Editorial

This issue of *Law, Democracy & Development* covers a range of topics that are pertinent to our central theme: the promotion of democracy – above all through the protection of fundamental rights – and socio-economic development. Some articles focus on the protection of the rights of vulnerable groups in society; others deal with broader questions ranging from the operation of governmental structures to the manner in which we understand our apartheid past (and, consequently, the lessons we learn for the future). Still others focus on the protection of fundamental rights and the maintenance of democracy in other parts of Southern Africa.

Lufuno Nevondwe analyses the recent amendments to the Pension Funds Act 24 of 1956 relating to the divorce benefit, particularly the amendment introduced by section 37D. This amendment will contribute positively to the development of South African retirement law. The allocation and payment of a share of a retirement fund member's retirement savings on divorce has been the subject of intense debate, especially in view of the unfairness to non-member former spouses (who are usually women) in this regard before 1 November 2008. In terms of section 7(8)(a)(i) of the Divorce Act 70 of 1979, the former spouse of a member on divorce could be awarded a portion of the benefits that the member would have received had he or she resigned on the date of the divorce. However, the former spouse was only entitled to receive that share when the member became entitled to a benefit in terms of the rules of the fund – that is, on his or her later retirement or termination of membership – which could have been many years after the divorce. By 1 November 2008 two pieces of legislation had been passed to clarify the position – the Pension Funds Amendment Act 11 of 2007 and the Financial Services Laws General Amendment Act 22 of 2008. Section 28(e) of the former stipulates that, for purposes of the Divorce Act, a benefit is deemed to accrue to the principal member on the date of divorce, thus allowing the non-member spouse to claim her share of it and have it transferred to another fund or paid to her within 60 days of the date of her election. The Financial Services Laws General Amendment Act further made it clear that the former spouses of members of retirement funds who had divorced those members before 13 September 2007, and to whom shares of the "pension interests" of those members were awarded on divorce, are entitled to claim them from the funds even if no benefits have yet accrued to the members they divorced.

Deon Erasmus starts his evaluation of the South African criminal trial process, which is governed by the Criminal Procedure Act 51 of 1977, by stating that the oral nature of a trial is one of its essential features. He then discusses the procedural explanations given to the accused and notes that there are important and informed procedural choices that the accused is required to

make, which may have a major effect on the outcome of the trial. The "minefield of hard choices" discussed in the article is said to be exacerbated when an accused is undefended whereas the concept of equality before the law, it is argued, must at the very least mean a person should not be denied effective access to the courts as a result of poverty. Research findings have shown that accused persons understood a mere 37% of what was explained to them in procedural explanations. However, a large number of accused persons in District and Regional courts are unrepresented either because they had not applied for legal assistance or would not have qualified for legal aid if they had applied. The article notes that, although the number of undefended accused has declined significantly since 1993, a substantial number of accused persons in the District and Regional Courts are still undefended.

Neil Coetzer examines the National Health Amendment Bill 2008 GG 30985 of 2008-04-18 (the Bill) against the background of promoting the right of access to health care. The article notes that the public health care sector is at pains to provide adequate basic health care in many areas of South Africa. However, despite the difficulties faced by the state in this regard and the criticism levelled at it for failing to ensure a high standard of basic public health care, the Bill aims at enabling the state to regulate the pricing of private health care. The author asks whether the long arm of the law is perhaps being stretched too far by attempting to regulate the private health care industry and whether these measures are reasonable in the context of the state's ongoing battle for progressive realisation of the right to health care. The article endeavours to answer these questions and suggests possible alternatives to achieve what the Bill sets out to do.

Irma Kroeze raises the question whether the Constitutional Court has assumed the responsibility in South Africa of creating public memory. While history and the past must be remembered, it is also susceptible to distortion and reconstruction. That is why the past often seems like a foreign country – one that bears little or no relation to one's own recollection. The author states that South Africa has been concerned with that foreign country called the past for quite some time. In the author's view it would be better to characterise that concern in Jean Baudrillard's terms as a perverse fascination with our own origins, "a collective attempt to hallucinate the historical truth of evil". The article argues that the Constitutional Court has been involved in the creation of what has been termed "official public memory" and looks at the way in which some of its decisions have arguably been instrumental in doing so. In conclusion, problems resulting from the conception of "historical truth" are examined.

Stu Woolman notes that for almost a decade government actors and academics have bemoaned a gaping hole in our law: the Final Constitution promised that Parliament would establish a legal regime to mediate and to resolve intergovernmental conflicts. Parliament ultimately produced this super-ordinate legislation in 2005: the Intergovernmental Relations Framework Act. This Act defines intergovernmental relations as "relationships that arise between different governments or between organs of state from different

governments in the conduct of their affairs." However, the Act is silent as to the problem of how cooperation between provincial departments within any given province should be regulated. The Final Constitution's provisions on cooperative government are likewise mute regarding the regulation of these "horizontal intra-governmental relations". The unspoken understanding would appear to be that all provincial departments are mere manifestations of the provincial Premier's executive authority. However, that understanding still leaves a significant gap in South African law: how are disputes between provincial departments to be avoided, and, if incapable of avoidance, resolved? The author concludes that every provincial Premier has an array of tools at his or her disposal to prevent and resolve such conflicts. Agreements between departments can be crafted in a manner that permits third parties to determine whether the provincial departments in question have discharged their duties. Such intra-governmental agreements are, however, only as good as the penalties that are in place for non-compliance.

Nadjita Ngarhodjim discusses the challenges of scrutinising regional standards of democracy in Africa. Democratisation, it is argued, was triggered mainly by the change in the distribution of international political power in the late 1980s. The continent's leaders, according to the author, reacted promptly, deciding to clothe democracy in African dress by setting their own standards. Although these standards are in accordance with universal standards and with standards adopted within the framework of other regional and sub-regional organisations, the article argues that they are not well entrenched owing to a lack of political will and the weakness of the mechanisms for their enforcement, oversight and monitoring.

Patrick Matibini examines the concept of freedom of information, starting with a historical overview of the political arena in Zambia. The primary objective of this article is said to be threefold – first, to demonstrate the importance of freedom of information in a democratic state; secondly, to consider the quest for legislating freedom of information in Zambia; and, thirdly, to highlight the principles of the Freedom of Information Bill that has been presented to the Zambian National Assembly. The author notes that, although the African Charter on Human and Peoples Rights does not guarantee the right to access information, it protects the right to receive information. The two freedoms are, however, understandably perceived to be closely connected and various international instruments treat freedom of expression as including freedom of information. The author concludes by restating the significance of freedom of information, referring to it as an "important concomitant of modern democracy".

As announced previously, we intend carrying an article by a young researcher in an indigenous African language, accompanied by an English text, in the Forum section of every issue of the journal as a contribution to the development of legal scholarship in indigenous languages. The article in this issue, co-written by Lesega Mnguni and Justin Muller, deals with **The principle of legality in constitutional matters with reference to *Masiya v Director of Public Prosecutions and Others* 2007 (5) SA 30 (CC)**. In

this matter, it may be recalled, an accused person was charged with rape after visiting a grossly indecent sexual act on a nine-year-old girl. Although the act in question did not fall within the common law definition of rape, the Regional Court felt justified in developing the common law definition in terms of section 39 of the Constitution to include the act in question and duly convicted the accused. The High Court upheld this decision. The article examines the reasoning of the Constitutional Court in determining the meaning of the principle of legality and applying the right to non-retrospective punishment, as entrenched in section 35(3)(l) and (n) of the Constitution, under extremely sensitive and challenging circumstances.