

What Should a Re-constituted Southern African Development Community¹ (SADC) Tribunal² Be Mindful of to Succeed?

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Abstract

The SADC is a sub-regional international organisation comprised of 15 transitional States that have embraced the principle of the rule of law as a basic norm of their constitutional arrangements. Their biggest challenge presently is to undo the provocative and salient legacy of social, economic and psychological apartheid on their territories for almost a century, without disrupting their developmental endeavours. This article examines the question of what role if any the SADC Tribunal envisaged under Article 9 of the constitutive SADC Treaty might play to facilitate successful transitions from apartheid to egalitarian rule. It shows that a multiplicity of dialectics abound that do not allow for easy answers, much to the frustration of both the cultural relativists and their rivals, the universalists, regarding human rights protection. The article recommends meaningful pedagogical engagement of the challenges confronting the SADC sub-region as a direct consequence of almost a century of apartheid – the worst form of governance known to man in recent times. This should inform national, sub-regional and regional dynamics in the pursuit of SADC goals and aspirations. SADC Human Rights Courts and Tribunals are encouraged to develop a “due-account jurisprudence” that is congruous with the transitional requirements of their societies just as the German Federal Constitutional Court had done in the aftermath of the fall of the Reich, and also after the re-unification of Germany.

Keywords: human rights, basic norm, regional customary international law, progressive treaty interpretation, rule of law, legacy of apartheid, due-account jurisprudence, judicial transplants, transitional requirements, SADC Tribunal, land disputes, reconciliation and reconstruction, *lex specialis*, separation of powers, law’s integrity, justice

1. Introduction

By a Declaration and Treaty of 17 August 1992, the Heads of State or Government of ten Southern African States³ established the Southern African Development Community (SADC). The constitutive Declaration and Treaty’s preamble is clear that the SADC is both a discontinuation and a continuation of the Southern African Coordination Conference⁴ (SADCC) which had been established pursuant to the Lusaka Declaration of 1 April 1980 as a forum to facilitate economic

¹ Established by the SADC Treaty (1992) which came into force in 1993, it comprises the following States: Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Mauritius, Madagascar, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. The SADC has a hybrid of functions that are interconnected and collectively linked to the overarching aim of creating a welfarist regional community similar perhaps to the European Community. *See also* Treaty Establishing the Southern African Development Community, 5 *RADIC* (1993) p. 415; Treaty of the Southern African Development Community (SADC), 17 August 1992, Windhoek, 32 *International Legal Materials* 116.

² Article 9(1)(f) of the SADC Treaty (1992) provides for the Establishment of the SADC Tribunal as a Community institution. *See also* SADC website: Protocol on Tribunal and Rules of Procedure Thereof, available at: <www.sadc-tribunal.org/docs/Protocol_on_Tribunal_and_Rules_thereof.pdf> (accessed 12 May 2012).

³ Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe.

⁴ Established in 1980 by Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe as a forum for economic liberation pursuant to the Lusaka Declaration of 1 April 1980. *See also* SADC website: <http://www.sadc.int/index/browse/page/119> (last accessed 12 May 2012)

liberation from apartheid South Africa.⁵ The SADCC itself was comprised of all the founding Member States Parties of the SADC, less Namibia. Membership of the sub-regional organisation quickly rose by half pursuant to Article 42 accessions (new Article 43 of the consolidated text of the SADC Treaty as amended at Blantyre in August 2001 – SADC Treaty).⁶ South Africa was the first to accede on 29 August 1994, followed by the following: Mauritius, 28 August 1995; Democratic Republic of Congo, 28 February 1998; Madagascar, 21 February 2006; and Seychelles, 16 August 2008. The SADC Treaty exists in three authoritative languages,⁷ reflecting the diverse colonial histories of Member States Parties.

The SADC Treaty lists among its primary objectives the acceleration of economic growth of the region and the improvement of living conditions of its citizens through regional cooperation in different fields, and the harmonisation of economic development of the region.⁸ In Article 4, the organisation lists among its cardinal principles human rights, democracy and the rule of law,⁹ and the peaceful settlement of disputes.¹⁰

The requirement of the rule of law is indisputable anywhere you look. When challenged, even the worst totalitarian governments refer to legal standards of some system in their own defence – usually Article 2(1) and often enough Article 2(4) of the United Nations (UN) Charter. The former states that: “The Organization is based on the principle of the sovereign equality of all its Members.” Classical approaches to international law that interpreted this provision as declaring an unfettered discretion regarding State conduct within the confines of their own territories have since been discredited.¹¹ The latter is said to protect the territorial integrity and political independence of all States from external interference.¹² Almost always, totalitarian States attempt to clothe even their worst acts with an appearance of legality.

The rule of law has been described as a “political value” that is characterised by the requirement to restrict an entity’s exercise of power through the separation and counterbalancing of the competencies of its institutions. The purpose is to ensure that judicial power is separated from other

⁵ See Article 45 of the amended SADC Treaty, 2001.

⁶ See SADC website: <www.sadc.int/index/browse/page/120> (accessed 12 May 2012).

⁷ English, French and Portuguese.

⁸ Article 5.

⁹ Article 4(c).

¹⁰ Article 4(e).

¹¹ Several UN institutions established after World War II contradict this view. In particular The UN Commission on Human Security and the recent inauguration and immediate application of the responsibility to protect principle in Libya support the view that under modern international law, sovereignty does not trump human rights.

¹² United Nations Charter (UNC), 26 June 1945, San Francisco, *UKTS* 67 (1946) Cmd. 7015, 1 *UNTS* xvi.

powers of the entity, and the other powers are subjected to oversight of the judiciary.¹³ Where this paradigm thrives, liberty also thrives. According to Tamanaha,¹⁴ liberty is the right to do whatever the law permits. The law establishes the scope of secure action within which individuals may then conduct their affairs as they please. Members of a community have liberty only to the extent that all are restrained by the law from doing harm to one another. In this sense liberty is possible only under the rule of law which is the only security from tyranny. Critical to the rule of law is a functional independent judiciary.

The idea is not so much to ensure judicial rectitude and public confidence, as to prevent the executive and its many agents from imposing their powers, interests and persecutive inclinations upon the judiciary. The magistrate can then be perceived as the citizen's most necessary, and also most likely, protector. The judiciary is the point of most direct confrontation between the government, law and the individual, and it can therefore serve as the best barrier against lawless governmental actions.¹⁵

By seeking to ensure that legislative and executive functions are not united in the same body of persons, and that the judiciary retains and maintains continuing oversight over the other institutions of power, power becomes a check on power. Without such a check on power apprehensions will persist that the same monarch or senate may enact tyrannical laws and execute them in a tyrannical manner.¹⁶ Thus, the principle of the separation of powers is the foremost test of any claims to governing in accordance with the principle of the rule of law. Any tinkering on the edges or at the core of it diminishes any claim to governing by or living under the rule of law.

The majority of SADC States are signatories to a wide range of regional and international instruments that espouse the rule of law as a fundamental of both States Parties' national and sub-regional constitutional arrangements. State practice shows that geographical circumstances, or intimate historical ties, or present concerns of fundamental importance often make for more successful treaty regimes than those engaged in for the pursuit of mere ephemeral or theoretical matters. Agreements entered into by SADC States as Member States Parties of either the African Union (AU) or Commonwealth Organization fall into the former category. Their shared historical, cultural, developmental and trade links sustain an affinity that gives an enormously inherent potential for success of their treaty regimes. It bolsters even their confidence to sanction recalcitrant conduct of States Parties, including suspension from membership of the organisation if and when they violate the rules of the organisation, until the required compliance is achieved.

¹³ See also M. Krygier, 'Ethical Positivism and the Liberalism of Fear', in T. Campbell and J. Goldsworthy (eds.), *Judicial Power, Democracy and Legal Positivism* (Dartmouth, 2000) p. 59.

¹⁴ B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP, 2000) p. 52.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

The recent troubles in both Mali and Madagascar demonstrate the co-operation of Africa's sub-regional entities with the regional body, the AU,¹⁷ to enforce their shared values. On 21 March 2012, soldiers led by Captain Amadou Sanogo overthrew the government of President Amadou Toumani Toure in a *coup d'état*. The AU Peace and Security Council immediately suspended Mali's membership of the AU until the restoration of the constitutional head of State and his government. The Council held that:

Given the manner in which the mutineers in Mali have acted against a constitutional government, and consistent with the various instruments of the African Union and ECOWAS, [Economic Commission of West African States] the Council decided Mali should be suspended from further participation in all its activities until the effective restoration of constitutional order is achieved without delay.¹⁸

Following its 316th meeting in Addis Ababa on 3 April 2012, the AU Peace and Security Council issued a communique strongly denouncing the *coup d'état* of 22 March in Mali and underlining its commitment to restore constitutional order in support of the sub-regional organisation's – ECOWAS – efforts to ensure “the return to constitutional order in the country”, in pursuance of the communiqué issued at the end of the 40th Ordinary Session of the Authority of Heads of State and Government of ECOWAS, held in Abuja on 16 and 17 February 2012,¹⁹ and several other admonitions.²⁰ This supports the view that African States in particular are evolving constitutional regional customary international law norms on various issues, including the inviolable sanctity of constitutional processes for change of governments. ECOWAS, which appears to be playing the lead-role in the Mali case, is the equivalent of the SADC in that they are both sub-regional organisations of the African region.

The SADC had itself taken similar action against Madagascar by its Double Troika Summit Communique of 14 January 2010²¹ which had reiterated and maintained the suspension of Madagascar from all SADC organs, structures and institutions until the restoration of constitutional order in that country, and called upon the AU, UN and other international organisations and institutions to also apply the same measure. The Summit had rejected “any attempt to use democratic means, institutions and processes to legitimise Governments that came to power through unconstitutional means, and urged the international community, in particular the development

¹⁷ Successor to the Organization of African Union. See the Constitutive Act of the African Union (2000), entered into force, 2001. See African Union website: <www.au.int/en/about/constitutive_act> (accessed 12 May 2012).

¹⁸ ‘African Union suspends Mali’, Voice of America website: <www.voanews.com/english/news/africa/AU-Malis-President-Safe-After-Coup-143994376.html> (accessed 12 May 2012). See also Peace and Security Council Communique of 3 April 2012 following its 316th Meeting in Addis Ababa, PSC/PR/COMM.(CCCXVI); African Union website: <au.int/en/dp/ps/content/peace-and-security-council-african-union-au-its-316th-meeting-held-3-april-2012-adopted-fo-0> (accessed 12 May 2012).

¹⁹ Peace and Security Council Communique, *ibid*.

²⁰ See also the communiqués following from Extraordinary Summit held in Abidjan on 27 March 2012, the meeting of the delegation of the six Heads of State of ECOWAS held in Abidjan on 29 March 2012, and the Extraordinary Session held in Dakar on 2 April 2012.

²¹ Issued at Maputo, Mozambique on 14 January 2010. SADC website: <www.sadc.int/index/browse/page/672> (accessed 12 May 2012).

partners, to support SADC’s efforts to promote and sustain democracy in the region in general and Madagascar in particular”. Further, the Summit had also rejected “the unilateral plan of the ‘*de facto*’ Government of Madagascar to ‘reorganize’ the transition and hold legislative elections in March 2010, and [urged] the international community to also reject it”.

Closely knit family-like organisations that are characterised by shared histories, traditions, language and aspirations – such as the Commonwealth Organization – have a much better chance of securing adherence to their values and principles. The Harare Commonwealth Declaration²² intimately commits States Parties to “the rule of law and independence of the judiciary”.²³ It is one of the Commonwealth’s standing commitments that is traceable to earlier Declarations of the organisation, including the 1971 Declaration of Commonwealth Principles.²⁴ This requirement adds a vital layer of significance to SADC States’ rule of law credentials because it is also one of its own cardinal principles.²⁵ Universal recognition and appeal, at least in theory, of the requirement of the rule of law is evident also in the African Charter of Human and Peoples’ Rights (ACHPR)²⁶ and other regional human rights treaty agreements,²⁷ and in relevant UN human rights treaties and documents.²⁸

2. SADC’s Credentials on the Rule of Law and the Independence of the Judiciary

At the core of the suspension of the SADC Tribunal in August 2010²⁹ is the question whether the SADC has begun a retreat from the principle of the rule of law. The preamble of the SADC Treaty talks of the need to “guarantee democratic rights, observance of human rights and the rule of law”.

²² 20 October 1991. See Commonwealth Organization website: <http://www.thecommonwealth.org/document/34293/35468/35773/harare.htm> (accessed 12 May 2012)

²³ *Ibid.*, para.9

²⁴ Singapore. See Commonwealth Organization website: <http://www.thecommonwealth.org/document/181889/34293/35468/declarations/> (accessed 12 May 2012).

²⁵ Article 4(c).

²⁶ African Charter on Human and Peoples’ Rights, 26 June 1981, Banjul, OAU Doc. CAB/LEG/67/3/Rev 5, 21 *International Legal Materials* 59.

²⁷ See also Treaty Establishing a Single Council and a Single Commission of the European Communities (The Merger Treaty) UKTS 1 (1973) Part II, Cmnd. 5179-II; Treaty Establishing the European Economic Community (EEC) 25 March 1957, Rome, UKTS 15 (1979) Cmnd. 7480, 298 *UNTS* 11; Treaty on European Union (TEU) 7 February 1992, Maastricht, UKTS 12 (1994) Cm. 2485, 31 *International Legal Materials* 247; Treaty Establishing the African Economic Community (AEC) 3 January 1991, Abuja, 30 *International Legal Materials* 1245; American Convention on Human Rights, 22 November 1969, San Jose, PAUTS 36, 9 *International Legal Materials* 67; Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA) 5 November 1993, Kampala, 33 *International Legal Materials* 1067.

²⁸ Universal Declaration of Human Rights, 10 December 1948, UN Doc. A/811; International Covenant on Civil and Political Rights, 16 December 1966, New York, Annex to UN Gen. Ass. Res. 2200 (XXI) GAOR, 21st Sess. Supp. 16, p. 49, UKTS 6 (1977) Cmnd. 6702; International Convention on the Elimination of all forms of Racial Discrimination, UK Treaty Series, Misc. No. 77, 1969; UN General Assembly Resolution 2547 (XXIV) 15 December 1969.

²⁹ Communique of the 30th Jubilee Summit of Heads of State and Government, 17 August 2010.

Article 4 lists as one of the key principles governing the organisation, the duty of Member States Parties to act in accordance with “human rights, democracy and the rule of law”.

Moreover, the constitutive treaty of the organisation includes individuals’ human rights guarantees against the State. Article 6 provides that: “SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability, or such other ground as may be determined by the Summit”. This leads to no other conclusion than that the SADC has embraced the rule of law as one of its basic norms. The majority of SADC States are signatories to the Harare Commonwealth Declaration issued by Heads of Government.³⁰ This agreement is habitually credited with setting the Commonwealth on a new course of “promoting democracy and good governance, human rights and the rule of law, gender equality and sustainable economic and social development”.³¹ On 29 November 2009, the Commonwealth Organization reinforced these values to all its Member States Parties by adopting the Declaration on the Affirmation of Commonwealth Values and Principles.³²

SADC States are also Parties to the African Charter on Human and People’s Rights.³³ Articles 1(7) and 26 of the Charter in particular commit Members States Parties to ensure judicial independence and the rule of law on their territories. To emphasise the centrality of the principle of judicial independence to all of its functions, the primary enforcer of the African Charter on Human and Peoples’ Rights, the African Commission,³⁴ observed the following in *Civil Liberties Organisation v. Nigeria*:³⁵

A government that governs truly in the best interest of the people ... should have no fears of an independent judiciary. The judiciary and the executive branch of government should be partners in the good ordering of society. For a government to oust the jurisdiction of the courts on a broad scale reflects a lack of confidence in the justifiability of its own actions, and a lack of confidence in the courts to act in accordance with the public interest and the rule of law.

The Vice Chairperson of the African Commission writes that:³⁶

³⁰ Commonwealth Organization website: <www.thecommonwealth.org/Templates/Internal.asp?NodeID=34457> (accessed 12 May 2012).

³¹ *Ibid.*

³² See Declaration on the Affirmation of Commonwealth Values and Principles, para. 5, Commonwealth website: <www.thecommonwealth.org/document/34293/35468/216908/commonwealth_values_and_principles.htm> (accessed 12 May 2012)

³³ African Charter on Human and Peoples’ Rights, 26 June 1981, Banjul, OAU Doc. CAB/LEG/67/3/Rev 5, 21 *International Legal Materials* 59.

³⁴ Article 2 of the Protocol which provides for the relationship with the African Court of Human and Peoples’ Rights only gives the Court a complementary role to the African Commission.

³⁵ Communication No. 129/94.

³⁶ M. Mumba, ‘The Independence of the Judiciary through the eyes of the African Commission on Human and Peoples’ Rights’, Paper presented at the symposium on Strengthening the Independence, Impartiality and Accountability of the Judiciary in the context of Lesotho organized by the International Commission of Jurists in conjunction with the Judiciary of Lesotho 4–5 March 2010, Maseru, Lesotho, 2010.

If we accept, as we should, that the judiciary is the custodian of the rule of law and justice in any country we should have no difficulty in asserting that the concept of the dependence of the judiciary is an important facet of the doctrine of separation of powers of the three branches of government.

Thus, by chocking off the SADC Tribunal, a key institution of the organisation as envisage by the constitutive treaty in Article 9(1)(g), the Summit of Heads of States or Government may also have dropped its rule of law credentials during the storm resulting from the SADC Tribunal's controversial attempt to preside over policy issues that are the proper domain of the executive. By suspending the Tribunal, whatever their pretext to that action, the Summit of Heads of State or Government have restricted the idea of an independent judiciary that most of them have subscribed to through their membership of the following in particular: SADC Treaty, Commonwealth Organization and African Charter on Human and Peoples' Rights. For the reasons mentioned above, these commitments are arguably perceptibly closer to the considerations of SADC States than the UN based ones.³⁷ They lead to no other conclusion than that the SADC Member States Parties closely recognise the requirements of the rule of law, including judicial independence, as the only basis upon which their affairs are hinged.

In *M v. Home Office*³⁸ the Home Secretary was held to be in contempt of Court for disobeying a judge's order to return to London a Zairean teacher that had sought asylum in England. The Court emphasised the inviolable significance of the separation of powers in constitutional provisions of free societies. Nolan LJ stated: "The proper constitutional relationship of the Executive with the Courts is that the Courts will respect all acts of the Executive within its lawful province, and the Executive will respect all decisions of the Courts as to what its lawful province is."³⁹

Assuming there is a basis for it, the reaction of the Summit of Heads of State or Government to the SADC Tribunal's decisions regarding the application of Article 6(2) of the SADC Treaty to Land Reform Programmes (LRPs) raises the further question of what if any is the proper function of human rights courts in transitional States that manifest the following:

- i) A genuine desire to embrace the rule of law principle?
- ii) An urgent need to correct the salient legacy of apartheid on their territories?

³⁷ See also 'United Nations Background Note: The Independence of the Judiciary: A Human Rights Priority', UN website: <www.un.org/rights/dpi1837e.htm> (accessed 12 May 2012); Articles 8 and 10 of Universal Declaration of Human Rights, 10 December 1948, UN Doc. A/811.

³⁸ [1992] QB 270.

³⁹ *Ibid.*, p.314.

3. Rule of Law, Independence of the Judiciary, and the Sudden Suspension of the SADC Tribunal

The Protocol on the SADC Tribunal was adopted on 7 August 2000 by the Heads of State or Government in accordance with Article 16(2) of the SADC Treaty.⁴⁰ Annexed to the Protocol are the Rules of Procedure which form an integral part of the Protocol.⁴¹ By a communiqué issued at the end of the 30th Jubilee Summit of SADC Heads of State or Government held in Windhoek, Namibia from 16–17 August 2010, the supreme executive institution of the SADC announced the suspension of the SADC Tribunal, and prohibited it from hearing or receiving new petitions while its role, functions and terms of reference were reviewed.⁴² At the time of the suspension were four pending cases. The suspension is linked to the Zimbabwean government's refusal to comply with the Tribunal's rulings in favour of white commercial farmers that had challenged the constitutionality under the SADC Treaty of the Constitution of Zimbabwe Amendment Act 17 which refers to acquisition of farmland for distribution to formerly dispossessed landless Africans.

In its reaction to the SADC Tribunal's rulings on disputes brought by commercial farmers resisting land redistribution,⁴³ the Zimbabwean government had called the Court a “day-dreamer” that was engaged in an “exercise in futility”. Tanzanian President Jakaya Kikwete is reported to have remarked to fellow heads of SADC States several years earlier that in creating the Tribunal they had created a monster that would “devour us all”.⁴⁴ Respected retired High Court judge Justice Simbi Mubako called for an enquiry into the creation of the SADC Tribunal “to establish its real motives. ... [It is] ... a kangaroo court and a comedy. ... In my opinion, an enquiry is called for to determine who was responsible (for its creation) and why?”⁴⁵ This level of aversion to a core institution of an emerging supranational organisation is unheard of. But why?

Of the first 19 cases brought before the Tribunal, 11 had been brought against the Zimbabwean government, mostly in relation to the country's on-going land reform programme.⁴⁶ Zimbabwe's land reform programme is an example of a social justice initiative, premised on the Constitution of Zimbabwe Amendment Act 17 that came into force in 2005. Its intended purpose is the correction of the continuing effects of colonial constitutional land laws like the Land Apportionment Act

⁴⁰ See <www.thecommonwealth.org/document/34293/39455/141099/harare_declaration.htm> (accessed 12 May 2012).

⁴¹ Article 23 of the Protocol provides: “the Rules annexed to this Protocol shall form an integral part thereof”.

⁴² Communiqué of the 30th Jubilee Summit of Heads of State and Government, 17 August 2010.

⁴³ See especially *Campbell* case, 48 *ILM* 534 (2009).

⁴⁴ ‘Killing the Monster’, Africa News website: <www.newsafrika.net/en/news/1565/killing-the-monster.html> (accessed 12 May 2012).

⁴⁵ ‘Justice: Call for Inquiry into SADC Tribunal’, Afriquejet website: <www.afriquejet.com/justice-call-for-inquiry-into-sadc-tribunal-2011060314104.html> (accessed 12 May 2012).

⁴⁶ P. N. Ndlovu, ‘Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal’, 1 *SADC Law Journal* (2011) p. 63.

(1930), which had reserved 30 per cent of all agricultural land for the 1.1 million Africans and 51 per cent of all agricultural land for the 50,000 whites, and the Land Tenure Act (1969), which had reinforced land classification into African and European areas. One immediate effect of these colonial constitutional land laws was that by 1960 more than 25,000 black families had been reduced to squatters. By 1976 a total of 4.5 million native blacks had been forced to crowd in the infertile, drought prone Tribal Trust Lands.⁴⁷

It is plain to see that in addressing the 11 or so cases brought against Zimbabwe's on-going land reform programme, the Tribunal had taken the view that it was constrained only by the provisions of the SADC Treaty and its Protocols. However, the unfavourable reaction of the SADC Member States Parties to the outcomes of those cases, culminating in the suspension of the Tribunal, confirmed at least four things. One is the indisputable status of black economic empowerment (BEE) as a new regional constitutional norm of customary international law on reconciliation and social reconstruction.⁴⁸ Its purpose is twofold. One is to undo the social, economic and psychological legacy of apartheid in the SADC. The other is to substitute equality for all under majority rule governments for inequality on racial grounds under apartheid. Although the BEE norm might have materialised well after the SADC Treaty of 1992, it appears to hold at the very least the status of *lex specialis* on land use in the SADC.

Further, Member States Parties of the SADC probably expected and will expect in future that the Tribunal will take account of all relevant sub-regional constitutional customary law norms in the determination of matters presented to it. In particular, by suspending the Tribunal, they have established the significance of BEE as a norm of regional constitutional law for all to see, including the suspended Tribunal itself. Thirdly, the Tribunal cannot interpret provisions of the SADC Treaty with regard to the current context only as it sought to do in the leading case of *Campbell*.⁴⁹ Rather the Tribunal had been expected, and will be expected to, interpret provisions of the SADC Treaty or its Protocols in light of the region's underlying context too. Perhaps, Member States Parties of the SADC had also hoped that the Tribunal would realise the policy nature of the land issues of the

⁴⁷ B. Chigara, 'Southern African Development Community (SADC) tribunal: Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe: introductory note', 48:3 *International Legal Materials* (2009) pp. 530–531.

⁴⁸ See also BBC Hardtalk: Interview with President FW de Klerk (18 April 2012), President of South Africa (1989–1994); see also B. Chigara, 'European/Southern African Development Community (SADC) States' bilateral investment agreements (BITs) for the promotion and protection of foreign investments v. post-apartheid SADC economic and social reconstruction policy', 10:3 *Journal of International Trade Law and Policy* (2011) pp. 213–242.

⁴⁹ 48 *ILM* 534 (2009).

SADC and immediately declined jurisdiction to consider them. The validity of any such suppositions is examined in detail below.

4. The SADC Tribunal and the Zimbabwean Courts: Jurisdiction and Separation of Powers?

In *Etheredge v. Minister of State for National Security Responsible for Lands, Land Reform and Resettlement*,⁵⁰ the applicant had argued that the Zimbabwe High Court's jurisdiction to continue with the matter had been superseded by the SADC Tribunal, which had already passed an interim judgment against Zimbabwe in that connection.

Gowora J. disagreed. He stated that:

The Treaty makes provision for the establishment of a tribunal. The Protocol is the document that then sets up the tribunal and provides for the powers of the Tribunal. I have examined the protocol very carefully and I have not observed therein any reference to the courts of any of the countries within SADC. If indeed the intention was to create a tribunal which would be superior to the courts in the subscribing countries that intent is not manifest in the document presented to me. The supreme law in this jurisdiction is our Constitution and it has not made provision for these courts to be subject to the (SADC) Tribunal. This court is a court of superior jurisdiction and has an inherent jurisdiction over all people and all matters in the country, and its jurisdiction can only be ousted by a statutory provision to that effect. I do not have placed before me any statute to that effect and the protocol certainly does not do that.⁵¹

Etheredge followed a long list of cases culminating in the Supreme Court decision in *Commercial Farmers Union (CFU) and Others v. The Minister of Lands and Rural Resettlement and Others (Zimbabwe)* (2010) in which Zimbabwean courts had declined competence to entertain challenges to Zimbabwean Constitution Amendment Act 17 in observance of the doctrine of separation of powers. Chidyausiku C.J. stated that former owners and/or occupiers whose land had been acquired by the acquiring authority in terms of Section 16 B(2)(a) of the Constitution of Zimbabwe could not challenge the legality of such acquisition in a court of law. This is because the jurisdiction of the courts has been ousted by Section 16 B(3)(a) of the Constitution.⁵² Thirdly, it recognises and emphasises the political nature of the land issue and locks it away from judicial scrutiny by virtue of its qualities. Support for this approach of distinguishing justiciable judicial matters from non-justiciable policy matters is ubiquitous.

In *Lindiwe Mazibuko and Others v. City of Johannesburg and Others*,⁵³ a case that dealt with the constitutional guarantee to access to water,⁵⁴ the Constitutional Court of South Africa observed that

⁵⁰ HH 16-2009, HC 3295/08 Decision of 4 Feb 2009 (Unreported).

⁵¹ *Ibid.*, p. 9.

⁵² *Commercial Farmers Union and Others v. The Minister of Lands and Rural Resettlement and Others (Zimbabwe)*, judgment No. SC31/10, Const. Application No. 81/10, decision of 26 November 2010

⁵³ Case CCT39/09 [2009] ZACC 28.

the question that the parties had variously presented as a matter for the determination of the extent of the State's obligation under Section 27(1)(b) and Section 27(2) of the South African Constitution actually required the Court to pronounce on executive policy matters – something that it was not competent or willing to do.

The Court unequivocally warned that it was ill-suited and reluctant to adjudicate upon issues that would undermine the functional balance contemplated by the constitutional allocation of separate competences between the judiciary, legislature and the executive. The Court prefaced its pronouncements on the matter with what it called “the proper role of Courts in a constitutional democracy”⁵⁵ and added that “[c]ourts are ill-suited to adjudicate upon issues where Court Orders could have multiple social and economic consequences for the Community”.⁵⁶ The Court divorced itself from policy making affairs of the State and summarised its reasoning as follows:

It is institutionally inappropriate for a Court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.⁵⁷

The long and short of it is that it is not the function of courts to either draft governmental policy or to determine its content,⁵⁸ which is what the SADC Tribunal appears to have sought to achieve in *Campbell*.⁵⁹ Thus, the mere presence of competing legal claims may not be sufficient to qualify a dispute as justiciable. Justiciable disputes are those disputes that lend themselves to an acceptance by the disputants of a judicial finding.

In *ex parte Dyer* (1994) Simon Brown L.J. stated that: “Matters of national policy are not open to challenge before the Courts other than on the basis of bad faith, improper motive or manifest

⁵⁴ Section 27(1) provides that: “Everyone has the right to have access to: (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance”. By paragraph 2 the State is obliged to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of the rights listed in paragraph 1 (a-c)”.

⁵⁵ Case CCT39/09 [2009] ZACC 28, paragraphs 57

⁵⁶ *Ibid.*, para.55.

⁵⁷ *Ibid.*, para. 61.

⁵⁸ *Ibid.*, para. 65.

⁵⁹ 48 *ILM* 534 (2009).

absurdity. Matters of national economic policy are for political – not judicial judgment”.⁶⁰ This is because the doctrine of separation of powers applies to exclude from judicial scrutiny matters of public policy. Judicial attempt to control such policy decisions is rare and when it occurs it is always regarded as an intrusion into the proper decision making competence of the executive – *GCHQ* case.⁶¹

5. Emergent Regional Constitutional Customary Law as *Lex Specialis* and the SADC Treaty and its Protocols: What Applies When and What Does Not Apply When and Why?

The findings against the application of the Constitution of Zimbabwe Amendment Act 17, which authorises the government to seize land for redistribution to dispossessed peasants, begs the question whether the SADC Constitution is both comprehensive, compact and static; or whether like other constitutions, it is an organic and evolving body of norms that both responds to, and maintains and shapes, peace and security under the rule of law principle. In this connection, the primary test for the SADC’s present constitutional arrangements is whether they are fitting and resilient enough to ensure the least painful path away from apartheid’s debilitating social, economic and psychological legacy of inequality based along racial lines, to egalitarian rule. It has been argued that apartheid had resulted in semi-authentic beings that could not pursue self-actualisation whether they were the beneficiaries of the system or victims of its brutality.⁶² Even Nobel Laureate F.W. De Klerk, President of South Africa (1989–1994), maintains to this day that apartheid was not then, and is not now, a repugnant idea. The one white leader that probably did the most to end apartheid in South Africa claims that it was for other reasons, and nothing to do with the immorality of the idea. It had become unworkable! “There are three reasons it (apartheid) failed. It failed because the whites wanted to keep too much land for themselves. It failed because we (whites and blacks) became economically integrated, and it failed because the majority of blacks said that is not how we want our rights.”⁶³ His justifications for a system that the UN has criminalised through its most elite category of norms – *jus cogens* – highlights the extent of the challenge facing anyone tasked with undoing the legacy of apartheid.

More importantly, the framers of the 1992 constitutive treaty of the SADC could not have imagined, or foreseen, all the scenarios that would require the Tribunal’s determination. Therefore,

⁶⁰ *R v. Commissioner for Administration (ex parte Dyer)* [1994] 1 WLR 621.

⁶¹ *CCSU v. Minister for the Civil Service* [1984] 3 All ER 935.

⁶² B. Chigara, ‘Deconstructing Southern African Development Community land relations challenges: Towards a new, sustainable land relations policy?’, in B. Chigara (ed.), *Re-conceiving Property Rights in the New Millennium: Towards a new sustainable land relations policy* (Routledge, London, 2012) p. 198.

⁶³ See CNN Interview of 10 May 2012, ‘No animosity with Mandela’, CNN website: <amanpour.blogs.cnn.com/2012/05/10/de-klerk-no-animosity-with-mandela/> (accessed 12 May 2012).

the principles enunciated in that document will require supplementing and adjustment in order to ensure efficiency of the system intended. For this reason, the Tribunal must fill in the gaps as they arise. Resort to regional customary international law in the same way that domestic courts resort to common law principles when statute falls short is a sure way forward. Failing that, the Tribunal ought to declare appropriately a state of *non-liquet* or decline jurisdiction on account of the policy nature of disputes similar to the land issue.

6. Regional Customary International Law (CIL) and the Interpretation of the SADC Treaty

To establish a system that sufficiently and efficiently addresses transitional States of the SADC's challenges relating to the legacy of apartheid, the SADC Tribunal must, in addition to distinguishing between justiciable judicial disputes and non-justiciable policy matters,⁶⁴ take into consideration applicable norms of regional customary international law. This approach has the benefit of protecting the judiciary from needless confrontation with relevant policy goals of the Summit of Heads of State or Government. The latter are at liberty also to establish their constitutional preferences through CIL. Efficient interpretation of the 1992 SADC Treaty should lead to a place where the law serves the SADC Community by facilitating Member States Parties' transition to more egalitarian societies. According to the 15th Supreme Court Chief Justice of the United States of America (1969–1986), “[t]he obligation of our profession is to serve as healers of human conflict. To fulfil our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with the minimum of stress on the participants. That is what justice is all about!”⁶⁵

The case for integrating CIL into the interpretation of the SADC Treaty is mandated by the organic nature of all societies and examples of how similar Courts have dealt with similar challenges. Quick changes in social attitudes, expectations and even fear of change itself can impose on policy makers the need to make rapid and radical policy changes not previously imagined or contemplated by framers of the constitution. Progressive and flexible interpretation of the same becomes mandatory.⁶⁶ According to Lord Sankey, the constitution cannot be interpreted in the same way as an ordinary statute. Rather, it must be read within the context of society to ensure that it adapts and

⁶⁴ See also *Haya de la Torre* [1951] ICJ Rep. 71, at 83.

⁶⁵ W. E. Burger, ‘Isn’t there a better way?’, 68 *American Bar Association Journal* (1982) pp. 274–275.

⁶⁶ Discussing the Canadian Supreme Court’s pronouncements on the interpretation of the Canadian Charter of Rights and Freedoms, in particular, the progressive interpretation of texts, see especially J. Cameron, ‘Fault and Punishment under Sections 7 and 12 of the Charter’, 40 *Supreme Court Law Review* (2008) pp. 554–592.

reflects changes. If constitutional interpretation adheres to the framers' intent, and remains rooted in the past, it would fall into disuse on account of its failure to reflect society.⁶⁷

But has a regional customary international law norm evolved since 1992 to complement or even suggest a possible amendment to the constitutive SADC Declaration and Treaty of 1992, which the Tribunal ought to be mindful of when determining matters presented to it? SADC States appear to have latterly instituted black economic empowerment constitutional pieces of national legislation to address the salient, resilient and provocative social, economic and psychological legacy of apartheid rule for nearly a century on their territories. This development has been either unambiguously supported⁶⁸ or acquiesced with by other Member States Parties of the SADC?⁶⁹ A regional constitutional customary international law norm on reconciliation and social reconstruction appears to have crystallised in the SADC. It appears to pass the *Asylum* case test of “specially affected State practice” in that it has been championed by the specially affected States of South Africa, Zimbabwe and Namibia. It has been endorsed by their co-Member States Parties of the SADC. It has also been embraced by stakeholders in the form of multinational corporations such as Shell. These companies now operate BEE scorecards as⁷⁰ an index of their performance in light of governmental policies.

Notwithstanding the weaknesses complained about Article 38(1)(b)'s⁷¹ law-making process in international law, including uncertainty,⁷² in the threshold of State practice and *opinio juris* required to confirm the emergence of a norm of customary international law,⁷³ and imprecision in the timing of the crystallisation of the nascent norm into a binding norm,⁷⁴ this development is said to have contributed to the emergence of a constitutional regional customary international law norm

⁶⁷ *Edwards v. Canada (Attorney General)* [1930] A.C. 124.

⁶⁸ See also interview of F.W. de Klerk, President of South Africa 1989–1994, Hard Talk, BBC, 18 April 2012, BBC website: <[www.bbc.co.uk/iplayer/episode/b01g8592/HARDtalk_FW_de_Klerk_President_South_Africa_\(19891994\)/](http://www.bbc.co.uk/iplayer/episode/b01g8592/HARDtalk_FW_de_Klerk_President_South_Africa_(19891994)/)> (accessed 12 May 2012).

⁶⁹ See also Chigara, *supra* note 48, pp. 213 – 242.

⁷⁰ *Ibid.*

⁷¹ Statute of International Court of Justice, 26 June 1945, San Francisco, UKTS 67 (1946) Cmnd. 7015, UNTS 993, 59 Stat. 1031

⁷² See especially *North Sea Continental Shelf* cases (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands*), *International Court of Justice Reports*, 1969, p. 3. See also J. P. Kelly, ‘The Twilight of Customary International Law’, 40 *Virginia Journal International Law* (2000) p. 449; M. Prost and P. K. Clark, ‘Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?’, 5:2 *Chinese Journal of International Law* (2006) pp. 341–370; S. Chesterman, ‘An International Rule of Law’, 56 *American Journal of Comparative Law* (2008) pp. 331–361.

⁷³ See especially *Asylum* case (*Columbia v. Peru*), *International Court of Justice Reports* (1950) p. 266.

⁷⁴ See also International Law Association, ‘Formation of Rules of Customary (General) International Law’, *Committee Report, Sixty-third Conference* (Wroclawska Drukarnia Naukowa, Poland, 1988) p. 935; R. R. Baxter, ‘Multilateral Treaties as Declaratory of Customary International Law’, *Recueil Des Cours*, 129 (I), 1970, p. 31; F. L. Kirgis, ‘Custom on a Sliding Scale’, 81 *American Journal of International Law* (1987) p. 146; M. H. Mendelson, ‘The Nicaragua Case and Customary International Law’, 26:1 *Coexistence* (1989) p. 85, at p. 92; J. I. Charney, ‘The Persistent Objector Theory and the development of Customary International Law’, 28 *British Yearbook of International Law* (1985) p. 1.

authorising a form of reverse discrimination in order to counter the salient economic and social legacy of apartheid.

However, such a development would possibly contradict Article 6 of the constitutive SADC Treaty which guarantees individual protection from racial discrimination. At the very least, it would require a determination on which prevails between two constitutional norms. Minimally, it raises the question of whether *lex specialis*⁷⁵ on land relations, deriving from custom can override the more definite and more certain treaty guarantees listed in the SADC Treaty itself.

These scenarios point to what Albert Thomas described as the deceptive and “capricious and fantastic play of constitutional texts and social realities [because] ... the texts often continue to exist when the reality has become something quite different”.⁷⁶ This is because the new social reality among SADC States that finally suspended the SADC Tribunal in protest at its decisions against the Zimbabwean government’s land reform programme approves a form of reverse discrimination in favour of victims of apartheid. This is evident in the SADC’s black economic empowerment programmes championed by the worst affected States, namely South Africa, Zimbabwe and Namibia and supported or acquiesced to by other SADC States Parties. Therefore, in the cases that referred to the application of the Constitution of Zimbabwe Amendment Act 17 of 2005, the SADC Tribunal might have erred by ignoring this reality.

Emergent scholarly writings on the suspension of the SADC Tribunal clearly show a divide between legal positivists that prioritise enforcement of Community values and SADC Treaty precepts on the one hand, and critical legal scholars that tend to emphasise the significance of social justice reform programmes and the law’s “duty” to recognise and ensure their protection.

7. Inter-Human Rights Discourses

Whether in Europe, Africa or the Americas, human rights courts and tribunals, regardless of their designation,⁷⁷ all habitually cross reference their opinions against one another on points of law. For instance in the recent case of *Al-Skeini v. United Kingdom* (2011)⁷⁸ the European Court of Human Rights (ECtHR) in Strasbourg referred also to the reasoning of the International Court of Justice in

⁷⁵ It refers to law governing a specific subject matter. It is law that is superior to generally applicable law.

⁷⁶ A. Thomas, ‘The ILO: Its origins, development and future’, 135:3–4 *International Labour Review* (1921, reprinted 1996) pp. 261–276.

⁷⁷ Whether they be constitutional courts, regional or even sub-regional tribunals of commissions, standing or *ad hoc*, hybrid, national or UN based.

⁷⁸ Application No.55721/07 Before the European Court of Human Rights, 7 July 2011 (2011) 53 *E.H.R.R.* 18.

the case of *Armed Activities on the Territory of the Congo (Democratic Republic of Congo (DRC) v. Uganda)* (2005)⁷⁹ and of the Inter-American Court of Human Rights in the case of *Mapiripán Massacre v. Colombia* (2005).⁸⁰

In the much publicised⁸¹ *Campbell* case⁸² – a very brief judgment – the SADC Tribunal cross referenced its opinions in aid of its reasoning to the European Court of Human Rights; the Inter American Court of Human Rights; the UK House of Lords; the Constitutional Court of South Africa; the African Commission on Human Rights; the International Covenant on Civil and Political Rights; the Universal Declaration of Human Rights; the African Charter on Human and Peoples’ Rights; and the UN Human Rights Committee. Such a broad referencing of other human rights judicial institutions and universal human rights treaties and regional human rights instruments and their institutions confirms a unity of purpose in time. It also presumes certain qualities about the experiences of the communities they serve. However, as the analysis below shows, such presumptions can be dangerously misplaced, even misleading, and therefore to be made with great care.

8. On Human Rights Discourse Transplants

Otto Kahn-Freund, sometime Professor of Comparative Law at Oxford, writes that the “use of foreign models as instruments of social or cultural change raises most sharply the problem of transplantation”.⁸³ Political differentiation is critical to effective transplantations of legal insights from institutions foreign to those of the SADC under the comparative approach. Current socio-economic challenges that are vying for judicial attention of national and regional institutions in the SADC bear a strong resemblance perhaps to the German situation at the end of World War II and upon the re-unification of that country in 1990. The question raised at each of those two points was this: How should a new political order deal with outcomes of the perished order previous to it? If this is correct, then, the SADC Tribunal should, to the extent that it would seek to rely on the comparative approach to judicial prognosis, compare its approaches to those of the Federal Constitutional Court of Germany while it was addressing similar challenges. Current jurisprudence of other foreign courts could not be said to be emerging from similar circumstances. Therefore, their social relevance to the current SADC reality does not in earnest exist.

⁷⁹ Unreported 19 December 2005.

⁸⁰ Unreported 15 September 2005.

⁸¹ A film has resulted, ‘Mugabe and the White African’, (2010, L. Bailey and A. Thompson).

⁸² 48 *ILM* 534 (2009)

⁸³ O. Kahn-Freund, ‘On uses and misuses of comparative law’, 37 *Modern Law Review* (1974) p. 5.

Alexy⁸⁴ offers lucid insights into German handling of this question first in the aftermath of the fall of the Reich and secondly following the re-unification of Germany. The question in each case was how the new order should deal with outcomes of false laws of the preceding order. But even without the collapse of a regime, a legal system can evolve rapidly and result in seismic conceptual changes that may create enormous challenges for addressees of the legal system. As an instance, international law's recent rejection of the fiction of *terra nullius*⁸⁵ as a justification for the continued alienation of native indigenous peoples from lands confiscated from them upon colonisation appears to have opened a can of worms that affected States are finding to be extremely problematic. The Supreme Court of Australia⁸⁶ has admirably responded to the former question in that context. Several cases of property rights filed at the SADC Tribunal against Zimbabwe invoke the same question with specific regard to the legacy of colonial constitutional land laws. Those laws were the result of apartheid – a system of governance that international law had also found to be so repugnant to human nature that it criminalised it in the end⁸⁷ by way of *jus cogens*, the most elite category of norms of international law.⁸⁸

Another question that the initial question triggered for the SADC was that of judicial thoroughness. Although the Tribunal had noted in the well-publicised case of *Campbell*⁸⁹ that Zimbabwe's land issues have a long history, it had limited its considerations to “current applicable history” without regard whatsoever to the “underlying past history” of colonial confiscation and enslavement of natives. This is a matter of public record. That *current history* was drawn from the SADC Treaty itself and pointed to the restrictions against racial discrimination that the Treaty imposes upon Member States Parties. From that perspective, the Constitution of Zimbabwe Amendment 17 of 2005 appears *ultra vires*, i.e. beyond the constitutional capacity of the Zimbabwean government when taken in conjunction with Zimbabwe's obligations under the SADC Treaty.

⁸⁴ R. Alexy, ‘A defence of Radbruch's formula’, in D. Dyzenhaus (ed.), *Recrafting the rule of law: The limits of legal order* (Hart Publishing, Oxford, 2000) pp. 14–39.

⁸⁵ Defined in P. Cane and J. Conaghan (eds.), *The New Oxford Companion to Law* (Oxford University Press, Oxford, (2008) p.1161.

⁸⁶ *Mabo No.2* [1992] HCA 23

⁸⁷ International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 *U.N.T.S.* 243, entered into force 18 July 1976. See also J. Dugard, ‘Convention on the suppression and punishment of the crime of apartheid’, United Nations Audio-visual Library of International Law, 2008, available at: <www.un.org/law/avl>.

⁸⁸ Article 53, Vienna Convention on the Law of Treaties (1969) which came into force on 27 January 1980 provides that: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

⁸⁹ 48 *ILM* 534 (2009).

However, as the Supreme Court of Australia's decision in *Mabo No.2*⁹⁰ shows, the SADC Tribunal's approach was both narrow and simplistic. It demonstrates shocking resort to textual constitutionalism. Unfettered textual constitutionalism can result in social irrelevance for failing to adjust to new realities such as those strongly suggested by the SADC States' inauguration of the regional constitutional norm of customary international law on reconciliation, economic and social reconstruction for the purpose of undoing the social and economic legacy of apartheid rule on their territories. Zimbabwe's Act 17 of 2005 is based also on the need to address the long and underlying historical claims of native indigenous entitlement to the disputed lands that are directly linked to European settlers' conquest of 1890 and the subsequent confiscation of their lands.

History⁹¹ and context are as much a basis for judicial pronouncements as the philosophical principles that a court may seek to apply to a dispute.⁹² Current history alone may not suffice in matters relating to the dominant tools of economic practice in predominantly agricultural societies that have suffered the indignities of both colonisation and later apartheid consecutively. This is because prior to the creation of apartheid law based legal titles to the SADC's disputed lands, other titles existed. Apartheid constitutional laws' treatment of previous indigenous titles and the manifest outcome of that treatment is itself indicative of the possible uses of constitutional authority in any State. If SADC States are sovereign independent States, then they also possess exactly the same constitutional competence as predecessor apartheid governments had to allocate land rights. Thus, the SADC Tribunal's finding in *Campbell*⁹³ recommends the view that:

- 1) Apartheid constitutional land laws that had alienated native indigenous peoples of their lands without compensation were still perfectly valid in the majority rule dispensation; and
- 2) Majority rule constitutional land laws lacked the quality that the enduring apartheid constitutional land laws had and still wield.

⁹⁰ [1992] HCA 23

⁹¹ Jose A. Cabranes writes: "I turn to history for a simple reason: history matters. It matters always, and it is relevant always, in the law, and especially in the Anglo-American legal system. As Holmes famously taught us, '[t]he life of the law has not been logic: it has been experience' —and by 'experience' we of course mean history." — "Customary International Law: What it is and what it is not" (22 *Duke Journal of Comparative and International Law* (2011) p. 143).

⁹² See also the landmark decision of the African Commission on indigenous land rights in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, available at: <www.unhcr.org/refworld/docid/4b8275a12.html> (last accessed 12 May 2012). On 4 February 2010, the African Commission held that attempts by the Kenyan government to evict the Endorois from their traditional land in order to develop tourist attractions violated their human rights.

⁹³ 48 *ILM* 534 (2009).

Nonetheless, SADC States' inauguration of black economic empowerment as a regional norm of customary international law⁹⁴ shows three things which the SADC Tribunal appeared to miss. The first is majority rule governments' own conviction in their own competence to address land issues even with norms of similar quality to those that apartheid governments had previously relied upon to confiscate and alienate native Africans' land. In this sense the SADC Tribunal's reasoning is vulnerable from charges of false appearances of constitutionalism because majority rule governments have as much sovereign competence as their predecessor apartheid governments to legislate on any subject on their territories subject only to the requirements of general international law. SADC constitutional laws include also basic SADC customary international laws.

The second is majority rule governments' deliberate creation of a *lex specialis* that targets the economic and social legacy of apartheid rule. *Lex specialis* is Latin for "law governing a specific subject matter". It derives from the maxim "*lex specialis derogat legi generali*" or a "special rule prevails over a general rule".⁹⁵ The doctrine applies to the interpretation of laws regardless of jurisdiction. It requires priority to be given to a law governing a specific subject matter (in this case land disputes) over a law that only governs general matters (such as Article 6 of the SADC Treaty), particularly where the competing standards are of equal stature. Shaw writes that *lex specialis* derogates from general law or *lex generalis* "so that the more detailed and specific rule will have priority".⁹⁶ It matters not that the *lex specialis* is customary international law while the general norm is a treaty provision. Shaw writes that regarding the question of priority as between custom and treaty is resolved by the general rule, "that which is later in time will have priority".⁹⁷

Moreover, where the *lex specialis* appears in double versions, both as treaty and custom, there should be no presumption that the latter is subsumed by the former. The two may co-exist.⁹⁸ Therefore, it is extremely curious that the land jurisprudence of the SADC Tribunal consistently privileged the *lex generalis* provisions of Article 6(2)⁹⁹ of the sub-regional SADC Treaty adopted in 1992 over the sub-regional customary international law norm crystallised by the simultaneous and compulsive promulgation in the last two decades of national statutes and regulations and the setting of whole governmental departments, and standing progress evaluation conferences, and scorecard

⁹⁴ A norm of customary international law is created when specially affected States posit practice under the belief that it was obligatory under international law and other States either actively support them or merely acquiesce with their practice. See *North Sea Continental Shelf* cases, *ICJ Reports* 1969, p. 3.

⁹⁵ See also M. Shaw, *International Law*, 6th edition (CUP, 2008) p. 66.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, p.123.

⁹⁸ *Ibid.*, p.124.

⁹⁹ On the prohibition of discriminatory treatment.

committees to oversee and ensure black economic empowerment.¹⁰⁰ Indeed, the inauguration of BEE by SADC States as a basic norm for addressing the legacy of apartheid, long after their adoption¹⁰¹ and coming into force¹⁰² of the SADC Treaty, recommends the view that the SADC Treaty should be interpreted and applied in light of the newer constitutional customary international law BEE norm and social realities in the region.

Albert Thomas¹⁰³ observed that this is the only way of ensuring legitimacy for those whose task it is to interpret constitutional texts such as the SADC Treaty. This is because texts often continue to exist when the reality has become something quite different.

Institutions are living things. All codification is abstract. Jurists have long ceased to confine themselves to studying the mechanical operation of institutions and laws. They seek to discover in each succeeding epoch the social reality which these embody. This method is just as applicable to newly-established institutions as to those which have ceased to be anything but a matter of history.¹⁰⁴

Thirdly, the SADC Tribunal's emergent jurisprudence on the question of the validity of constitutional land law statutes of Member States Parties also appears to oppose Member States Parties' basic policy of reconciliation, reconstruction and the pursuit of equality. SADC States have inaugurated this standard both as a basic norm¹⁰⁵ and mechanism for dealing with the social and political legacy of apartheid on their territories.

The way other courts have historically responded to the initial question of whether legal validity should continue to be attached to something that had offended against universally recognised fundamental principles of justice and the rule of law, even though it had been legally valid in respect of the positive laws of a preceding, is relevant to the SADC Tribunal's effort regarding land disputes, if at all they fall into its proper sphere of operation.¹⁰⁶ Because in general courts are reticent to adjudicate over public policy matters – a preserve of executive power – this article argues that if at all land issues properly fall under the competence of the Tribunal, then the best approach is not its literal textual interpretation of basic provisions of the 1992 Treaty, but what I call the 'due-account approach'.

¹⁰⁰ On this development and commentary on corresponding BEE legislation in the sub-region *see also* Chigara, *supra* note 48, pp. 213–242.

¹⁰¹ 1992.

¹⁰² 1993.

¹⁰³ Thomas, *supra* note 76, pp. 261–276.

¹⁰⁴ *Ibid.*, pp. 262–263.

¹⁰⁵ *See also* Chigara, *supra* note 48, pp. 213–242.

¹⁰⁶ *Haya de la Torre* (1951) *ICJ Rep.* 71, at 83.

The latter approach takes due regard of two things. One is SADC States' recent inauguration of reconciliation, reconstruction and the pursuit of equality as a regional norm of customary international law.¹⁰⁷ The other is the mandatory requirement to consider CIL's position on the matter. Only in this way can the Tribunal ensure against legal intolerability in the Radbruch sense.¹⁰⁸ Legal intolerability is reached when the contradiction between positive law and justice reaches an intolerable level and the law becomes a "false law" from justice's perspective. Legalised injustice occurs "[w]here justice is not even aimed at, where equality – the core of justice – is deliberately disavowed in the enactment of a positive law, then the law is not simply 'false law', it has no claim at all to legal status".¹⁰⁹

If the law is that which is appropriately enacted and is socially effective, only when the threshold of extreme injustice is crossed do appropriately enacted and socially effective norms such as apartheid constitutional land laws that confiscated from indigenous natives of the SADC their land and compelled them to become wage earners on newly developed European enterprises then lose their legal validity under Radbruch's formula¹¹⁰ because of law's association with objectivity, fairness and justice. Apartheid regimes' expropriation of black lands without compensation in the SADC is well documented.¹¹¹ Judicial institutions' support of those laws is also well documented.

Professor Kader Asmal has observed that apartheid judges were themselves "prime movers in the conversion of law to the ends of violence and lawlessness. ... [T]he apartheid judiciary has much responsibility to shoulder for the ills of the past – and could have done much to enlighten the country about the inner workings of apartheid's administrative labyrinth."¹¹² Revulsion against the practice of both the apartheid legislators and apartheid's judicial bodies is also well documented.¹¹³

Presently, this raises the question of how the relevant judicial institutions should respond to claims of blacks that they want their land back, which commercial farmers claim is nonsense because they own the land? At the heart of this question is the question whether what was legal under apartheid rule could remain legal today even though it lacked validity under Radbruch's false law principle,

¹⁰⁷ On creation of regional customary international law see the *Asylum* case. Tracing the State practice and *opinion juris sive necessitatis* resulting in the manifestation of this norm see especially Chigara, *supra* note 48, pp. 213–242.

¹⁰⁸ See also Robert Alexy (2000) *supra* note 84 p.14.

¹⁰⁹ *Ibid.*, p. 16.

¹¹⁰ *Ibid.*

¹¹¹ R. Home, 'The colonial legacy in land rights in southern Africa', in B. Chigara (ed.), *Southern African Development Community Land Issues: Towards a New Sustainable Land Relations Policy* (Routledge, Oxford and New York, 2011) pp. 8–26.

¹¹² K. Asmal, 'Foreword', in D. Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing, Oxford, 1998) p. ix.

¹¹³ See *ibid.*, pp. 91–135.

eventually manifested in the rapture of apartheid rule itself. This is not a novel question. Twice in the last century the Federal Constitutional Court of Germany had to address the same problem. First after the Second World War to resolve also property claims of individuals that had been nullified by the Reich, and secondly to determine the justifiability of illegal actions resulting in the deaths of individuals killed while trying to cross the internal border between East and West Germany.

The difficulties that the SADC Tribunal has encountered with the Summit of Heads of State or Government result from its own emergent property rights jurisprudence which is incongruous with all of the following:

- i) New regional constitutional norm of customary international law on reconciliation, economic and social reconstruction and the requirement of equality.
- ii) History of legal dispossession of native land during apartheid and the requirement of the principle of fairness.
- iii) Social and economic reconstruction agenda of the SADC encapsulated in post 1992 regional customary international law.

Consequently, it risks fermenting violence in affected States particularly because of its own violence on majority rule constitutional land laws that it has rendered completely inapplicable to land rights disputes while upholding the effect of apartheid constitutional land laws in affected States by shielding them from the possible effects of emergent reconstruction laws. Therefore, the Tribunal could not while developing such jurisprudence serve to facilitate reconciliation and reconstruction and to repair communities damaged by a century of apartheid policies.

To be of any use to the parties, future jurisprudence of the SADC Tribunal should:

- i) Account for the evolving nature of the SADC constitutional provisions, particularly those norms provided for by regional constitutional customary international law.
- ii) Adopt a more flexible teleological interpretation of SADC Constitutional provisions.
- iii) Be mindful of the hazards inherent in legal transplants. In particular, it should recognize that it is a transitional Court – practically a vehicle to facilitate departure from the effects of the worst form of government ever known to man to a promised better possible one, built on equality. Consequently, any borrowing from other jurisdictions should be tempered by the requirement of how similar courts (in temporal context) discharged their obligations in transitional settings similar to its own.

This should be the minimal duty of a human rights court serving societies in transition from a century of apartheid rule to equality.

9. Tribunal's Duty to Pursue Proportionate Reconciliation and Reconstruction Jurisprudence

Support for the view that the SADC Tribunal may be under a duty to ensure the development of a proportionate reconciliation, reconstruction and pursuit of equality jurisprudence is apparent. Courts do not operate in social and political vacuums where legal transplants from other jurisdictions could flourish without the inhibitions of context. In fact the decisions of the Constitutional Court of South Africa habitually invoke history and context as significant parameters in its decision making process.¹¹⁴

Parroting of anti-discrimination jurisprudence borrowed from external jurisdictions into the SADC without regard to temporal context may prove to be unhelpful because the decisions premised on such exercises may conflict with the current legitimate expectations of both the executive and the formerly oppressed majority. Such a scenario would facilitate the delivery of useless judicial pronouncements that Parties openly disregard. The result, as the suspension of the SADC Tribunal has shown, would be that the judicial institution becomes involved in socially irrelevant bureaucratic exercises.

Chiding the newly established International Labour Organization (ILO), its illustrious founding Secretary General Albert Thomas warned against the “mechanical operation of institutions and laws” because of its potential to castrate them of their potential to impact lives and thereby reduce their function to bureaucratic exercises. He insisted that the *social reality test* was the litmus test for the legitimacy and significance of any institution – something that the currently suspended SADC Tribunal might do well to learn should the SADC States choose to reinstate it.

The ILO might act in perfect conformity with all the articles of the Treaty [its constitutive Treaty – The Peace treaty of Versailles 1918, gave it power to secure as far as possible, equal conditions for all workers of the world by the adoption of uniform Draft Conventions and Recommendations]; it might obtain the ratification of every Convention; it might distribute throughout the world abundant information; and nevertheless be nothing but a bureaucratic institution without real authority. Its publications would not be read; its recommendations would be treated with indifference; its life would be purely formal.

Within the framework of the same constitution, on the other hand, it may come to be regarded by public opinion as a beneficent and necessary institution. It may command the attention of governments; its advice and intervention may be sought; its operations may furnish the workers whom it protects and the employers who are anxious to secure

¹¹⁴ Case CCT39/09 [2009] ZACC 28, paras. 2, 7, 144 (on reasonableness of water provider's policies).

organisation and stability with opportunities for a continuous effort. A common spirit may be created which will animate it from within. It may be the centre of a real and intense international life.¹¹⁵

The birth and sudden suspension of the SADC Tribunal shows the Tribunal's enormous failure regarding Albert Thomas' social relevance requirement. This is in large part because of the Tribunal's failure to interpret its role among its subjects, particularly in light of SADC States' adoption of reconciliation, economic and social reconstruction, and the requirement of equality as a basic norm of regional customary international law. Consequently, the Tribunal has struggled to deal with the question of the validity of apartheid-engineered property rights in the post-apartheid dispensation. In fact one wonders to what extent the SADC Tribunal manifests the psychological legacy of apartheid. It seeks to uphold and legitimise the land thefts of the apartheid era by emasculating efforts of majority rule governments to undo those thefts probably because they occurred over a century ago.

In *Re-crafting the Rule of Law: The Limits of Legal Order*, Professor Dyzenhaus painstakingly examines case examples to determine whether we should continue to regard as legally valid something which had offended against fundamental principles of justice and the rule of law merely because it had been legally valid in terms of the positive law of the system of the preceding order.¹¹⁶ The same question applies very much to the SADC land issues of today. The question that the Tribunal's emergent property rights jurisprudence has raised is whether it is ethically sustainable for the Tribunal to privilege property rights emanating from apartheid constitutional land laws while simultaneously denying the applicability in the same sphere of similar laws of majority rule governments that are seeking to reverse confiscation of native black lands under white domination and without compensation.

Reconstruction jurisprudence of the Federal Constitutional Court of Germany makes apparent that Court's awareness of the utility of social relevance to its practice. By Section 2 of Decree 11 of the Reich's Citizenship Law of 25 November 1941 a Jewish person lost his citizenship and by implication any corresponding property rights if his usual residence was abroad at the time the Decree came into force, or whenever he made his usual residence abroad after the coming into force of the Decree.

¹¹⁵ Thomas, *supra* note 76, p. 263.

¹¹⁶ Alexy, *supra* note 84, p. 15.

The Federal Constitutional Court's jurisprudence disavowed Decree 11 as false law on account of its intolerability or conflict with justice. It stated that the Decree "so evidently contradict[ed] fundamental principles of justice that the judge who applied them or recognised their legal consequences would pronounce injustice instead of law".¹¹⁷ If the Court had ruled otherwise, one of the applicants, a lawyer that had been deported from Amsterdam in 1942, would have lost his claim to his inheritance. The decision served to reconcile the man with his wealth even as an heir. It served also to perfect the law's integrity by rejecting claims that the distortions of entitlement to keep property authored under the Reich could be valid in the post-Reich era. It served also to extinguish the legacy of confiscation of property belonging to Jewish people.

The German Federal Court's findings contrast sharply with those of the SADC Tribunal on matters of similar significance and weight, particularly in the leading case of *Mike Campbell (Pvt) Ltd. and Others v. Zimbabwe*. The finding of the Tribunal potentially exposes it to criticism regarding three salient matters that are pivotal to its purpose in the reconciliation, reconstruction and pursuit of equality era.

10. Inherent weaknesses in SADC Tribunal Jurisprudence on land issues in Light of other approaches

The first of these criticisms refers to the Tribunal's assessment¹¹⁸ of the challenge presented by the Parties' dispute. The Tribunal took the simplistic view that this was a question of whether the Constitution of Zimbabwe Amendment Act 17 of 2005 breached provisions of the constitutive SADC Treaty on anti-discrimination. That assessment contrasts sharply to the German Federal Constitutional Court's reconstruction assessment of the challenge posed by the Parties' dispute in *BverfGE* after the demise of the Reich. The latter Court, mindful that its social relevance was at issue, interpreted the question presented by Applicants as one that required it to consider whether one should continue to regard as legally valid something which offended against fundamental principles of justice and the rule of law even though it had been legally valid in terms of the positive law of the system which had perished.

¹¹⁷ BVerfGE 3, 58 (119) translation: Alexy, *supra* note 84, p. 18.

¹¹⁸ Tribunals can ask the wrong question and mislead themselves only to be overturned on appeal where the system provides for that possibility. Where that facility does not exist, Parties' rejection of the outcome as happened in *Campbell* becomes a real possibility. This underlines Tribunals' responsibility to make valid assessments of the questions put before them. *See also* the ICJ's correct assessment of the question put to it recently by the UN General Assembly in the Advisory Opinion, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010.

Cognisant of its function to ensure law's integrity by disavowing intolerability when validly enacted laws contradict justice, the German Federal Constitutional Court ruled that Decree 11, regarding the Reich's Citizenship Law of 25 November 1941, was in the reconstruction era null and void. It stated that "Decree 11 offends fundamental principles. ... [Its] contradiction with justice has reached so intolerable a level that it must be regarded as void from the outset."¹¹⁹

More recently, the UK House of Lords has persistently refused to enforce UK counter-terrorism pieces of legislation whose practice would have resulted in foreign terrorist suspects being treated less favourably than their British counterparts, an example of the House of Lords disavowing intolerability arising from potential enforcement of validly enacted laws to arrive at outcomes that would contradict justice. Lord Hoffmann described the relevant sections of the emergent UK counter-terrorism pieces of legislation as anathema to the British instincts of justice and constitution. He stated:

The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom.

At present, the power cannot be exercised against citizens of this country. First, it applies only to foreigners whom the Home Secretary would otherwise be able to deport. But the power to deport foreigners is extremely wide. Secondly, it requires that the Home Secretary should reasonably suspect the foreigners of a variety of activities or attitudes in connection with terrorism, including supporting a group influenced from abroad whom the Home Secretary suspects of being concerned in terrorism. If the finger of suspicion has pointed and the suspect is detained, his detention must be reviewed by the Special Immigration Appeals Commission. They can decide that there were no reasonable grounds for the Home Secretary's suspicion. But the suspect is not entitled to be told the grounds upon which he has been suspected. So he may not find it easy to explain that the suspicion is groundless. In any case, suspicion of being a supporter is one thing and proof of wrongdoing is another. Someone who has never committed any offence and has no intention of doing anything wrong may be reasonably suspected of being a supporter on the basis of some heated remarks overheard in a pub. The question in this case is whether the United Kingdom should be a country in which the police can come to such a person's house and take him away to be detained indefinitely without trial.¹²⁰

It is to these instincts of justice that courts of law should look to when assessing the substantive quality of the questions placed before them. This is because judicial courts have a duty to ensure law's integrity by ensuring against intolerability which results when validly proclaimed laws contradict requirements of justice. In particular, affected States of the SADC have to fathom an objective and sustainable formula to efficiently eradicate apartheid's salient legacy of unequal land distribution on racial lines and the economic exclusion of the majority black communities.

¹¹⁹ BverfGE 23, 98 (106), translation: Alexy, *supra* note 84, p. 18.

¹²⁰ Judgments – A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) [2004] UKHL 56, paras. 86–87.

Perhaps some still do believe that the implementation of Rhodesia's (now Zimbabwe) Land Apportionment Act (1930) that had reserved 30 per cent of all agricultural land for the 1.1 million blacks and 51 per cent of all agricultural land for the 50,000 whites was not contrary to the principle of fairness. And some that the implementation of the Land Husbandry Act (1951) and the Land Tenure Act (1969) that had reinforced land classification into African and European areas with the result that by 1960 more than 25,000 black families had become squatters on a "communal basis" – a condition that had been aggravated by the civil war for independence until 1980 when the first majority rule government came to power – was not contrary to fairness. And others that the refusal of commercial farmers to make land available to the Zimbabwean government through the willing seller willing buyer policy is not inconsistent with the current policy of reconciliation and reconstruction.

Moreover, under the critical date theory, international law requires that barring application of the much diminished doctrine of *terra nullius* which operates to authorise a State to claim sovereign rights over territory that its agents had encountered as vacant and belonging to no one else, any competing claims to ownership of territory ought to be settled between the contesting Parties by stopping time on that all important significant date to which they both point. "Whatever were the Parties' respective positions and corresponding rights then should be enforced now."¹²¹

It has never been claimed that Zimbabwe was *terra nullius* at colonisation. That fact was the basis upon which blacks had premised their armed liberation struggle on against the settler white regime. Therefore, the legal titles that commercial farmers insist upon may not be valid as blacks can point to ownership of the same lands before colonisation. In fact this is a matter of historical record. Secondly, blacks could argue that to insist upon colonial land titles in the reconciliation, reconstruction and pursuit of equality era would contradict justice in the Radbruch formulation sense. Thirdly, it could be interpreted as the farming community's rejection of reconciliation, reconstruction and the pursuit of equity, and therefore a declaration of war.

Additionally, *Mabo No.2*¹²² turned down a long list of cases, including UK Privy Council decisions that had held that native peoples of colonised lands were "so low in the scale of social organization" that it is idle to impute to such people some shadow of the rights known to Western civilisation. The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law. Per Brennan J:

¹²¹ Cane and Conaghan, *supra* note 85, p. 1161.

¹²² [1992] HCA 23.

The policy appears explicitly in the judgment of the Privy Council in *In re Southern Rhodesia* in rejecting the argument that the native people ‘were the owners of the unalienated lands long before either the Company or the Crown became concerned with them and from time immemorial ... and that the unalienated lands belonged to them still.’¹²³

The second question that the SADC Tribunal’s finding in *Campbell* raises is the matter of whether the SADC Tribunal actually had jurisdiction to intervene in policy matters that are ordinarily the preserve of the executive under the requirement of separation of powers doctrine in a democratic society? The cases of *ex parte Dyer*, *CCSU v. Minister for the Civil Service*, and *Commercial Farmers Union (CFU) and Others v. The Minister of Lands and Rural resettlement and Others* (Zimbabwe) (2010) discussed above lead only to the conclusion that probably not. Courts have habitually held that substantive issues of national policy, of which Zimbabwe’s land reform policy is one, are not open to challenge before the courts other than on the basis of bad faith, improper motive or manifest absurdity. For this reason, it could be argued that the SADC Tribunal may have gone on a limb.

Thirdly, even if we assumed that the SADC Tribunal had jurisdiction to intervene in the substantive matter of Zimbabwe’s constitutional land reform programme, it would still not escape the challenge of needing to arrive at a logically sustainable determination of the matters raised. However, the Tribunal’s finding can be challenged for its inconsistency with the commonly adopted Radbruch intolerability formulation which requires the judge(s) to reconcile the requirements of formerly valid laws of a perished order with justice in order to ensure law’s integrity. This, the suspended SADC Tribunal would have achieved by recognising and acknowledging the intolerability of colonial constitutional land laws and their incompatibility with justice, particularly in light of the salient racial divide in the allocation of land in Zimbabwe then.

Instead, the Tribunal manifestly chose to contradict fundamental principles of justice when it upheld the legal consequences of colonial constitutional land laws while dismissing Zimbabwe’s own constitutional land laws that deliberately target the correction of imbalances in land allocation on racial lines.¹²⁴

¹²³ No. 2 [1992] HCA 23, para. 42.

¹²⁴ See also Alexy, *supra* note 84, p. 18.

Moreover, the Tribunal failed to justify its decision to uphold unjust laws of the colonial legal order.

It casually noted that:

The applicants are, in essence, challenging the compulsory acquisition of their agricultural lands ... under the land reform programme undertaken by the Respondent. We note that the acquisition of land in Zimbabwe has had a long history. However, for the purposes of the present case, we need to confine ourselves only to acquisitions carried out under section 16B of the Constitution of Zimbabwe Amendment Act 17 of 2005.¹²⁵

It then immersed itself in textual interpretation to expose the literary inconsistencies between Act 17 of 2005 and the prohibition against discrimination contained in Article 6 of the SADC Treaty. However, that literal interpretation of texts misses what the case was about when one considers the object and purpose of Act 17 which is also consistent with the SADC's emergent regional constitutional customary international law norm on reconciliation, reconstruction and pursuit of equity.

Other courts have properly determined similar challenges as requiring the reconciliation of law to justice by eliminating potential intolerability that could arise from giving legal effect to the issues premised on injustices of a preceding order. The German Federal Constitutional Court had disavowed Decree 11 of the Reich regarding nullification of citizenship of Jews in order to ensure the reconciliation of a Jewish lawyer with his inheritance which he would otherwise have been denied. So too had the Supreme Court of Australia in rejecting a long list of cases that had denied native rights to land based on the discredited doctrine of *terra nullius*.

This begs serious questions about the suspended SADC Tribunal's recognition of its own function as a human rights court of transitional States that are seeking to normalise a very abnormal set of circumstances, i.e. correcting land thefts that have lasted for over a century. The outcome in *Campbell* begs serious questions about the quality of the Tribunal's property rights jurisprudence especially in light of State practice that increasingly is emphasising black economic empowerment as a norm of regional customary international law. It shows why suspension of the Tribunal was never far from coming.

More importantly, it raises the question of when, if at all, native indigenous Zimbabweans could hope to have their property rights claims recognised by law. Blacks have persistently sought after this recognition from the very time colonial confiscation of their lands began. African Kings had

¹²⁵ 48 *ILM* 534 (2009).

fought and resisted Cecil Rhodes' Pioneer Column to the death. Numerous monuments erected by the invading colonialists to commemorate several such battles exist to this day.

Magaisa¹²⁶ writes that Rhodesian courts showed no interest at all in enabling Africans to claw back any of their rights that colonial legislation had withdrawn, particularly with regards to land ownership. The case of *Madzimbamuto v. Lardner-Burke*¹²⁷ is regarded as a seminal test of the independence of Southern Rhodesia's judiciary. Nonetheless, only two judges had resigned in protest against the machinations of the Rhodesian government led by Ian Smith to defy a Privy Council judgment that had challenged the legality of the Smith regime.

The provisions of the Lancaster House Agreement (1979) which had settled the 16 year civil war for majority rule had constrained the Zimbabwean government:

- 1) To acquiring land for resettlement only on a willing seller/willing buyer regime. Therefore the government's land reform programme would depend on the speed and extent to which commercial farmers were willing to make land available. As it turned out that strategy failed. It has also failed in South Africa.
- 2) From making constitutional changes that would affect property rights of individuals within the first ten years of majority rule.

Therefore, the Lancaster House Agreement required blacks to postpone any hopes of reconciliation with their land – a very frustrating thing indeed as it is land claims that had been the rallying point of the many sacrifices, including life, which many had had to make during the armed struggle for political freedom.

With the satisfaction of the sunset clauses of the Lancaster House Agreement the Zimbabwe government had begun to amend its constitution so that they could overcome the frustrations of the commercial farming community which had held back land required to expedite the resettlement of landless peasants. It is these constitutional amendments that the white farmers sought declarations against at the SADC Tribunal. This was an indirect attempt to ensure the same result with or without sunset clauses of the Lancaster House Agreement. The Tribunal, in its own words, did not care about the history that had eventually peaked in the suit before it. But the *Campbell* case shows also the peaking of blacks' frustration with the denial of their legitimate expectations.

¹²⁶ A. Magaisa, 'The Land question in Zimbabwe: the judiciary as an instrument of recovery', in B. Chigara, *Southern African Development Community Land Issues: Towards a New Sustainable Land Relations Policy* (Routledge, Oxford and New York, 2011) p. 200.

¹²⁷ [1969] 1 AC 645.

There is a real sense of misfortune when those whose actions should demonstrate objectivity and reason miss their opportunity. The suspended SADC Tribunal's emergent jurisprudence on land reform sounded like the last nail in the coffin of native Zimbabweans' hope for legal recognition of the injustices that have accompanied them in the name of the law since the arrival of the Pioneer Column on their territory in 1890 until now. What should they do that they have not already done for their land rights to be recognised at law and for them finally to be reconciled with their confiscated lands? The emergent land rights jurisprudence of the now suspended SADC Tribunal shows that even getting rid of settler apartheid regimes is not enough for this to happen. Neither is satisfaction of sunset clauses contained in settlement agreements such as the Lancaster House Agreement, nor the enactment of reconstruction legislation by majority rule governments. Hope alone that one day commercial farmers would make land available has proven to be illusory since colonisation.

When judicial bodies such as the currently suspended SADC Tribunal extinguish hope held this long, and anarchy breaks out, it is because the law has lost its integrity. The SADC Tribunal's emergent jurisprudence on land rights frustrate Asmal's¹²⁸ hope that law is that which people should instinctively turn to these days for collective self-expression.

11. The SADC Tribunal: Handmaiden of Reconciliation and Reconstruction OR Defender of Apartheid's Legacy?

Commercial farmers' apparent deployment of delay and frustration tactics against affected governments' land redistribution programmes following the formal end of apartheid appears to have galvanised these States' determination to reconcile natives to lands long lost under both colonial and apartheid rule. They are undeterred even by others' characterisation of their land redistribution policies and programmes as racist, discriminatory and contrary to the rule of law. Nonetheless, racial discrimination is proscribed by numerous UN Conventions, the constitutive SADC Treaty itself, and also by constitutional provisions of these States even. But what makes those criticisms hollow is their insistence upon textual analyses of discrimination. Even UN Human Rights Committees that are tasked with interpreting the major universal human rights instruments – favour teleological interpretations that give due weight to context, or to genuine requirements, in order to ensure social justice. It is not a requirement of the principle of the rule of law to trump social

¹²⁸ Asmal, *supra* note 112, p. vii.

justice. Professor Miller has helpfully defined social justice as a people-oriented idea and a critical idea that “requires us to reform our institutions and practices in the name of greater fairness”.¹²⁹

On the contrary, the rule of law should always be a handmaiden of social justice because whenever social justice is threatened, peace and security, which are the pre-requisites for court activity, could not be guaranteed. The League of Nations had realised this fact and established the International Labour Organization by Chapter XIII of the Peace Treaty of Versailles for the specific purpose of ensuring social justice so that conditions of privation and hardship could never again be visited upon such a large number of the people of the world and lead to peacelessness and insecurity.¹³⁰

Moreover, SADC States individually possess all the competences that all other sovereign independence States possess, namely, to determine upon all constitutional law matters on their territories to the exclusion of other States’¹³¹ involvement, and in accordance with the requirements of the emergent universal human rights morality championed by the human rights movement.¹³² Even the African Charter on Human and Peoples’ Rights¹³³ – the regional human rights instrument – qualifies its guarantee to the recognition and protection of property rights by subjecting it to the requirements of public policy. Article 14 provides that “[t]he right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

Professor Murray writes that the African Commission on Human Rights has spent little time examining Article 14 of the ACHPR. However, in the few cases in which it has done so, they have related to land. The Commission’s view is that:

the right to property is a traditional fundamental right in democratic and liberal societies. ...The role of the state is to respect and to protect this right against any form of encroachment, and to regulate the exercise of this right in order for it to be accessible to everyone, taking public interest into due consideration.¹³⁴

¹²⁹ D. Miller, *Principles of Social Justice* (Harvard University Press, Cambridge, MA, 1999) pp. ix–xi’.

¹³⁰ See also B. Chigara, ‘Latecomers to the ILO and the Authorship and Ownership of the International Labour Code’, 29:3 *Human Rights Quarterly* (2007)pp. 706–726.

¹³¹ See also Judge Huber in the *Island of Palmers* case (*Netherlands v. US*) (1928) 2 *R.I.A.A.* 289.

¹³² See UN Secretary General’s report on the idea of the rule of law, S/204/16, 23 August 2004, para 6.

¹³³ African Charter on Human and Peoples’ Rights, 26 June 1981, Banjul, OAU Doc. CAB/LEG/67/3/Rev 5, 21 *International Legal Materials* 59.

¹³⁴ Communication 373/2009 (formerly 242/2001), *Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l’Homme v Islamic Republic of Mauritania*, 28th Activity Report of the African Commission on Human and Peoples’ Rights, EX.CL/600 (XVII), Annex II, para. 43.

Only by securing the channels for social justice can peace and security be secured. By their General Comments of 2009 and 1989, both the UN Committee on Economic Social and Cultural Rights and the UN Committee on Human Rights have summarised and codified respectively their jurisprudence on the prohibition against discrimination.

The UN Committee on Economic Social and Cultural Rights stated in its General Comment No. 20 adopted at its 42nd session held in Geneva the position that although States are required under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights to ensure against formal and substantive discrimination in economic, social and cultural rights:

[I]n order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.¹³⁵

Therefore, the claim that constitutional land laws of affected SADC States are racist is very much open to question. The UN Human Rights Committee has cemented its view that the prohibition against discrimination is to be understood teleologically, and not textually. It stated in its General Comment No. 18:¹³⁶

[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.¹³⁷

Colonial governments had passed and enforced successive pieces of draconian constitutional land laws that had left natives landless, stranded and compelled to become wage earners in order to pay hut and other taxes towards their new white rulers while the settlers themselves creamed off for themselves lands situated in zones with the most potential for agricultural activity and packaged them into large-scale commercial farms, national trust lands, *etc.*

With the acquiescence of other SADC Member States Parties, these three longest apartheid ruled States appear to have successfully inaugurated in a very short period of time a regional norm of

¹³⁵ Para. 9, Input field, 2 July 2009.

¹³⁶ 10 November 1989, <www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument> (accessed 12 May 2012)

¹³⁷ *Ibid.*, para. 10.

customary international law on black economic empowerment as their basic norm for dealing with the salient legacy of apartheid rule engineered social and economic inequalities along racial lines.¹³⁸

The task of substituting economic and social equality for economic and social inequality in the post-apartheid dispensation is made more complex by *status-quo* advocates' pleas to respect for property rights and the respect for the rule of law and constitutional guarantees. It is also made difficult by the unflinching positions adopted by social justice advocates who insist upon the inviolability of apartheid rule engineered property rights in the post-apartheid dispensation.

The task of substituting equality for inequality in transitional SADC States is made even more complex by the tensions around social and economic reconstruction between post-apartheid governments and judicial courts and tribunals that are manned by men and women that appear to be so removed from the realities from which the matters placed before them for adjudication originate. Their selective application of historical facts to the disputes would impress even the masters of fiction. Consequently, governments' reaction to the findings of these tribunals has annihilated any hope that the SADC Tribunal in particular could give judicial judgments that governments would be keen to follow through.

12. Conclusion

The cases filed at the SADC Tribunal challenging Zimbabwe's on-going land reform programme gave the SADC Tribunal the opportunity to objectively determine the question whether what had been legal under apartheid rule could still be insisted upon in the reconciliation and reconstruction era even though it breached the intolerability test under the Radbruch formulation. The SADC Tribunal is not the first judicial decision making body to have been confronted with this question. However, the SADC Tribunal appears to have made a right mess of it, and through its jurisprudence on the matter dismally failed Albert Thomas' social relevance test. More importantly the SADC Tribunal failed to distinguish between matters of policy that properly belong to the province of the executive under the doctrine of separation of powers, and justiciable disputes that properly belong to the attention of the judiciary.

Even if we supposed that these disputes were within the Tribunal's jurisdiction, it is questionable whether its resort to legal transplants from incongruous Courts was a reasonable thing to do. The Tribunal failed to recognise that as a Human rights court for peoples in transition from apartheid – the worst form of government known to man in recent times – and attempting to make a way

¹³⁸ Chigara, *supra* note 48, pp. 213–242.

towards egalitarian rule, it should have considered if it wished only that jurisprudence coming from courts that had presided over similar issues during their own societies' transitions to egalitarian rule. In this sense, jurisprudence developed by the German Federal Constitutional Court at several points in the recent history of Germany would have been more apposite to the task of the Court than that of the ECtHR.

Moreover, the Tribunal completely ignored the seminal jurisprudence of the Human Rights Committee on the application of the prohibition against discrimination for communities in transition. In particular it missed the teaching of General Comment 18 which authorises reverse discrimination in appropriate cases, of which the dismantling of the legacy of apartheid in the SADC is one. Instead the Tribunal pursued a narrow and simplistic formulation of the prohibition against discrimination in its attempt to apply the obligations of Article 6 of the SADC Treaty against the on-going land reform programme in Zimbabwe.

Probably, the SADC Tribunal would have done better if it had taken due regard of the complete history of the land issue in the SADC, starting even with pre-colonial land rights in Zimbabwe. That would have established the validity or not of colonial constitutional land laws, if for instance the land had been *terra nullius* and the commercial farming community had had no prior rights to observe before establishing the farms at issue in the disputes before the Tribunal. Instead the Tribunal focused only on apartheid constitutional land laws as the only legal titles that were at issue.

The Tribunal would have enhanced its legitimacy, which it did not, had it also taken account of the organic nature of the SADC's constitutional arrangements, particularly in light of the sub-region's current transitional circumstances from apartheid to more egalitarian societies. That would probably have brought to its attention the relevance to these land disputes of the later regional constitutional customary international law norm on reconciliation and reconstruction for the purpose of undoing the economic, social and psychological legacy of apartheid – the BEE norm.

Consequently, the Tribunal could be criticised for failing to ensure law's integrity because its ruling in the leading case of *Campbell* led to the view that indigenous natives' quest for legal recognition of their right to lands confiscated upon colonisation and kept away from them by various legal games, including Privy Council determinations, and Lancaster House Agreement) protections of colonial rights, must continue, even 30 years after the formal end of apartheid rule in Zimbabwe. In this sense the Tribunal failed to ensure law's integrity which required it to disavow false laws and

false interpretations of human rights' prohibitions against discrimination. The SADC Tribunal had Human Rights Committee precedents to learn from if it wished, but it chose not to. Jurisprudence of the German Federal Constitutional Court, the Supreme Courts of Australia and Canada and more recently the UK House Lords all support the disavowing of validly established laws if they contradict the Radbruch formulation of justice.

Therefore, a re-established SADC Tribunal would do well to interpret the SADC Treaty in matters presented before it in a way that ensures its own social relevance by several ways. It should always seek to:

- 1) Maintain the distinction between non-justiciable public policy matters which are the preserve of the executive on the one hand, and justiciable matters that could fall for its determination in accordance with the Tribunal's rules of procedure.
- 2) Avoid developing a jurisprudence that is inconsistent with the requirement to disavow validly enacted laws of a perished order.
- 3) Follow the guidelines of the UN Committee on Economic Social and Cultural Rights' General Comment No. 20 of 2009 and of the UN Human Rights Committee in its General Comment 18 of 1989 on understanding and application of the prohibition against discrimination; neither of which appears to contradict the emergent SADC regional customary international law norm on proportionate reconciliation, reconstruction and requirement of equality.
- 4) Fulfil its function as a handmaiden of reconciliation and reconstruction in SADC States' transition from apartheid to democratic governance by making itself socially relevant to the newly inaugurated regional norm of customary international law on reconciliation, economic and social reconstruction, and the requirement of equity.
- 5) Understand the application of *lex specialis* in light of general law.

Only by ensuring these requirements could a reconstituted SADC Tribunal achieve integrity in its jurisprudence and also gain the social relevance which it had lost, resulting in the suspension of its mandate and role in the sub-region especially at a time when such a judicial institution was most needed. This is because SADC States have deliberately inaugurated *lex specialis* on post-apartheid social reconstruction. The aim is to undo apartheid rule engineered social and economic inequality on racial lines in affected States. The regional customary international law norm on reconciliation, economic and social reconstruction appears to have been promoted by South Africa, Zimbabwe, Namibia and Mozambique. It has been actively supported and

acquiesced to by other SADC Member States Parties. Its purpose is to ensure black economic empowerment. Normatively, the goal is to substitute equality under majority rule government for inequality under apartheid rule government. However, the fundamental presumption inherent in this development is that domestic and sub-regional judicial institutions of SADC States also perceive themselves to be, and actually function as, handmaidens of reconciliation, reconstruction, and the pursuit of equality in the post-apartheid era. Without judicial recognition of this ever increasing BEE legislation and administrative regulations, the *lex specialis* will play no part in the effort to redress social and economic inequality in affected States.