Editorial

There can be no peace without development. This powerful statement, once made by Cuban ex-President Fidel Castro to a conference of the Movement of Non-Aligned Countries, has been echoed so widely that it has become almost trite. Yet it continues to capture one of the most central challenges that the African continent, including South Africa, faces. And all the long-standing questions remain: what exactly does "development" entail? Development of what, according to whom? And what are we prepared to concede in order to achieve our developmental goals?

This edition of *Law, Democracy and Development* examines a number of issues pertinent to this theme which, taken together, offer a multi-faceted view of possible paths of development. These include the question of constitutionally entrenched public participation rights, the possible use of Sharia law to advance the rights of children in international law, and the development of a human rights framework to spark cultural dynamism without causing unnecessary infringements of the individual's right to practise her or his culture. Indeed, a theme running through more than one article is the manner in which culture interacts with development and the question of how these two facets of social life may coexist symbiotically.

This issue of *Law, Democracy and Development* also contains the first instalment of what is intended to become a regular feature – an article on a topic of major constitutional importance in an indigenous African language, accompanied by an English text. The article this time (summarised below) is in Xhosa. This is the outcome of an exciting project launched during 2008, involving the appointment of a student research assistant who is a speaker of an African language to research and draft such an article under the supervision and with the assistance of Faculty academic staff. Not only should this help to foster a culture of research and research capacity among students; we see it also as a small contribution to the development of legal literature in South Africa's indigenous languages. Needless to say, any contributions from readers to advance this project – for example, in the form of comment – will be very welcome.

We turn now to the articles in their order of appearance. **Nqosa L Mahao** sets the scene, arguing that the concept of the constitutional state has its genesis in the evolution of constitutionalism in Europe. Its basic elements – the rule of law, separation of powers, independence of the judiciary – were born of a specific agenda of restraining the holders of political power and building a state based on liberal foundations, that would play only a limited role in social affairs. During the twentieth century this ideology was substantially reversed with the development of the notion of a broad social writ enabling the state to harmonise formal and substantive equality. The author

argues that this trend, which has enriched the democratic project, has been the principal casualty of globalisation. Globalisation has redefined the role of the state in the developing world at the expense of popular sovereignty, weakening its mission of providing public goods and mediating social justice. In this context, it is suggested, democracy is reduced to little more than a ritual in electoral proceduralism. To combat these trends the article advocates a number of reforms: the constitutionalisation of elements of direct public participation in certain spheres of public life to reinforce representative government; monitoring of progress being made by governments in bridging the gap between civil and political rights on the one hand and socio-economic rights on the other; making courts of law more activist in upholding the public good; and, finally, reviewing the borrowed Westminster constitutional model, that has become institutionalised in many countries, to ensure effective parliamentary oversight of the executive.

Turning to the international scene, **Cephas Lumina** critically examines the role of the World Trade Organisation (WTO). In recent years, it is noted, the organisation's agenda of trade liberalisation, its perceived lack of accountability and insensitivity to human rights have attracted intense criticism. It has been asserted, inter alia, that provisions of WTO agreements concerning agricultural trade and intellectual property directly affect the ability of governments to fulfil their human rights obligations to their citizens. Conversely, supporters of the WTO argue that by expanding global trade the organisation in fact assists in raising living standards. While it is generally acknowledged that trade has an important role to play in improving livelihoods, studies indicate that trade liberalisation has not necessarily achieved this result for many WTO members. This author assesses these claims from a human rights perspective and explores the relationship between trade, human rights and development. The discussion is divided into two parts. The first part, published in this issue of *LDD*, sets the context by sketching the history and functions of the WTO; discussing the linkages between trade liberalisation, human rights and development; and assessing the human rights obligations of the WTO. It notes that most WTO Member States have assumed legal obligations through ratification of one or more of the core universal human rights treaties and that these remain binding on them, and concludes with the suggestion that the WTO's trade liberalisation agenda should be more responsive to human rights. The second part, due to be published in the next issue of *LDD*, will explore the human rights implications of two controversial WTO agreements: the Agreement on Trade-Related Aspects of Intellectual Property and the Agreement on Agriculture.

Jamil Ddamulira Mujuzi turns to a practical aspect of the implementation of human rights in Africa. At the time of ratifying the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("the Protocol"), he explains, South Africa made several reservations and interpretative declarations. The reservations related to Article 4(2)(j), which deals with the imposition of the death penalty on pregnant and nursing mothers; Article 6(d), which deals with the registration of customary marriages; and Article 6(h), dealing with the nationality or citizenship of children born of

alien parents. The interpretative declarations related to Article 1(f), which defines "discrimination against women", and Article 31, dealing with the question whether the South African Constitution offers more favourable human rights protection than the Protocol. Against the background of a general discussion of reservations and interpretative declarations in international law, the author considers the legal implications of South Africa's reservations and interpretative declarations to the Protocol. The reservation to Article 6(d), he suggests, is in conflict with South Africa's international treaty obligations under the Protocol with regard to the marriage of girl children and the interpretative declaration to Article 1(f) is vague. However, the article highlights that the other reservations and interpretative declaration further the protection of women's rights in South Africa. Several recommendations are made on how South Africa can better comply with its obligations under the Protocol.

'Dejo Olowu looks at a different dimension of the developmental process: religion and its socio-legal implications. There has, he observes, been a noticeable growth in the number of Western and non-Western writers exploring possible linkages between Islamic legal theory and an international human rights ethos. The article then focuses on dimensions of Islamic legal theory pertaining to the rights of children and, more particularly, the potential of this theory to reinforce the theoretical understanding of children's rights within the context of international human rights. While dealing with issues broadly, it does evaluate Islamic legal understanding of the rights of the unborn child in some detail, albeit without getting embroiled in the debate about whether an unborn child is a human being or not. It argues that the *Sharia* includes not only law, but also religion and ethics, thus offering a multidimensional approach covering the total personality of the child. Moreover, Islam provides enforceable sanctions as well as religious and social measures to promote the welfare of the child. Islamic law, it is concluded, contains extensive provisions that can reinforce global advocacy for the promotion and protection of the rights and welfare of children.

In the Annual Dullah Omar Memorial Lecture, reproduced with the kind permission of the Community Law Centre, **Emeritus Archbishop Desmond Tutu** reflects on "The State of our Democracy". The speech commences with a brief historical background of the past that South Africa inherited and sets the tone for the critical assessment that follows. It highlights some of the challenges inherited from the past which, if not dealt with, may "augur ill" for the future. However, the conclusion is drawn that "[w]e have a wonderful land with immense potential".

The topic chosen for our first Xhosa-language article links up with a theme addressed by Professor **Mahao** (above). In an outstanding debut, **Linda Nyati** explores the duty to facilitate public participation in legislative processes as encompassed by sections 59(1) (a), 72(1) (a) and 118(1) (a) of the Constitution. This issue, the article demonstrates, is highly pertinent to the citizens of this country in grappling with the inner working of a democratic dispensation. The author delves into it by way of a critical analysis of the judgment of the Constitutional Court in *Merafong Demarcation Forum & Others v The President of*

the Republic of South Africa.[1] After investigating the brief historical background of the "right" in question, and considering the representative and participatory aspects of our constitutional democracy, the article considers whether the standards set by the courts are effective in ensuring that the legislative bodies fully discharge their duty to facilitate meaningful participation for all citizens. The "minimalist approach to public participation" adopted by the court in this matter, it concludes, "has created a gap wide enough to let an important piece of legislation which has significant implications on the public to be passed as reasonable. Setting such low standards means that judicial review of the other branches of government is ineffective."

Finally, **Amos Adeoye Idowu** reflects on a highly controversial cultural practice which continues to have a deep impact on women's right to equality, physical integrity, dignity and privacy: female genital mutilation (or "cutting"). One of the greatest paradoxes in many nations, he argues, is the increasing contrast between major achievements in struggles against human rights violations, on the one hand and, on the other, peoples' instinctive insistence on conservative socio-cultural identities. Focusing on Nigeria, he notes the refusal of people of various ethnic groups to disengage from the practice of different forms of genital cutting – a practice which continues despite many campaigns opposing it on account of its numerous health hazards as well as international conventions and domestic laws criminalising it. The article aims at analysing the factors responsible for its persistence and appraising its effects on the fundamental rights of women and female children. Weighing up the various arguments, it concludes that the law must not only impose penalties but must be accompanied by education of all those concerned. "[I]t may be necessary", it is argued, "to consider the underlying factors that make some people so protective of their culture that they would attempt to preserve it in its original form even if it means the death of fellow human beings."

1 [2008] ZACC 10; available at http://www.saflii.org/za/cases/ZACC/2008/10.pdf