

Transformative constitutionalism, substantive equality and the role of the courts: Lessons from South Africa and Zimbabwe

Introduction

In theory, the constitutions of South Africa and Zimbabwe are transformative documents – they seek to transform the lives of ordinary citizens and to create better conditions of living for ‘everyone’ resident within the territorial borders of these countries. These constitutions have Bills of Rights which codify fundamental human rights and spell out, in broad terms, what the respective governments should do in order to achieve social and economic transformation. At the heart of the social transformation agenda are socio-economic rights, the notion of substantive equality, affirmative action measures and other mechanisms for addressing historical injustices.¹ These mechanisms ensure that these Bills of Rights stand as ‘bridges’ linking pasts that were characterised by inequality, racial segregation and the marginalisation of ‘blacks’ in all sectors of society to futures that are characterised by dignity, social justice and equal opportunity for all persons regardless of their race, gender and skin colour. To ensure that these ‘bridges’ are not made up of ‘constitutional ropes of sand’, both constitutions provide for courts that are, in theory at least, independent and empowered to adjudicate upon and provide appropriate remedies for breaches of rights.

South Africa is portrayed as ‘one sovereign, democratic state founded on the values of...the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism’.² In the same vein, the ‘recognition of the equality of all human beings’ is one of the founding values of the new Zimbabwean Constitution.³ What is more, ‘the equitable sharing of national resources, including land’ is one of the principles of good governance binding on all agencies of the state.⁴ Both Constitutions make bold statements about the ‘sacred’ nature of the right to equality without enumerating, in the provisions entrenching founding values, what the state should do to promote or achieve equality. In terms of the South African Constitution, the need to achieve equality symbolises the lawmaker’s awareness of the huge disparities that exist between the rich and the poor, and the possible remedial measures to be adopted in curbing stubborn historical injustices. By way of contrast, the Zimbabwean Constitution simply recognises ‘the equality of all human beings’ and does not directly bind the state to strive to achieve equality. Given that the ‘land question’ was one of the (if not the most) central issue(s) during the liberation struggle,⁵ it is perhaps not surprising that the founding provisions of the Zimbabwean Constitution implicitly tie equality to the equitable distribution of such an important resource as land.

As a founding value, equality ‘must inform all law’ and must be one of the normative standards ‘against which all law must be tested for constitutional consonance’.⁶ The recognition of equality as one of the founding values of the two Constitutions underlines the importance of distributive justice and transformative constitutionalism in post-colonial

¹ Black Economic Empowerment, for example.

² Section 1(a) of the Constitution of South Africa, 1996.

³ Section 3(1)(f) of the Constitution of Zimbabwe.

⁴ Section 3(2)(j) of the Constitution of Zimbabwe.

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⁶ *Minister of Finance v Van Heerden*, para 22.

states. It also underlines the perpetual nature of the constitutional project of providing equality and casts the constitutions as aspirational documents laying the foundation of distributive justice between different social groups. Accordingly, the idea of equality lies at the heart of the notion of transformative constitutionalism. Construed appropriately, the substantive right to equality (not the founding value), provides wide scope for 'achieving equality' and transformation in post-colonial and post-apartheid states. When equality rights are entrenched in national constitutions or statutory enactments, the challenge then consists not in finding solid legal grounds for developing measures which remedy existing disparities in wealth, power and privilege, but the political will and courage to translate the theoretical promises into practical reforms and programmes targeted at achieving equality in society. This often requires the introduction of affirmative action or preferential treatment programmes designed to benefit historically disadvantaged groups. However, the dividing line between reasonable and justifiable affirmative action, on the one hand, and reverse discrimination, on the other, is always contested and often invite courts to determine the correctness of government programmes that would have been allegedly developed to 'cancel out' the unequal access to services caused by institutionalised discrimination against certain classes or social groups in society. In the process, courts should adjudicate on the constitutionality or otherwise of legislation or state policy measures designed to achieve equality.

Inequality – The enormity of the challenge

Formal and substantive equality

Under the new democratic order, the idea of equality is a norm of great significance and is one of the founding values of the South African Constitution.⁷ To prevent inequalities between different categories of persons, the Constitution provides that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'.⁸ For unequal treatment between categories of persons to be justified or ethically appropriate, there must be a rational purpose behind the discrimination. Accordingly, law or conduct violates the equal protection clause if the differentiation it makes serves no legitimate purpose or if there is no rational connection between the differentiation and the purpose for which it is designed.⁹ This is the idea of formal equality.

⁷ See section 1 of the Constitution. Other constitutional provisions placing equality at the centre of legislative and administrative measures, and judicial decision-making include sections 9, 25, 36, and 39 of the Constitution. The right to equality and non-discrimination are also protected by section 6(2)(d) of the Children's Act and the whole of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Both pieces of legislation apply vertically and horizontally, thereby binding states and families to refrain from unfairly discriminating against certain classes of children.

⁸ Section 9(1) of the Constitution.

⁹ See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 25, holding as follows:

In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of a constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner....Accordingly before it can be said that mere differentiation infringes section 8(1) [of the Interim Constitution], it must be established that there is

Formal equality 'presumes that all persons are equal and that any differential treatment of the basis of arbitrary grounds, such as race or gender, is almost inevitably suspect or irrational'.¹⁰ Inequalities that exist between different categories of persons may thus be addressed by extending the same rights to all, according to the same neutral standard. This conception of equality arises from the 'everyone is born free and equal' mantra that characterised early international human rights instruments such as the Universal Declaration of Human Rights.¹¹ It ignores, for instance, the stubborn reality that children born with physical or mental disabilities or to poor families which have to 'dig deep' to procure even the most basic necessities for survival, are neither free from poverty, stigmatisation and marginalisation nor equal to those born to parents with all the resources needed for a minimally decent life. The former child's life chances are foreclosed and the latter's are wide open.¹²

Characterised by strict adherence to legal formalism, formal equality leaves no room for differences and sees affirmative action programmes not as part of legitimate efforts to promote the achievement of equality, but as discriminatory practices which violate the right to equality. In emphasising equal treatment according to the same neutral standard, formal equality masks the actual social and economic differences between groups and individuals. As observed by Albertyn and Goldblatt, '[t]he application of standards that appear to be neutral, but which often embody the interests and experiences of socially privileged groups, means that a legal commitment to formal equality may exacerbate the inequality of socially or economically disadvantaged groups'.¹³ Therefore, formal equality wrongly depicts the application of remedial measures as an unjustifiable violation of individual or group rights to equal treatment and non-discrimination. It fails to address the economic and social disparities caused by systemic and institutionalised privilege. On the whole, the problem with the idea of formal equality is that it is premised on conditions (natural freedom and equal access to resources) which do not exist and ignores the importance of context in addressing social challenges such as unemployment, poverty and marginalisation.

Contrariwise, the notion of substantive equality recognises that genuine equality can only be achieved if the relevant government programmes respond to the historical, social and political developments of the communities in which these programmes are implemented. Early conceptions of substantive equality are observable in the writings of Greek philosopher Aristotle. According to him, there is no inequality when unequal persons are treated differently in proportion with their inequality. Consequently, similarly situated persons in society should receive equal treatment and those who are not similarly situated should be treated differently in proportion to their differences. The corollary of this principle is that pieces of legislation which single out certain social or racial groups for

no rational relationship between the differentiation in question and the government purpose which is proffered to validate it. In the absence of such a rational relationship the differentiation would infringe section 8 [of the Interim Constitution].

¹⁰ Albertyn and Goldblatt 35-6.

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¹² J Feinberg 'The child's right to an open future' in J Feinberg 'The child's right to an open future' in W Aiken and H LaFollette (eds) *Whose child? Children's rights, parental authority and State power* (1980) 124.

¹³ Albertyn and Goldblatt 35-6.

preferential treatment do not constitute breaches on the notion of equality if they are grounded on classifications which appropriately distinguish between different categories of persons.

In the context of South Africa, this implies that government programmes that respond to the deep-seated inequalities are not necessarily unjustifiably unfairly discriminatory. As argued by eminent scholars Albertyn and Goldblatt, the history of South Africa was characterised by the 'extensive and systematic exclusion of black people from all aspects of political, social and economic life'.¹⁴ In terms of colonial and apartheid policies, the race and skin colour of an individual determined whether or not they could vote, have access to quality education, own land, enjoy access to high quality services and amenities, and enter into decent employment.¹⁵ Colonialism and apartheid 'produced and reinforced racially-based inequalities that became part of the structure of economic and social relations'.¹⁶ Unfortunately, racial disparities in access to education, health care services, arable and residential land, employment and income are still rampant across all the countries under study.¹⁷ Thus, inter-racial inequality is the legacy of colonial and apartheid policies which discriminated, based mainly on race, against the majority of people in South Africa.¹⁸

Decades of systematic and institutionalised discrimination against the majority of the people caused deep inequalities between persons belonging to marginalised social classes, particularly blacks.¹⁹ In *Brink v Kitshoff NO*,²⁰ the Constitutional Court explained the systematic discrimination that characterised apartheid in the following terms:

Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90 percent of the land mass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior

¹⁴ See Albertyn and Goldblatt 'Equality' in at 35-3.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ See Statistics South Africa, *General Household Survey* (2003), placing the number of African people who had not acquired an education at all at 14 percent and that of white people at 0.3 percent. See also *In re: The School Education Bill of 1995 (Gauteng)* 1996 (4) BCLR 536 (CC), holding as follows:

Immense inequality continues to exist in relation to access to education in our country. At present, the imperatives of equalising access to education are strong, and even though these should not go to the extent of overriding constitutionally protected rights in relation to language and culture, they do represent an important element in the equation. The theme of reducing the discrepancies in the life chances of all South Africans runs right through the Constitution, from the forceful opening words of the preamble to the reminder of the past.

¹⁹ Today, there has been a surge in intra-racial inequality and children from poor families have continued to bear the yoke of social exclusion and marginalisation. See J Seekings and N Nattrass *Class, race and inequality in South Africa* (2005) 340 and S Terreblanche *History of inequality 1652-2002* (2002) 132, arguing that neo-liberalism has created a 'black elite' at the expense of the masses, who continue to live in abject poverty.

²⁰ 1996 (4) SA 197 (CC).

facilities were provided. *The deep scars of this appalling programme are still visible in our society.*²¹

Equal protection and benefit of the law does not necessarily mean some form of identical treatment which absolutely negates the importance of differentiating between certain categories of people.²² Classificatory distinctions founded on a reasonable basis and rationally related to the purposes for which they are designed, ordinarily fall within the meaning of equal treatment. These distinctions lie within the equal protection clause provided the stipulated grounds for discrimination are not arbitrary, but based on objectively verifiable facts and factors. In both the private and the public sphere, gender imbalances in wealth, power and privilege remain an impediment to the enjoyment of equality. Gender disparities remain a serious challenge to aspirational visions of non-discrimination, especially in the context of employment and education opportunities. Against this background, the constitutional prohibition of gender- and sex-based discrimination goes a long way in ensuring every woman's equal enjoyment of rights.²³

Problematic features of modern conceptions of equality

First, the idea of substantive equality, especially as defined by Aristotle and the majority of modern day scholars,²⁴ is conceptualised at too high a level of generality that it is often difficult to determine whether one person is 'like another'. This overgeneralisation creates numerous practical challenges at both the theoretical and practical levels. In most cases, approaches seeking to justify unequal treatment between groups and individuals barely provide meaningful and objective criteria for determining whether or not an individual (or group) is equal to another. To this end, Hogg laments that 'Aristotle's idea of equality...provides no criteria to assess the appropriateness of different legislative treatment of those who are not alike....The similarly situated test does not supply the crucial criteria that are required to determine who is similarly situated to whom, and what kinds of differences in treatment are appropriate to those who are not similarly situated. The test is deficient in the sense that it provides too little guidance to a reviewing court'.²⁵

At the heart of this problem is the fact that equality is inherently and inescapably a 'comparative concept' and involves determining whether a person who is treated worse off

²¹ Para 40.

²² See *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) para 32, holding that remedial measures should not be viewed as an exception to the right to equality, but as a substantive and composite part thereof; and *National Coalition* case, paras 60-61.

²³ See, however, *Volks NO v Robinson* 2005 (5) BCLR 466 (CC) para 163, where Sachs J held that '[f]or all the subtle masks that racism may don, it can usually be exposed more easily than sexism and patriarchy, which are so ancient, all-pervasive and incorporated into the practices of daily life as to appear socially and culturally normal and legally invisible'. See also S Firestone *The dialectic of sex* (1970) 1-14, arguing that no society can claim innocence to the charge of marginalising girls because boys and girls are, from birth, not equally privileged; and K O'Donovan *Family law matters* (1993) 60-89, arguing that social institutions and the law have gendered and masculine faces.

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²⁵ PW Hogg *Canadian constitutional law* 4 ed (1997) 1241 and 1242.

than others is not similarly situated to those who are being given preferential treatment.²⁶ If there are clear differences between two individuals or groups, then another difficult question arises; namely whether the contested remedial measure proportionally addresses the differences between those benefitting from or disadvantaged by the measure. In postcolonial African states and many other parts of the globe, these difficulties have driven governments and courts to differentiate between persons based *solely* on contested grounds such as race and gender. In Zimbabwe, for instance, race based classifications have been applied in such a general and context-blind manner that the outcome of the relevant legislation and policies usually borders on reverse discrimination.²⁷

Second, the idea of equality relies on and makes constant reference to general differences between individuals or groups without quantifying, in scientific terms, the exact harm each member of the disadvantaged group experienced or the exact benefits which accrued to individual members of the historically advantaged groups. In short, philosophical and legal discourses on human rights and corrective justice are premised on the assumption that inequality is 'somewhere there' and everyone should be able to see it. However, whilst this approach to rights-based claims overlooks the complex nature of inequality, it can be justified on the basis that it is either impossible or prohibitively expensive for the state to make individualised enquiries into whether specific persons benefited from or were prejudiced by such discriminatory practices as apartheid. In fact, one of the enduring charges against ameliorative and preferential treatment measures is that not all persons belonging to historically disadvantaged groups directly benefitted from discrimination or, put inversely, that not all persons belonging to historically disadvantaged groups were actually disadvantaged by colonialism and apartheid. This argument has great levels of force, but its greatest weakness is that it is premised on the wrong assumption that advocates of substantive equality are either not aware of or overlook the **role to be played by this fact.** Yet, even the most unapologetic of all defenders of remedial equality does not necessarily have to deny the existence of this problem.

Part of the problem is that equality is a political concept. It is susceptible to manipulation, inflation and deflation by individuals and groups seeking to challenge or maintain historically institutionalised power and privilege. In this respect, calls for equality in deeply unequal societies are not just about making claims for government support, but also about demanding power sharing in a 'new deal' designed to fulfil the egalitarian ethos, spirit and conscience of the national constitution. The South African Constitutional Court has relied on the notion of substantive equality to uphold certain forms of race-based discrimination²⁸ and, in some instances, dismissed substantive equality claims as constituting unfair racial discrimination.²⁹ In Zimbabwe, the Supreme Court has blown the notion of substantive equality out of proportion and held that fast track land reform targeted at white farms does

²⁶ See *Minister of Finance v Van Heerden*, para 39, where Moseneke J '[t]he starting point of equality analysis is almost always a comparison between affected classes'.

²⁷ **DOUBLE AMPUTEE Case**

²⁸ **See *Minister of Finance v Van Heerden*, paras**

²⁹ **See *City Council of Pretoria v Walker* paras**

not constitute racial discrimination.³⁰ Some of the relevant cases are dealt with in some detail below.

AFFIRMATIVE ACTION IN SOUTH AFRICA

Affirmative action, substantive equality and the role of the courts

Affirmative action programmes may be seen in one of two ways. First, these programmes may be seen as an exception to equality in the sense that they permit discrimination based on prohibited grounds for purposes of transforming social, economic and power relations between people belonging to different social or racial groups. This approach portrays equality as a 'necessary evil'. Second, the same programmes may be defined as part of what the right to equality requires and, therefore, not an exception to equality. There are interpretive and evidential questions that largely on whether affirmative action measures are considered as part of or an exception to equality. First, if affirmative action clauses are viewed as exemptions to the right to equality, then the relevant clause may have to be interpreted narrowly in line with the idea that legislative or constitutional provisions conferring human rights (the right to equality in this case) have to be liberally interpreted to widen the ambit of the relevant rights.³¹ This, in turn, implies that as exceptions to equality, affirmative action clauses will have to be narrowly construed in order to ensure that they remain consistent with the most generous definition of formal equality. Second, if affirmative action is construed as part of the general right to equality, the person challenging the constitutionality of the remedial measures adopted by the state, bears the burden to prove the unconstitutionality of the measures in question. Conversely, the state would bear the burden to prove the constitutionality of the remedial measures it adopts if affirmative action measures are seen as an exception to equality.³²

The constitutional project of achieving equality between different categories of persons is expressly entrenched in the South African Constitution. Section 9(2) thereof provides that '[e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'. This provision has radical implications for socio-economic transformation in post-apartheid South Africa. It allows positive discrimination, based on prohibited and analogous grounds, as a means of addressing racial and gender inequality in many facets of life. In this respect, Albertyn and Goldblatt capture have argued in the following terms:

We understand the transformation to require a complete restructuring of the state and society, including redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systematic forms of domination

³⁰ See *Mike Campbell (Pvt) Ltd. and Another v Minister of National Security Responsible for Land, Land Reform and Resettlement* [2008] ZWSC 1.

³¹ See N Smith 'Affirmative action under the new Constitution' (1995) 11 *South African Journal on Human Rights* 84, 88 and C Sheppard *Litigating The Relationship Between Equity And Equality* (1993) Ontario Law Reform Commission, 21-22.

³² Besides these 'theoretical' differences, it does not seem to matter whether affirmative action measures are seen as part of or as an exception to equality because the outcome is, at the end of the day, the same.

and material disadvantages based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realize their full human potential within positive social relationships.³³

Under the Zimbabwean and the South African Constitutions, both state and non-state actors bear the duty to promote the achievement of equality as the respective Bills of Rights apply vertically and horizontally. The provisions of both Bills of Rights bind not only the legislature, the executive, the judiciary and all organs of state,³⁴ but also natural or juristic persons to the extent that they are applicable.³⁵ These provisions require the courts to promote the achievement of equality and transformation of race, gender and class relations in society. Courts in both countries should the responsibility to ensure that the state and private persons promote the achievement of equality in such areas as employment, education and access to basic amenities of life. In fact, state and non-state actors have the duty to respect, protect and promote the rights entrenched in the two Constitutions. Where section 7(2) of the South African Constitution provides that '[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights', section 44 of the Zimbabwean Constitution provides that '[t]he State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter'.

There is no doubt that the rights to be protected, promoted and fulfilled include the right to equality in its broadest possible sense. That this duty is also incumbent upon private actors is most evident from the Zimbabwean Constitution which expressly includes 'every person, including juristic persons' in the list of agencies and functionaries that are bound to promote the egalitarian spirit of the Constitution. The judiciary is also duty bound to ensure that the state and private actors act in ways that are consistent with their duty to address race, class, gender and power disparities in society. Thus, the horizontal application of Bills of Rights has

³³ C. Albertyn and B. Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *South African Journal on Human Rights* 248, 249.

³⁴ Section 8 of the South African Constitution provides as follows:

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-
 - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

Similarly, section 45 of the Zimbabwean Constitution provides as follows:

- (1) This Chapter binds the State and all executive, legislative and judicial institutions and agencies of government at every level.
- (2) This Chapter binds natural and juristic persons to the extent that it is applicable to them, taking into account the nature of the right or freedom concerned and any duty imposed by it.

important implications for the full achievement of equality in the private sphere. It should be recalled that the patriarchal domination of women is a result of the distinction between the private and public spheres of activity. I must hasten to say that income and education inequalities between men and women are still prevalent across the continent and the globe because societies have failed to achieve a complete break from the public-private dichotomy. Both the South African Constitution and the Zimbabwean Constitution recognise that inequality partly emanates from the law's failure or reluctance to address the challenges presented by the public/private dichotomy. As Hogg amply demonstrates, '[t]he real threat to egalitarian civil liberties...comes not from legislative and official action, but from discrimination by private persons such as employers, trade unions, landlords, realtors...and other suppliers of goods and services. The economic liberties of freedom of property and contract, which imply a power deal with whomever one pleases, come into direct conflict with egalitarian values'.³⁶

The right to equality includes the right not to be discriminated against on the basis of sex and gender.³⁷ From this perspective, it is evident that calls for the equal protection of women in the context of employment and access to education are about making public what has traditionally been regarded as a private matter, about redrawing the boundary between the public and the private spheres of activity. To this end, it must be emphasised that the historical invisibility of women, children and their rights can be located in the public-private divide.³⁸ The distinction between the private and public spheres of activity curbs, usually unfairly, government intervention in the private family.³⁹ To the extent that the private-public divide enables patriarchy to reign supreme in the private sphere and entitles men to claim the right to control the lives of women and girls without state intervention, it can be a recipe for the perpetual exclusion of women from the economic system. This means the perpetuation of income disparities within and outside the family. Most women who are taken as a special protected class eventually find themselves fighting against gender discrimination.⁴⁰ To this end, the notion of gender equality and the horizontal application of provisions entrenching human rights, are solid grounds for state intervention in the private sphere of family life, employment relationships and many other fields where women need protection and upliftment in order to enjoy the constitutional promises of substantive equality and socio-economic transformation.

More importantly, however, the judiciary shoulders the positive obligations to protect and promote gender, race and class equality. Judges are custodians of such constitutional values as human dignity, equality and freedom, and bear the obligation to ensure that constitutional provisions are applied in ways that 'improve the quality of life of all citizens and free the potential of each person'.⁴¹ This duty primarily arises from the need to protect citizens from government programmes that either entrench existing inequalities or promote reverse discrimination in that such programmes have a severe negative impact on previously advantaged categories of persons. To this end, Moseneke J, for the South African

³⁶ PW Hogg *Canadian constitutional law* 4 ed (1997) 1231.

³⁷ Section 9(1) and (3) of the South African Constitution and section 56(3) of the Zimbabwean Constitution.

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³⁹ See generally Law Commission of Canada (ed) *New Perspectives on the Public-Private Divide* (2003) vii.

⁴⁰ See S Firestone *The dialectic of sex: The case for feminist revolution* (1970) 1-14.

⁴¹ See the preamble of the South African Constitution.

Constitutional Court, once held that remedial measures designed to protect or advance persons historically disadvantaged by unfair discrimination, should not be 'arbitrary, capricious or display naked preference'. Further, such measures should not be 'less likely to achieve the end of advancing or benefiting the interests of those who have been disadvantaged by unfair discrimination'.⁴² Thus, courts play an important function in determining the appropriateness of affirmative action measures.

The fact that the government has labelled a particular measure 'remedial' does not necessarily mean that that programme thereby becomes constitutional and immune to judicial review. Holding otherwise is tantamount to allowing the executive and legislative branches of the state to be judges in their own cause. The independence and review powers of the courts are an important tenet of the separation of powers doctrine. It enables the courts to review government approaches to equality in order to ensure that the relevant policies do not undermine or threaten the project of transformative constitutionalism. Conflicts between state agencies seeking to advance substantive equality and transformative constitutionalism and persons challenging the constitutionality of the state's remedial measures, invite the courts to play a mediatory role and to determine the reasonableness and justifiability of the remedial measures adopted by the state. In approaching this mediatory function, the judiciary should recognise not only the gross inequality that exists between different social groups, but also the power imbalances between the state and historically advantaged categories of persons.

In post-colonial and post-apartheid countries, there is need for the courts to be aware of two stubborn facts; first, that some of the 'remedial' policies taken by governments are sentimental and uninformed responses to public calls for political action against historical injustices (most of Zimbabwe's programmes seem to fall in this category) and, second, that remedial measures should be targeted at promoting the rights and interests of the weaker members of society, not those of emerging or established elites. Accordingly, the proper role of the court is to ensure that the executive and legislative branches of the state pass remedial measures that are informed by the need to curb inequality and to dismantle structures of disadvantage without promoting reverse discrimination or breeding a strong sense of entitlement on the part of historically disadvantaged categories of persons. Similarly, it is important for the courts to recognise that the theory of minimal intervention in private and public spheres of life is consistent with the oppressive notion of formal equality and shields unfairly discriminatory practices from public scrutiny by the courts and other branches of the state.

Substantive equality as seen by the courts

***City Council of Pretoria v Walker*⁴³**

⁴² *Minister of Finance v Van Heerden*, para 41.

⁴³ 1998 (2) SA 363 (CC).

Established in 1994, the City Council of Pretoria included two predominantly black communities, Atteridgeville and Mamelodi, and one historically white community, Old Pretoria. The Council charged a flat rate for electricity in the black communities, but required residents of Old Pretoria to pay tariffs based on actual consumption. The main reason behind this differentiation was that there were no metres to calculate the actual consumption of electricity in black townships and, while the applicant was in the process of installing such metres, the process had not been completed. Residents in some parts of Old Pretoria withheld payment in objection to the policy of different rates. The applicant launched legal proceedings to recover arrear rates, but Mr Walker declined to pay on the basis that the conduct of the City Council violated his right to equality under section 8 the Interim Constitution.⁴⁴

Langa DP, for the majority, held that determining whether there had been an infringement on the right to equality, it was important to consider the wording of the Constitution against the country's historical context. Atteridgeville and Mamelodi were poverty-stricken areas and there were huge disparities, in terms of delivery, infrastructure and property values, between these two black townships and Old Pretoria. The fact that the Council was in the process of installing metres demonstrated that the Council intended to charge full rates, in the townships, on completion of the process. According to the Court, determining whether the two legs of section 8(1) – equality before the law and equal protection of the law – had been violated, the first question to be answered was whether there was a rational connection between the differentiation and the objective sought to be achieved by the Council. Langa DP held that there was no violation of the two legs as the measure of the differentiated tariff was of a temporary nature and were designed to provide continuity in the provision of services, while achieving equality in terms of facilities and resources during a difficult period of transition.⁴⁵

In answering the question whether there was unfair discrimination, the Court followed two-staged approach formulated in *Harksen v Lane NO*.⁴⁶ This test involves answering the following questions:

- Does the differentiation amount to discrimination on a stated ground or on an analogous ground?⁴⁷

⁴⁴ Section 8 provided as follows:

- (1) Every person shall have the right to equality before the law and to equal protection of the law.
- (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language
- (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedom
- (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

⁴⁵ *City Council of Pretoria v Walker* para 27.

⁴⁶ 1998 (1) SA 300 (CC).

⁴⁷ Para 29.

- If so, does the differentiation amount to unfair discrimination? Where the differentiation is based on a stated ground, then unfairness would be presumed under section 8(4) of the Interim Constitution. If based on an unstated or analogous ground, then unfairness has to be established by the party alleging it.⁴⁸

Langa DP reasoned that the inclusion of indirect discrimination in the province of section 8(2) of the Interim Constitution shows that 'conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination, and if it does, that it falls within the purview of s 8(2)'.⁴⁹ At the heart of the majority's reasoning lay the finding that the Council's policy of differential treatment constituted indirect discrimination on the basis of race. Whilst the policy did not expressly discriminate against residents of Old Pretoria based on race, but on geography, the effect of apartheid policies was that geography and race became intricately linked. In the words of the Court,

It would be artificial to make a comparison between an area known to be overwhelmingly a 'black area' and another known to be overwhelmingly a 'white area', on the grounds of geography alone. The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral may in fact be racially discriminatory.⁵⁰

Thus, given that the differentiation was based on race, the presumption of unfairness had been triggered and the state bore the burden to rebut the correctness of the presumption.⁵¹ In examining whether the presumption of unfairness has been rebutted, focus should be placed on the impact of the discrimination on the complainant.⁵² Langa DP found that Mr Walker was not economically disadvantaged, had benefited from racial policies and practices of the past, and had not pleaded poverty in the circumstances. He could, however, be described as a vulnerable person in light of his racial minority identity. The Court emphasised that intention did not play an important role in establishing whether an individual has been discriminated against under South African law.⁵³ Instead, the main factor to be considered was the relationship between the discriminatory measure and the individual or group affected by it. Ultimately, the majority held that the Council had failed to rebut the presumption of unfairness with regard to the issue of selective enforcement of debt collection. It emphasised that if an appropriate policy to promote a culture of payment and to achieve an 'important societal goal' had been formulated, the Court would have been able to analyse such a policy, determine its fairness and monitor its implementation.⁵⁴

⁴⁸ Para 29.

⁴⁹ Para 31.

⁵⁰ Para 32.

⁵¹ For a detailed discussion on this aspect of the case, see W Adherdien and H Shelton '*City Council of Pretoria v Walker* 1998 (2) SA 363 (CC)' (1999) 15 *South African Journal on Human Rights* 248.

⁵² For further authority in this respect, see *Harksen v Lane* and *President of the Republic of South Africa v Hugo* 1997 (4) SA I (CC).

⁵³ *City Council of Pretoria v Walker* para 40.

⁵⁴ *Ibid*, paras 77-78.

Finally, there is need to emphasise that while the majority construed the selective enforcement of debt recovery system as unfairly discriminatory based on the ground of race, Sachs J, dissenting, found that Mr Walker had not been discriminated against in any way. His reasons for holding this view were multiple and potentially, if not entirely, convincing. First, the policy of selective enforcement was 'based on the identification of objectively determinable characteristics of different geographical areas, and not race'.⁵⁵ Second, Sachs held that reference to the presumption of unfairness was misplaced because Mr Walker belonged to a racial group that had historically benefited from unfair discrimination.⁵⁶ Mr Walker had benefited from institutionalised privilege in the past and continued to enjoy these benefits.

Third, selective enforcement of debt collection burdened Mr Walker in no way as he was being required to pay for services that had been rendered to him and the 'soft approach adopted in black townships was intended to transform rather than entrench a culture of non-payment that was deeply rooted in the history of painful struggles for political rights and equal treatment'.⁵⁷ Sachs held that since Mr Walker had been required to pay for something that was due, his rights and dignity had not been impaired by anything reinforcing negative stereotypes of patterns of disadvantage associated with his skin colour or sense of self-worth. Sachs' dissent is important for purposes of demonstrating that there is no fine line between unfair discrimination based on prohibited grounds and affirmative action programmes meant to address past injustices. The jurisprudence of the South African Constitutional Court wrongly suggests that there is and imposes a lesser burden on the state to demonstrate the reasonableness of legislative and policy measures allegedly designed to achieve substantive equality. This argument is pursued forcefully below.

Minister of Finance v Van Heerden

EQUALITY AND TRANSFORMATION IN ZIMBABWE

In Zimbabwe, both the Supreme Court and, recently, the Constitutional Court have, on the pretext of affirmative action and substantive equality, authorised land seizures without requiring the government to compensate owners for loss of their land. Part of the problem is that Zimbabwean law is fraught with provisions ousting the jurisdiction of the courts in what are seen as politically 'sensitive matters'. Besides, the local courts have been complicit in the process and have openly held that their hands are 'tied' and their jurisdiction limited to determining whether the government's actions have been implemented in compliance with these draconian laws. Whilst earlier judgments of the Supreme Court have condemned the land reform process and found in favour of white farmers, these judgments were

⁵⁵ Para 105. See also paras 106-108.

⁵⁶ See paras 107. At para 113, Sachs would hold that to establish that the 'impact of the indirect differentiation is discriminatory on the grounds specified in s 8(2), the measure must at least impose identifiable disabilities, burdens or inconveniences, or threaten to touch on or reinforce patterns of disadvantage, or in some proximate and concrete manner threaten the dignity of equal concern or worth of the persons affected'.

⁵⁷ Para 126.

outdone by the spontaneous and unlawful occupation of the farms and the physical removal of the farm owners from their land. Zimbabwe's lost decade (1999-2009) was characterised by very high 'political temperatures', violence, intimidation, economic recession and unemployment. These conditions compromised the independence of the judiciary and it became difficult for 'anyone' to get a meaningful judgment against the state as judges that were seen as 'counter-revolutionary' invariably lost their seats. Overall, these developments demonstrate that it is difficult to alleviate poverty through the courts because they lack the capacity and resources needed to transform society on a massive scale. Below is a discussion of some of the cases illustrating the correctness of these charges against the Zimbabwean government.

The Mike Campbell trilogy of cases

Mike Campbell (Pvt) Ltd and Another v Minister of National Security Responsible for Land, Land Reform and Resettlement (Campbell I)

In this case, the applicant sought redress against the compulsory acquisition of his land by the state. The applicant claimed that the acquisition violated (a) the right not have private property compulsorily acquired without lawful authority,⁵⁸ (b) the right to equal protection of the law,⁵⁹ (c) the right to a fair hearing and to have rights-related disputes determined by a court of law⁶⁰ and (d) the right not to be treated in a discriminatory manner on the grounds of race and colour.⁶¹

The right not to have property compulsorily acquired

The Supreme Court observed that section 11 of the same Constitution provided that the fundamental rights protected in the Declaration of Rights were 'subject to the provisions' of the Constitution, including section 52(1) of thereof. Section 52(1) authorised Parliament to 'amend, add to or repeal any of the provisions of the Constitution'. According to the Court, section 52(1) empowered Parliament to pass laws with effect of 'taking away any of the fundamental rights' provided the procedural requirements to be followed in adopting such laws had been followed. Thus, provisions entrenching 'fundamental rights were not beyond the reach of the legislative power to amend, add to or repeal any of the provisions of the Constitution'. If this was not clear enough, the court would later reiterate the fact 'fundamental rights are not immutable. They are subject to being amended, added to or repealed by the Legislature...provided there is strict compliance with the requirements of the special procedure for the making of fundamental laws prescribed under s 52(1) of the Constitution'.⁶²

⁵⁸ Section 16(1) of the Lancaster House Constitution.

⁵⁹ Section 18(1) of the Lancaster House Constitution.

⁶⁰ Section 18(9) of the Lancaster House Constitution.

⁶¹ Section 23(1) of the Lancaster House Constitution.

⁶² In later sections of the judgment, the Court would hold as follows:

Right to equal protection of the law

With regards to the violation of the right to equal protection of the law, the Supreme Court held, wrongly in my view, that the acquisition of land was lawful in terms of section 16B(2)(a) of the Lancaster House Constitution. This was because section 16B(3) of the Constitution⁶³ stated that subsections 18(1) and (9), the provisions relating to the right to protection of the law and access to appropriate remedies against breaches of fundamental rights, were not applicable to the compulsory acquisition of land. In other words, section 16B(3) permitted the executive branch of the state to operate outside the law and 'suspended' the application of the equal protection clause in the context of land reform policies. Consequently, subsections 18(1) and (9) – the equal protection clauses – only regulated land reform which had not been done in terms of section 16B(2)(a) of the Constitution. In such contexts, the provisions of section 16B(3) would not afford the state the protection it is given in cases where it acquires land for agricultural and resettlement purposes. However, this provided no protection to hundreds of commercial farmers as section 16B(2)(a) virtually subjected all land to the state's power to acquire land by force. The relevant provisions included (a) all land covered (including the applicant's farm) in the list of 157 preliminary notices published in government gazettes on the basis of which full ownership and title of all the identified pieces of land vested in the state from 14 September 2005, (b) all land that had, before 8 July 2005, been identified as agricultural land required for resettlement purposes, and (c) all land that would in the future be identified 'by the acquiring authority for *whatever purpose*'.⁶⁴ The state was given full title in respect of these different types of land.

The clear indication is that the makers of the Constitution did not intend to make the fundamental rights and freedoms specified in *Chapter III* immune from the exercise of legislative power to effect constitutional amendments in compliance with the special procedure prescribed under s 52(1) of the Constitution. The fundamental rights bind the three organs of the State, that is to say, the Legislature, the Executive and the Judiciary and are directly enforceable by law until the Legislature in the exercise of legislative power acts in terms of s 52(1) of the Constitution.

⁶³ Section 16B(3) provided as follows:

The provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day and the provisions of section 18 (1) and (9) shall not apply in relation to land referred to in subsection (2)(a) except for the purpose of determining any question related to the payment of compensation referred to in subsection (2)(b), that is to say, a person having any right or interest in the land –

(a) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge;

(b) may, in accordance with the provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired.

⁶⁴ See section 16B(2)(a)(i)-(iii) of the Lancaster House Constitution.

There is a lack of legal positivism and judicial restraint in the way the court approached claims of breaches of the equal protection clause. First, the Court simply accepted that since section 16B(2) began with the phrase 'notwithstanding anything contained in this chapter', Parliament 'gave the provisions of section 16B overriding effect in respect of matters relating to the acquisition of all agricultural land identified by the acquiring authority in terms of section 16B(2)(a)' of the Constitution. There is little doubt that the Supreme Court views law as the product of the commands of a sovereign to be respected (by the sovereign's subjects) on the pain of criminal sanctions. To its credit, the Court affirmed its allegiance to positivism by categorically stating that 'underlying section 16B is the principle which is almost a universal law to the effect that every sovereign, independent state like Zimbabwe has an inherent right to compulsorily acquire private property within its territory for public purposes'. This implies that Parliament has the authority to pass legislation authorising the acquisition of private property simply because it can and the courts have no obligation to assess whether these laws are consistent with such foundational principles as equality and the rule of law. Just how positivism is a 'universal law' is unclear, especially given the criticisms to which the doctrine and its philosophical backers have been subjected. Nor is it clear what the source of the 'inherent right' to compulsorily acquire land is.

Ironically, the Supreme Court acknowledged that the effect of section 16B(3) 'is the taking away of the right to protection of the law afforded to the right of property in agricultural land' earmarked for compulsory acquisition. This provision was both an amendment of the protection of the law clause and an addition (to the Constitution) brought about in compliance with the legitimate exercise of the power to amend the Constitution as envisaged in section 52(1) of the Lancaster House Constitution.

The right not to be treated in a discriminatory manner on the grounds of race and colour

With regards to claims based on equal treatment and non-discrimination, the Supreme Court held that 'the law as embodied in the provisions of s 16(B)(2)(a)(i) of the Constitution and the acquisitions of the pieces of agricultural land which resulted from its operation had no reference at all to the race or colour of the owners of the pieces of land acquired. There was no question of violation of s 23 of the Constitution to be considered in this case. No more shall be said on the alleged violation of s 23 of the Constitution'. It is regrettable that the Court dismissed arguments of race-based discrimination without any meaningful engagement with the issues. There is an implicit assumption, from the wording of the judgment, that when governments choose to discriminate against a certain group of persons based on a prohibited ground, they always explicitly state the ground upon which the discrimination is based. This is a fallacy. Most forms of unfair discrimination are of an indirect nature and the relevant policies or provisions often claim to be based on seemingly neutral grounds and intended to achieve noble ends. Given that black Zimbabweans were historically dispossessed of their land by white colonial settlers, any measure meant to acquire land would invariably predominantly negatively affect white farmers.

Although the relevant provisions did not stipulate that compulsory acquisition of land was based on race, the fact that they predominantly targeted white-owned farmers meant that they potentially indirectly unfairly discriminated against these farmers. Indirect

discrimination recognises that conduct or law which may appear to be neutral may nevertheless result in discrimination based on any of the prohibited grounds.⁶⁵ Consequently, the Supreme Court should have engaged in some deep discussion on issues relating to equality and non-discrimination before reaching the conclusion that the relevant provisions and policies did not unfairly discriminate on the basis of race. It could be that the Court might still have reached the conclusion that the race-based discrimination was fair, reasonable and justifiable in that it was intended to address historical injustices and to achieve substantive equality in the long term, but that would have been a different matter altogether. In fact, the Court had earlier emphasised that the radical changes introduced by Amendment 17 to the Lancaster House Constitution-

- recognised that under colonial domination, native Zimbabweans had unjustifiably been dispossessed of their land;
- recognised that people had to take up arms in order to regain their land, political sovereignty and independence;
- declared that Zimbabweans should reassert their rights and regain ownership of their land; and
- bound the former colonial power to pay compensation for agricultural land compulsorily acquired for resettlement.

It must be stated, at the outset, that these 'political statements' were never seriously pursued later in the judgment, but they give an indication of the background against which the Court made its decision on equality and non-discrimination. It is difficult to escape the conclusion that it was politically and jurisprudentially convenient for the Supreme Court to avoid the issue of racial discrimination altogether because there were no compelling substantive reasons (furnished by the state) to justify the radical fast land reform policy. The main reason provided by the state was that the acquisition had been done on the authority of the law, but we have seen that the laws referred to were arbitrary and mirrored the political mood of the time.

The rights to a fair hearing and to have disputes determined by a court of law

Counsel for the applicant had argued that section 16B(3) of the Constitution took away the applicant's fundamental rights to access to court and to be heard by a tribunal in the determination of rights-related disputes. The relevant provisions had to be declared null and invalid as they interfered with such essential features or core values of the Constitution as the doctrine of the separation of powers and the rule of law. In another manifestation of its adherence to positivism, the Court held that 'the question of what protection an individual should be afforded under the Constitution in the use and enjoyment of private property is a question of a political and legislative character. In other words, what property should be acquired and in what manner is not a judicial question'. While the Court acknowledged that the general rule should be that the Constitution should not oust the jurisdiction of the Constitution, this rule was subject to another rule that 'when in clear and unambiguous language the Legislature in its proper exercise of its powers' ousts the jurisdiction of the

⁶⁵ See *City Council of Pretoria v Walker* para 31.

court in cases relating to matters not before the courts at the time the ouster is made operational, 'the intention of the Legislature should must be respected and enforced'.⁶⁶ Through the 'clear and unambiguous language of section wording of section 16B(3) of the Constitution' the legislature had lawfully ousted the jurisdiction of the courts of law in respect of disputes involving the compulsory acquisition of land.

Part of the problem is the fact that Court was so willing, perhaps in response to the political turmoil that was prevalent at the time, to limit its own role in determining the validity of statutory and constitutional provisions. It held that '[a]n acquisition of the land referred to in s 16B(2)(a) would be a lawful acquisition. By a fundamental law the Legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded'. In circumstances where Parliament had acquired land in line with the facts stipulated in the provisions of section 16B(2)(a), the right of access to justice could 'not protect the individual against the lawful exercise of power under the Constitution'. This meant that the right not to be deprived of one's property gave way to the state's power to compulsorily acquire agricultural land in line with the impugned provisions.

There are numerous references to 'the intention of the Legislature in acting' the relevant provisions of the Constitution. Leaning on this positivist wall, the Court would soon characterise the applicant's attempt to rely on access to court and protection of the law clauses as abuses of the rights in question. There are earlier parts of the judgment in which the Court also held, without adequately explaining why and how,⁶⁷ that '[a]n application to a court of law to challenge a lawful acquisition would in effect be an abuse of the right to protection of the law'. It would also hold that since the duty to determine whether the acquisition of agricultural land has been done in accordance with the provisions of section 16B(2)(a), then the provisions ousting the jurisdiction of the courts have a limited effect on the separation of powers between the judiciary and the legislature. In the present case, held the Court, Parliament had not taken the powers of the judiciary into its own hands and the ouster of the jurisdiction of the courts had 'no obnoxious effect on the principle of the rule of law' as suggested by counsel for the applicant.

Campbell II

Mike Campbell (Pvt) Limited and William Michael Campbell filed an application with the Tribunal contesting the acquisition of their farm in Chegutu, Zimbabwe. Pursuant to article 30 of the Protocol on the Tribunal,⁶⁸ 77 other persons (whose farms had been designated

⁶⁶ In making this holding the Court referred to the cases of *Smith v East Elloe Rural District Council* [1956] AC 756 at 750-751 and *Winter v Administrator-in-Executive Committee* 1973 (1) SA 873 (A) at 884. In the later case, Ogilvie Thompson CJ said that '[t]he Legislature's competence to enact a statutory provision ousting the jurisdiction of the courts in respect of certain matters (however undesirable in itself) is indisputable'.

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⁶⁸ Art 30 permits other persons or states to apply to be joined as parties if they have legal interests in the dispute.

for compulsory acquisition) applied and were allowed to intervene in the proceedings. These applications were then consolidated into one case: *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (hereafter *Campbell II*).⁶⁹

The applicants submitted, among other things, that the Tribunal had competence to determine the matter because they (the respondent) were unable to 'proceed under the domestic jurisdiction' as required by article 15(2) of the Protocol. The applicants also argued that the decision as to whether or not agricultural land was to be expropriated was determined by the race or country of origin of the registered owner; that Amendment 17 was the ultimate legislative tool used by the respondent to seize all white-owned farms;⁷⁰ and that land reform was directed at persons who owned land because they were white, regardless of whether they acquired the land during or after the colonial period.⁷¹ The applicants argued that, although Amendment 17 made no reference to the race and colour of the farm owners whose land was acquired, it struck only at white farmers and no other rational categorisation could be made in the circumstances. Hence, the respondent was in breach of article 6(2) of the Treaty which prohibits discrimination based on, among other grounds, race and ethnic origin.⁷² The respondent argued that its land reform programme was for the benefit of those historically disadvantaged under colonialism; that, given the history of land ownership, it was inevitable that land reform would adversely affect white farmers and thus the respondent had not breached article 6(2) of the Treaty.

Accordingly, the Tribunal was called upon to determine, among other things, whether the applicants had been denied access to courts in Zimbabwe; whether the applicants had been discriminated against on the grounds of race; and whether compensation was payable for the lands compulsorily acquired from the applicants by the respondent.⁷³ In one of its landmark cases, the SADC Tribunal, the regional court for Southern Africa, held in favour of white farmers and ordered the Zimbabwean government to pay compensation to those who had lost their farms. Of particular relevance is the SADC Tribunal's holding on access to court and racial discrimination.

Access to court

The Tribunal held that Amendment 17, particularly the provision stating that 'a person having any right or interest in the land shall not apply to a court to challenge the acquisition of the land by the state, and no court shall entertain any such challenge',⁷⁴ ousted the jurisdiction of the local courts and the applicants were therefore 'unable to proceed under

⁶⁹ SADC (T) Case 02/2008, 28 November 2008; <http://www.saflii.org/sa/cases/SADC/2008/2.html> (accessed 30 September 2009).

⁷⁰ Para 128 of the applicants' heads of argument.

⁷¹ Para 175 of the applicants' heads of argument.

⁷² Art 6(2) of the Treaty prohibits discrimination on grounds of 'gender, political views, race, ethnic origin...'

⁷³ Page 18 of the judgment.

⁷⁴ Sec 16B(3)(a) of the Lancaster House Constitution stated that 'a person having any right or an interest in the land — (a) shall not apply to a court to challenge the acquisition of land by the state, and no court shall entertain any such challenge'.

the domestic jurisdiction' within the meaning of article 15(2) of the Protocol.⁷⁵ Moreover, the Zimbabwe Supreme Court's holding that the legislature had lawfully ousted the jurisdiction of the courts of law,⁷⁶ confirmed that the applicants were unable to proceed under the domestic jurisdiction.⁷⁷

The Tribunal observed that it was a fundamental requirement of the rule of law that those who are affected by the law be heard before they are deprived of a right, interest or legitimate expectation.⁷⁸ It further observed that the provisions of sections 18(1) and (9) — provisions which guarantee the right to equal protection of the law and to a fair hearing — had been taken away regarding land acquired in terms of section 16B(2)(a) of the Zimbabwean Constitution.⁷⁹ The Tribunal held that section 16B(3) of the Constitution barred farmers from challenging the validity of land acquisitions implemented under section 16B(2)(a)(i) and (ii), and ousted the local court's jurisdiction to entertain any such challenge. Since judicial review did not lie at all in respect of land acquired under section 16B(2)(a) (a section in terms of which applicants' land had been acquired), the applicants had been denied the opportunity to seek redress in courts of law.⁸⁰

For purposes of the judgment, the Tribunal confined the rule of law (arguably an elusive concept) to the rights of access to court and a fair hearing.⁸¹ To the Tribunal, the most important provisions in this regard were articles 4(c) and 6(1) of the Treaty. Article 4(c) binds states to respect principles of 'human rights, democracy and the rule of law'. Article 6(1) of the Treaty enjoins states to undertake to 'refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty'.⁸² Relying heavily on the judgment of the Zimbabwe Supreme Court in *Campbell I*, the respondent argued that in ousting the jurisdiction of the local courts, section 16B(3) of the Zimbabwean Constitution had not taken away for the future the right of access to the remedy of judicial review in cases where expropriation was not in terms of section 16B(2)(a). The applicants argued that the court's review powers were confined to determining whether the facts on which section 16B(2)(a) provided that the acquisition of agricultural land must depend, existed. This formulation essentially meant that courts were entitled to review not the constitutionality of the provisions of Amendment 17, but simply whether land acquisitions were done in terms of section 16B(2)(a) — the very section the applicants were challenging as unconstitutional in the first place.

⁷⁵ Page 21 of the judgment.

⁷⁶ See *Campbell I*, at 28-29.

⁷⁷ *Campbell II*, at 21.

⁷⁸ *Campbell II*, at 35.

⁷⁹ *Campbell II*, at 37.

⁸⁰ *Campbell II*, at 40-41.

⁸¹ *Campbell II*, at 26-27.

⁸² *Campbell II*, at 26-27.

Five years ago, I strongly supported this approach in one of my writings and I still believe that the approach I adopted in that paper was correct. I argued in the following terms:

The respondent's argument that the legislature had the competence to water down the review powers of courts by stating those occasions in which the courts' jurisdiction was ousted was rightly not allowed to stand. Surely the inquiry should go beyond the respondent's narrow construction of the question that confronted the Tribunal. The question was not, as argued by the respondent, whether compulsory land expropriations were done in terms of section 16B(2)(a) of the Constitution and therefore lawful acquisitions within the meaning of that section. If it were to be so, the inquiry would be limited to whether compulsory acquisition of property was carried out in terms a law (Amendment 17) the constitutionality of which was in issue. The impugned provision would then have provided the very legitimacy it lacked as its constitutionality was being contested. The real question that confronted the Tribunal was whether it was permissible under national law for the legislature to spell out the facts upon which the compulsory expropriation of land could be based, in circumstances where the courts' jurisdiction to review the lawfulness of the expropriation is ousted by the very law authorising the expropriation. Given the importance of the right of access to courts and the right to a fair hearing, this question would then have been answered in the negative.⁸³

The promise of this approach lies in the fact that it envisages an active role for the courts in matters relating to rights-based litigation. Where courts neither see their role as a limited one nor interpret legal texts in extremely positivist terms, they are often prepared state and non-state actors to justify legislative and policy measures allegedly designed to achieve remedial equality. Without defending claimants' rights to access to court and a fair hearing, courts may well allow Parliament to place unfairly discriminatory affirmative action measures beyond the judiciary's power to review state action and prevent reverse discrimination in particular cases. This is important in drawing the boundary between legitimate and illegitimate affirmative action programmes.

To a greater extent, provisions ousting the jurisdiction of the courts in equality and non-discrimination cases seek to reassert the now defunct doctrine of parliamentary sovereignty. This doctrine stipulates that Parliament has the sovereign power to make laws and the function of the judiciary is merely to interpret laws and enforce the commands of the sovereign legislature. Unfortunately, the doctrine of parliamentary sovereignty negates the idea that the central tenets of the rule of law binds Parliament to refrain from making laws or commands that are unjust because courts have the duty to set such rules aside. Where courts construct ouster clauses as breaches of the rights to access to court, equal protection of the law and equality of all persons in the enjoyment of rights, they broaden the scope for the meaningful enjoyment of constitutional rights, including the right to equality. This is consistent with the principle of the supremacy of the constitution which is entrenched in many modern day constitutions.

⁸³ A Moyo 'Defending human rights and the rule of law by the SADC Tribunal: *Campbell* and beyond' (2009) 9(2) *African Human Rights Law Journal* 590, 601.

Racial discrimination

On racial discrimination, the SADC Tribunal held that, since the effects of Amendment 17 of the Constitution would 'be felt by white Zimbabwean farmers *only*, its implementation affect[ed] white farmers *only* and consequently constituted indirect discrimination or substantive inequality'.⁸⁴ Given that Amendment 17 had an unjustifiable and disproportionate impact upon persons distinguished by race, the respondent had discriminated against the applicants on the basis of race in violation of article 6(2) of the Treaty.⁸⁵ Surely, the impact of any law or conduct should not, under normal circumstances, affect a significant segment of a particular social group and, if it does, may be a good candidate for judicial intervention based on the concept of proportionality. According to the Tribunal, if (1) the criteria for land reform had not been arbitrary but reasonable and objective; (2) fair compensation had been paid for land compulsorily acquired; and (3) the acquired lands had been distributed to poor, landless and marginalised individuals or groups, *making the purpose of land reform legitimate*, the differential treatment afforded to the applicants would not constitute racial discrimination.⁸⁶

However, the use of the phrase 'since the effects will be felt by the Zimbabwean white farmers *only*' wrongly implies that if there had been one black farmer or a handful of black farmers — and I am sure there were — who lost their lands during 'fast track' land reform, Zimbabwe's use of force to regain control of white-owned farms thereby would have been justified. The Tribunal failed to observe that, even if land reform had overwhelmingly (but not exclusively) affected white farmers, it could still have amounted to racial discrimination against white farmers who, in large numbers, stood to lose their farms.

Further, the fact that the implementation of Amendment 17 affected white persons *only* does not necessarily mean that it *automatically unfairly* discriminated against whites on racial grounds. In Zimbabwe and in every other country that has a colonial history, race and land ownership are so inextricably linked that legislative and other measures designed to promote the rights of persons belonging to historically disadvantaged communities will invariably adversely affect those previously advantaged by systematic patterns of racial segregation. Sachikonye records that at independence, about 6 000 white commercial farmers owned 15,5 million hectares of land and 8 500 small-scale African farmers had 1,4 million hectares. The rest, an estimated 700 000 indigenous communal farming households, subsisted on 16,4 million hectares.⁸⁷ Seventy five per cent of the land owned by communal farmers was in agro-ecological regions IV and V, which are dry and barren.⁸⁸

⁸⁴ Campbell II, at 53.

⁸⁵ Campbell II, at 53-54.

⁸⁶ Campbell II, at 54.

⁸⁷ LM Sachikonye 'From "growth with equity" to "fast-track" reform: Zimbabwe's land question' (2003) 30 *Review of African Political Economy* 227. 228-29

⁸⁸ *Ibid*, 228-29.

Considered in its historical context, land reform would inevitably adversely affect white farmers who benefited from colonial seizures of native land on grounds of race. This is not to say that expropriation of property without paying compensation is fair, but to demonstrate that there are circumstances under which discrimination may not be determined solely by reference to the impact of government action on a particular social group. Historical patterns of institutionalised advantage and disadvantage overtly implemented by the colonial administration for over nine decades show why every piece of legislation and virtually every kind of government action will differentially impact on various social groups. Dissenting, Sachs J in *City Council of Pretoria v Walker* holds that ‘differential treatment which happens to coincide with race *in the way that poverty and civic marginalisation coincide with race*, should [not] be regarded as presumptively unfair discrimination when it relates to measures taken to overcome such poverty and marginalisation’.⁸⁹ In *Campbell*, the fact that the loss of land (designated for compulsory acquisition) coincided with race (white) in the same way landlessness coincided with race (black) did not in itself imply that farmers who were white as a consequence of history had been discriminated against on the basis of race.⁹⁰ As a matter of principle, it will be wrong in law to hold that all government actions which coincidentally benefit the great majority of one racial group at the expense of another are *automatically unfairly* discriminatory.

However, it is evident from the facts of *Campbell II* that the criteria for designating land for compulsory acquisition had nothing to do with the current use of the land — acquisition was arbitrary and unreasonable in that even commercial farms that were ‘going concerns’ were designated for acquisition. It is also clear that there was racial discrimination in that the persons who were severely adversely affected by the government’s compulsory land acquisition programme were predominantly white. Another indication of the racially discriminatory nature of the programme is evident from the fact that some of the farmers who lost land (and all their employes) had no alternative place to call ‘home’ besides the compulsorily acquired farms. This meant loss of livelihoods, access to affordable education and homelessness. All these observations reinforce the notion that the government may allege historical disparities to justify unfairly discriminatory practices.

Campbell III

LESSONS FROM SOUTH AFRICA AND ZIMBABWE

A Affirmative action programmes undermine the review powers of the court

Affirmative action distinguishes between social or racial groups by conferring on one group advantages or benefits it denies the other. To be blunt, affirmative action programmes always discriminate against groups which historically benefited from structured advantage and institutionalised racism, and the question left for decision by the court is whether the

⁸⁹ Para 118.

⁹⁰ This observation does not mean that the laws in terms of and the manner in which land reform was implemented in Zimbabwe were constitutional. It just means that the concept of racial discrimination goes beyond the Tribunal’s skin-deep understanding of the subject.

discrimination is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁹¹ This is made clear by section 9(5) of the South African Constitution which provides that '[d]iscrimination [based] on one or more of the grounds listed in subsection 9(3) is unfair unless it is established that the discrimination is fair'. Therefore, once preferential treatment is based on a prohibited ground, it amounts to discrimination and the state or whoever is discriminating bears the constitutional burden to prove the fairness thereof. I am aware that both the South African Constitutional Court and the Zimbabwean Supreme Court have denied this approach to equality disputes and I return to this argument later in this paper. For now, it is important to emphasise that whether we categorise affirmative action as part of or as an exception to equality, the outcome, particularly where the differentiation is based on a stated or analogous ground, is 'discrimination' which needs to be justified.

B There is need to merge the impact test and the substantive equality test

C Proportionality should be the locus of decision-making in both non-discrimination and affirmative action programmes

Distinguishing between discriminatory, but legitimate affirmative action and reverse discrimination always involves a proportionality enquiry into the balance between the goal sought to be achieved and the means used to achieve such goals. This involves answering the question 'how much affirmative action is too much?' The principle of proportionality implies that the state needs such affirmative action programmes as equality demands, no more and no less.

Socio-economic rights and the role of the courts in South Africa

The paper traces the socio-economic rights jurisprudence of the South African Constitutional Court and argues that while the Court has made landmark judgments which confirm the transformative nature of the Bill of Rights, these judgments have not had any broad practical impact on the lives of ordinary citizens. These judgments are no doubt important and their role in providing guidance on what government may or may not do, should not be underestimated. However, the government has continued to violate the same set of rights in similar circumstances despite the existence of judicial precedents from the highest court of the land. This suggests that courts, while important, are not proper forums for driving socio-economic transformation and have no tangible role to play beyond passing 'transformative' judgments which nonetheless need the hand of a politically willing executive to be fully implemented.

In post-apartheid South Africa, strict adherence to the doctrine of separation of powers has somehow led to judicial restraint in the interpretation of socio-economic rights. The fact that courts lack the institutional competence to develop policies and budgets should not mean that judges lack the authority to subject such policies and budgets to judicial review.

Socio-economic rights and the role of the courts in Zimbabwe

⁹¹ Section 36 of the South African Constitution regulates issues related to the limitation of constitutional rights.



In Zimbabwe, access to adequate housing remains both a challenge and a chimera as the state has limited, if any, capacity to respond to the needs of ordinary citizens living in major cities, towns and growth points. In May 2005, the government launched the much dreaded Operation Murambatsvina (Restore Order), destroyed 92, 460 ‘illegal’ backyard homes promised to build 15, 825 houses and to provide 200, 000 serviced stands.⁹² To address respond to the loss of livelihoods and homelessness it had created, the Zimbabwean government launched the Operation Garikai (Live Well) programme, but most of the 3,325 houses build under this programme are uninhabitable and inconsistent with the right to live

⁹² See A Van Wyk ‘Mr President, South Africa is not the only country giving free housing to the poor’ available at <https://za.news.yahoo.com/mr-president-africa-not-only-125324605.html> (accessed 8 November 2013).

in dignity.⁹³ Further, only about '1,891 stands without water and sanitation services had been provided a year after the demolitions.⁹⁴

Further lessons from South Africa and Zimbabwe

- A Judicial independence and activism fosters socio-economic transformation**
- B Resource constrains limit social transformation through socio-economic rights adjudication**

⁹³ Ibid.

⁹⁴ Ibid.