Webb* [2007] SCA 87 (RSA), in which they examine the fundamental principles applicable to the international transfer of children via the adoption process, dissect the role of the Court in giving effect to the treaty obligations engendered by South Africa's ratification of the Hague Convention on the Protection of Children and Co-operation in respect of Inter-Country Adoption (1993) (hereafter Hague Convention) and determine the suitability of a guardianship application in the High Court to effect the first step of an international adoption. They argue that the minority judgments misconceive the nature of the Hague principles and their underlying rationale to a significant extent, and further, that even the majority judgments do not fully explain the reasons for which the alleged conflict with the international law provisions render the use of a guardianship procedure to effect an inter-country adoption fatally flawed. They contend that the fulfilment of the principle of subsidiarity, whilst remaining at the heart of the international law framework established in Article 21 of the CRC and Article 24 (b) of the ACRWC, was overemphasised in the minority judgments, at the expense of other overarching principles rel-

evant to inter-country adoption. They conclude their article by arguing that the act of conferring parental status on a prospective adoptive parent via a guardianship order violates fundamental constitutional principles and policy considerations, and that sanctioning this avenue, even temporarily until the full promulgation of the Children's Act 38 of 2005 renders this unlawful, is unnecessary and unwarranted.

Lee Steyn argues that a balance needs to be struck between a mortgagee's security interest and a homeowner's security of tenure. This is because the Constitutional Court, in the case of *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC), set aside the sale in execution of the immovable properties of the appellants on the basis that it amounted to an unjustifiable infringement of their right to have access to adequate housing, protected by section 26 of the Constitution. Following upon this, a number of reported cases have dealt with the issue whether the sale in execution of mortgaged immovable property may constitute an infringement of the mortgagor's section 26 rights and, if so, whether such infringement is justifiable in terms of section 36 of the Constitution. The author seeks to trace developments leading up to, and in relation to these reported decisions. The author also seeks to highlight the need for the enunciation of appropriate principles, policies and processes to be applied when a mortgagee seeks the sale in execution of a defaulting mortgagor's home, in order to provide a more clearly defined framework within which the required balance is to be struck between a mortgagee's security interest and a homeowner's security of tenure. Insufficient predictability may lead to reluctance on the part of potential mortgagees to provide finance, and this may well create the very 'poverty trap' which the Constitutional Court sought to avoid in the *Jaftha* case.

Lesala Mofokeng provides a detailed discussion regarding the definition of legal pluralism, which according to him, has the same meaning as 'legal diversity'. He argues that despite the fact that everyone has a right to freedom of religion under section 15 of the Constitution, the section does not adequately afford people the right to practice their religions freely, as people would understand that right. In other words, the freedom of religion clause should be interpreted in a manner that would guarantee linguistic and religious communities the right to have their private law matters regulated in accordance with the personal laws of their choice, provided they do not conflict with the spirit and values of the Constitution. The author concludes his article by providing a comparative analysis of foreign legal systems in order to identify a suitable model concerning the incorporation of legal pluralism into South African law.

Ebenezer Durojaye considers the decision of the Nigerian court in the case of *Festus Odiafe and ors and the Attorney General and ors* relating to right of prisoners' access to HIV treatment in Nigeria. This case is the first decided case on HIV/AIDS in the country The article argues that while the court was proactive in holding that failure of the Nigerian prison officials to provide treatment for the applicants who are HIV positive was a violation of article 16 of the African Charter the court fails to maintain the same momen-

tum with regard to whether this act of the officials amounts to discrimination under Nigerian law. Similarly, the article argues that the failure of the court to explore international law principles and standards and to consider decisions from other Commonwealth countries as aids, in arriving at its decision, is an oversight and thus, a shortcoming on the part of the court.

Forum Discussion

Waruguru Kaguongo discusses issues arising from decisions handed down by the African Commission on Human and Peoples' Rights in 2004. A total of 12 communications were considered in that year with seven communications being decided on the merits. It is noteworthy that the first interstate communication was published in 2004. The article is divided into two main sections, issues implicit in the determination of admissibility and those arising from the consideration of the merits. On admissibility, the most often considered criterion is the requirement to exhaust local remedies. In determining compliance with this criterion the Commission displays consistency with its previous jurisprudence. The exhaustion of local remedies tends to take ascendancy over the other criteria both in terms of how often it has been raised as well as the depth of consideration by the Commission. The Commission fails to take the opportunity presented by the raising of other criteria to further elaborate on their application. On the merits, communications raise issues related to evidence and the lack of consistency on how it affects decisions; the limitation of rights; the role of the Commission versus national jurisdictions; fair trial guarantees; interpretation of international treaties and the administrative capacity of the Commission and its effect on decisions. The article discusses the Commission's reasoning and treatment of these issues.