Editorial

This issue of *LDD* has a special focus on women. It comes at an appropriate time. The position of women in African and South African society has been highlighted by the controversy surrounding disclosures of illegitimate children fathered by President Jacob Zuma. Indeed, the President's marriage to a third wife also sparked criticism among sections of the population where monogamy is the norm. In itself, such criticism is easily answered: cultural differences must be accepted and respected, as required by the Constitution – not only in a narrow legalistic sense but in the spirit of embracing our national diversity rather than merely tolerating it. Aptly, this spirit of inclusiveness was recalled in the celebration of Nelson Mandela's legacy 20 years after his release from Victor Verster Prison on 11 February 1990. But the acrimony of the debate surrounding Zuma shows that Mandela's vision is still far from becoming a reality.

And thorny questions do remain. Leaving aside the question of polygyny and whether the original values of the institution live on in present-day practice, it is clear that extra-marital relationships are widely frowned upon, as is the generation of extra-marital children with its inevitable concomitant of unprotected sex. This is so regardless of whether the marriage is monogamous or not. And this, in turn, raises the question of gender equality: to what extent are men able to act with impunity while different standards are applied to women? And – given that the issues have presented themselves in the context of "Zulu culture" – to what extent are the fundamental rights of women in traditional African societies recognised and protected, especially in the sensitive area of sexual relationships?

Two articles in this issue of LDD address the latter question, showing that important steps forward have been taken but much remains to be done. **Aniekwu Nkolika Ijeoma** starts by noting that, in July 2003, the African Union adopted a landmark treaty known as the Protocol on the Rights of Women in Africa (the Protocol) to supplement the regional human rights charter, the African Charter on Human and Peoples' Rights (the African Charter). The Protocol significantly advances human rights protections in Africa to better reflect and incorporate women's experiences, providing broad protection for sexual and reproductive health rights. It presents a tremendous opportunity for women's rights advocates in Africa, being the first regional human rights treaty to explicitly articulate women's rights to abortion in specified circumstances and to identify protection from HIV/AIDS as a key component of sexual and reproductive rights. The Protocol further reinforces and affirms the language of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by prohibiting violence against

women and harmful traditional practices, including female genital mutilation, in the African region.

The article highlights the significance of the African Charter on Human and People's Rights and its Additional Protocol on Women's rights. It acknowledges the tensions posed by universal human rights protection and cultural relativity, and assesses the regional treaties' provisions on sexual rights for African women. It also emphasises the gender specificity of sexual rights and health, the legal indications of capacity and willingness provided in the Additional Protocol and the indications for state governments to protect and realise women's sexual and reproductive rights within the sub-Saharan African diaspora.

In similar vein, **Letetia van der Poll** critically evaluates the traditional African sex practices of dry sex (or vaginal drying) and virginity testing against the backdrop of three key (African) human rights instruments, namely the African Charter on Human and Peoples' Rights, the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the Constitution of the Republic of South Africa. In particular, the possible impact of these two practices on a number of fundamental rights of women, as entrenched in the above three instruments, is considered. To this end the notions of harm, (female) sexuality, individualism and (African) socialism are conceptualised and juxtaposed with particular reference to the constitutionally entrenched values of equality, dignity, privacy and freedom and security of the person. As a consequence, this article argues that the practices of dry sex and virginity testing violate some of the most basic rights and freedoms accorded to women within the African human rights system. And since it cannot be denied that female sexuality is a determining factor in understanding the particular oppression of women and girls in any society, and the ensuing harm, dry sex and virginity testing constitute harmful traditional practices that infringe the inherent dignity of women, their freedom and security, and their rights to equality and privacy. The African Commission does not sanction limitations on the rights of women, nor does it support the subordination of women to the collective.

The article therefore concludes that African states have an obligation to ensure that the family unit, traditionally a private domain, does not become a haven for harmful sexually based gender specific practices. That obligation rests on the broader legal community also. Failure to act decisively could indeed be said to constitute tacit condonation of the sexually based subordination of women and girls.

Socio-economic rights

Another area of major concern in South Africa (as in other developing and some developed countries) is that of "service delivery", underscored by numerous protests in recent years against the perceived failure by (local) government to provide the amenities of a decent existence to impoverished communities whose lot, in many cases, has hardly improved since the advent of democracy 16 years ago. These protests continue to focus our attention

not only on the third-world conditions in which such communities languish but also on the huge gulf that separates them from the first-world affluence enjoyed by an elite that is no longer mainly white. In legal terms it underlines not just the duty of local government to provide essential services but broader issues bound up with the implementation of the socio-economic rights enshrined in the Constitution, designed to chart the way towards "a better life for all".

Central to this aspiration, it is submitted, is the right to social security, without which the core values of the Constitution – dignity, equality and freedom – will remain the preserve of those in well-paid employment. Indeed, our progress in giving effect to this right may be seen as a measure of our progress towards achieving the degree of social transformation implicit in the service delivery protests. Two articles in this issue of LDD address different aspects of this question, indicating the extent to which our scholarship is rising to the challenge. **Naudè Malan** considers how and to what extent the Constitution empowers non-state actors to realise rights by reference to the right to have access to social security. The article proposes that rights should be understood in terms of performance by both non-state and state-based actors. This allows the meaning of the right to incorporate aspects of social and economic policy in its realisation. The article shows that the construction of horizontal application and justiciability, the provisions for the subsidiarity of non-state actors to the state in the Constitution, the emphasis on "access to" and the generous "rules of standing" in the Bill of Rights support a performative conception of rights. The article concludes with the implications such a performative reading holds for the realisation of rights by reference to social and economic policy, the duties of the state and the governance of firms and civil society organisations.

Kitty Malherbe and **Lorenzo Wakefield** again address the position of women in this context, showing how roles traditionally allotted to women may obstruct their access to the right to social security. The Constitution guarantees "everyone" that right, including social assistance if persons are unable to support themselves and their dependants. The article deals with the extent to which women's traditional care-giving role affects their access to social security. There are some instances where women's care-giving role provides them with benefits which they otherwise would not have had, such as the child support grant. On the other hand, care-giving responsibilities can exclude women from the scope of application of other benefits, such as benefits from certain retirement funds. The authors examine the need for measures aimed specifically at providing assistance to women as care-givers, as well as the potential pitfalls of such measures, such as unfair discrimination against men also fulfilling a care-giving role, and the danger of stereotyping women as care-givers.

In our Forum section we are proud to reproduce the 2009 Dullah Omar Memorial Lecture, delivered by United Nations High Commissioner for Human Rights **Navanethem Pillay**. Addressing the issue of "Women's Rights in Human Rights Systems: Past, Present and Future" it serves to contextual-

ise many of the issues facing women that were raised in earlier articles. And, in our regular ALAD[1] feature, UWC law student **Ronnie Bedu** deals with the judgment of the Constitutional Court in *Centre for Child Law v Minister of Justice and Constitutional Development and Others*[2] on the constitutionality of minimum sentences in respect of young offenders under 18 years of age.

It only remains to reiterate, as many readers will already be aware, that this is the last issue of *LDD* that will appear in the traditional printed format. As from 2010 we have taken what we see as an important and exciting step forward: *LDD* will from now on be appearing online in "open access" electronic format. This means that *LDD* is now freely accessible to readers around the world, with all articles available to be downloaded at no cost other than that of an internet connection. Not only do we expect this to significantly increase our readership in South Africa, Africa and internationally; it also means a major increase in the number of contributions we shall be able to publish and the speed with which they will appear. We are therefore not taking leave of existing readers and subscribers; we look forward to your continuing contributions to and interaction with the journal in the belief that it will in future be more useful than ever before. Please visit our website at www.ldd.org.za and see for yourself!

1 ALAD, the African Language and Development Programme, entails the publication of an article by a UWC law student in each issue of LDD, in an indigenous African language as well as in English, dealing with an important constitutional question.

2 2009 (2) SACR 477 (CC).