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Abstract

Legal racialization of land ownership and land use in the SADC's former apartheid governed States remains the most divisive subject particularly between Western States and SADC States. Western States have reacted to the SADC land issue with the imposition of severe economic sanctions on target States while SADC states have, after the Campbell decision, closed down the very SADC Tribunal for handing down that decision. Further, SADC states have limited the jurisdiction of the Tribunal to inter-State matters only, shutting the door to individual petitions for human rights abuses. At the heart of this matter is the issue of contested title to lands that the SADC Tribunal had dealt with in the Campbell case. This article applies Nozick's entitlement theory to determine the question of entitlement as a means of illuminating the incommensurabilities around the SADC land issue. Formalist arguments that are based on strict and purist positions on either side of these incommensurabilities are weighed under the light of entitlement theory. The article shows that because of its historically multi-layered dimensions, the SADC land issue appears ill suited to legal formalist arguments that ignore both the historical context of colonialism and forcible expropriation of native titles without expropriation.

The problem

Since the seizures began in 2000 of predominantly white-held commercial farmland in Zimbabwe,² the SADC land issue has dominated and sharply divided international opinion particularly between African and Western States and this shows no sign of abating. In South Africa, white commercial farmers who refused to sell their property to the government under a land redistribution scheme were warned that their property would be seized.³ To mark the occasion of the African National Congress' (ANC) 103rd anniversary, South Africa's President Jacob Zuma announced that 2015 would “see the first Zimbabwe-style land seizures”.⁴

Until November 2014 the European Union (EU) and its allies⁵ had established and maintained unilateral trade embargoes against Zimbabwe as a direct consequence of the latter's fast-track land reform programme (LRP) implemented in consequence of constitutional land laws, including the Zimbabwe Constitution Amendment Act 17 (2005) which seeks to counter Rhodesia's constitutional land laws that had alienated native lands without compensation, including the Land Apportionment Act (1930) which reserved 51 percent of the country's agricultural land for the 50,000 whites and only 30 percent for the 1.1 million native Africans; and the Land Husbandry Act (1951) which enforced private ownership of

* All internet sources cited last accessed on 10 June 2016.

¹ 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>

² See also Chigara, B. (2001) “From Oral to Recorded Governance: Reconstructing Title to Real Property in 21st Century Zimbabwe”, *Common Law World Review* (formerly Anglo American Law Review), vol. 30 No. 1 pp.36 – 65

³ See also Bill Corcoran in Johannesburg and Mike Pflanz, (2007) “South Africa to step up land seizure” *The Telegraph*, at: <http://www.telegraph.co.uk/news/worldnews/1544384/South-Africa-to-step-up-land-seizure.html>

⁴ See also Tino Staff (2015) “South African President Announces Land Seizures and Blames Whites for Electricity Blackouts”, *The New Observer* at: <http://newobserveronline.com/south-african-president-announces-land-seizures-blames-whites-electricity-blackouts/>

⁵ See also Australia's Autonomous Sanctions Regulations 2011, amended by the *Autonomous Sanctions Amendment Regulation 2012* (No. 1): also available at: <http://www.comlaw.gov.au/Series/F2011L02673>

land; and the Land Tenure Act (1969) which reinforced land classification into African and European areas. Act 17 (2005) authorises the Zimbabwe government to nationalise private commercial farmland held predominantly by white farmers, for redistribution among the dispossessed,⁶ landless indigenous majority black population.

The purpose of these constitutionally driven SADC LRPs is to undo apartheid-rule's provocative legacy of legally sanctioned racialized land ownership policies particularly in the longest apartheid-governed States of Namibia, where political independence was achieved only in 1990; South Africa, where majority rule was achieved in 1994 and Zimbabwe, which attained political independence in 1980. These most affected African States regard their LRPs as non-negotiable reconstruction objectives aimed at ending economic and social apartheid in the post-apartheid dispensation. Western States however have adopted the view that the same LRPs are an unacceptable attack on the rule of law principle, and an affront to the notion of property rights and human rights. Western States have wasted no time in implementing unilateral coercive economic measures against LRP implementing SADC States. The purpose of these measures is to 'compel respect for human rights'. However, SADC States refuse to be distracted by any such measures from implementing their post-apartheid Black Economic Empowerment (BEE)⁷ programmes, of which LRPs are one and perhaps the most significant for these predominantly agricultural economies.

This article evaluates the arguments for and against the de-racialization of land ownership in the SADC between the European Communities and 'Others' and, SADC States themselves. In particular it examines the incommensurabilities that arise from (i) ignoring the multi-layered context of the SADC land ownership issue, and (ii) from taking formalist human rights and doctrinal 'purist rule of law positions' in seeking to address the problem. It applies Nozick's 'Entitlement Theory' and the *Mabo case No. 2*⁸ 're-evaluation of indigenous claims approach under modern international law' to determine the issue of contested property claims in the post-apartheid transitional States of the SADC. It also applies Alder's 'incommensurability principle' and Miller's 'Social Justice Theory' to test Western States' claims that SADC LRPs trump human rights and the rule of law. The article shows that because of its historically multi-layered dimensions, the SADC land issue appears ill suited to frame in legal formalisms that are diametrically opposed to the social reconstruction needs of these transitional States that have just emerged from almost a century of apartheid-rule. The article recommends a holistic, joined up framework towards a possible end to Western and African States' conflict over the de-racialization of land ownership in affected SADC States.

EU Unilateral Coercive Measures taken against Zimbabwe's fast-track Land Reform Program

Pursuant to Article 215 of the *Treaty on the Functioning of the European Union*⁹ (TFEU), and for the purpose of achieving the objectives of the Common Foreign and Security Policy (CFSP), the 28 Member States Parties bloc adopted on 18 February 2002 a package of punitive measures in relation to Zimbabwe's fast-track land reform programme. They included:¹⁰

1. A ban from entering the EU of listed persons, entities and bodies.

⁶ Discussing how successive settler colonial regimes legally expropriated indigenous blacks of their lands without compensation and gifted them to settler white entrepreneurs, see also Chigara, B. (2009) "Southern African Development Community (SADC) tribunal: Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe: introductory note", *International Legal Materials*, 48 (3). pp. 530 - 548

⁷ See especially Chigara, B. (2011) "European/Southern African Development Community (SADC) States' bilateral investment agreements (BITs) for the promotion and protection of foreign investments vs post-apartheid SADC economic and social reconstruction policy", *Journal of International Trade Law and Policy*, 10 (3) pp. 213-42.

⁸ [1992] HCA 23

⁹ Treaty on the Functioning of the European Union (2007) (consolidated version), Official Journal of the European Union (OJ) 2012 O.J. C326/47. This treaty is the formal legal basis for the interruption or reduction, in part or completely, of the Union's economic and financial relations with one or more third countries.

¹⁰ See also eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf

2. An embargo on arms and related materials.
3. A ban on exports of equipment for internal repression.
4. A ban on provision of certain services
5. Restrictions on admission to the EU
6. Freezing of funds and economic resources

Consequences of EU Measures taken against Zimbabwe's fast-track Land Reform Programme

In its intervention at the UN Workshop on the impact of unilateral coercive measures on the enjoyment of human rights held at Geneva on 5 April 2013, the Zimbabwe Delegation observed that since independence in 1980, the EU had been the most important donor to Zimbabwe, especially in the areas of health, education and agricultural development - contributing millions of Euros in various programmes. But immediately the Zimbabwe government had instituted fast-track land reform, the EU withdrew all its support, resulting in an immediate depletion of essential drugs in 73% of Zimbabwe's health facilities. Infant mortality rates immediately shot up, with at least 100 children dying everyday from treatable diseases and at least eight Zimbabwean women dying everyday in childbirth for chronic underfunding of the health sector. Even more, "Global fund made it difficult, and most of the time impossible for the country to scale up its HIV prevention programmes by rejecting Zimbabwe's applications for funds for unspecified reasons."¹¹

A 2010 report of the Zimbabwe National Statistical Agency (ZIMSTAT) states that in 2002, Zimbabwe had an estimated population of population of 11.6 million, with a trajectory of 12.2 million for 2009. It notes that the 2002 population estimate might have been underestimated as many Zimbabweans had migrated to neighbouring countries or overseas in response to emergent economic challenges. Zimbabwe's gross domestic product (GDP) showed a cumulative decline by 46 per cent between 2000 and 2007. This "unstable macroeconomic environment was characterized by hyperinflation, with annual inflation reaching 231 million per-cent in July 2008. The economy experienced severe shortages of many basic commodities, including drugs, food, fuel, and industrial and consumer goods. The past decade had also witnessed increasing poverty levels. For instance, the Total Consumption Poverty Line (TCPL) rose from 61 per cent in 1995 to 72 per cent in 2003."¹²

Other Unilateral Coercive Measures taken against Zimbabwe's fast-track Land Reform Programme

On 21 December 2001 the USA passed the *Zimbabwe Democracy and Economic Recovery Act* ¹³ (ZIDERA) as a platform for effecting 'peaceful, democratic change', and for achieving 'broad-based and equitable economic growth, and finally for restoring 'the rule of law'.¹⁴ ZIDERA, barred international financial institutions from extending any loans, credit, or guarantee to the Government of Zimbabwe. This has had a direct impact on the economy of Zimbabwe as intended, and wiped out Zimbabwe's previous potential to realize as many of the time bound UN MDGs.¹⁵

Canada's *Special Economic Measures (Zimbabwe) Regulations*¹⁶ of 4 September 2008 list at least seven prohibitions that are intended as a response to the Zimbabwe authorities' perceived "escalation in human rights violations and violence directed at the political opposition, a stolen election, the denial of a peaceful democratic transition and a worsening humanitarian situation"¹⁷ – all of which are linked to

¹¹ UN OHCHR website at: www.ohchr.org/Documents/Events/WCM/Zimbabwe.pdf

¹² (2010) "Migration in Zimbabwe: A Country Profile 2009" available at International Organization for Migration (IOM) website: http://publications.iom.int/bookstore/free/mp_zimbabwe.pdf

¹³ Also available at US government website: <http://www.govtrack.us/congress/bills/107/s494/text>

¹⁴ Section 2.

¹⁵ See also Chigara, supra n. 6.

¹⁶ P.C. 2008-1588 September 4, 2008. Also available at Canada government website : <http://canadagazette.gc.ca/rp-pr/p2/2008/2008-09-17/html/sor-dors248-eng.html>

¹⁷ See also Foreign Affairs website: <http://www.international.gc.ca/sanctions/zimbabwe.aspx?view=d>

the fast-track land reform process. This makes de-racialization of land ownership in post-apartheid SADC one of Western States' most foreign sanctioned issues in recent times.

Australia's Autonomous Sanctions Regulations 2011, as amended by the *Autonomous Sanctions Amendment Regulation 2012 (No. 1)*, at Section 5 (1) places limitations in relation to Zimbabwe regarding:

1. A military activity
2. A sanctioned supply for Zimbabwe
3. The manufacture, maintenance or use of an export sanctioned good for Zimbabwe.

By Section 5(2) (2) "a sanctioned service is also, for an entity or person mentioned in an item of the table, the provision to the entity or person of the following: (a) technical advice, assistance or training; or (b) financial assistance; or (c) a financial service; or (d) another service; if it assists with, or is provided in relation to, an activity involving the supply, sale, transfer, import, purchase or transport of an item of gold, precious metals and diamonds."¹⁸

Consequences of Other Measures taken against Zimbabwe's fast-track Land Reform Programme

In sum, the consequence of these severe unilateral coercive measures against Zimbabwe's fast-track de-racialization of land ownership reform programme was to reduce the former 'bread basket of Africa' to a 'basket case' with the country unable to either feed itself, or to run an economy with any realistic hope of achieving any of the UN Millennium Development Goals.¹⁹

The Zimbabwe government's response was to substitute multiple foreign currencies, including the Chinese Yuan/Renminbi; the US Dollar; South African Rand; and Japanese Yen for the once universally appreciated and stable Zimbabwe Dollar. At the peak of the sanctions regime, unemployment, inflation and poverty reflected a 'failed economy', matching US Assistant Secretary of State for Africa - Chester Crocker's objective of seeking to separate the Zimbabwean people from ZANU PF by making "... their economy scream, and I hope you Senators, have the stomach for what you have to do."²⁰

Dimensions of Land Reform Programmes

SADC land issues have become one of the most internationally litigated matters in recent times. The litigation is intense and attracts international stakeholders ranging from international media, international civil society, governments and even cinema companies. It has been litigated before national courts of South Africa²¹ and Zimbabwe.²² It was also litigated before the sub-regional SADC Tribunal²³ until its suspension by the SADC Executive in August 2010,²⁴ pending the review of its mandate and jurisdiction because of what appeared to be its obstruction to post-apartheid reconstruction policy initiatives of Member States Parties that are seeking to de-racialize land ownership.²⁵ More recently, the SADC land issue has become the subject matter of litigation also at the

¹⁸ Also available at Australia government website: <http://www.comlaw.gov.au/Series/F2011L02673>

¹⁹ See also Chigara, B. (2008) "Social justice: The link between trade liberalization and Sub-Saharan Africa's potential to achieve the United Nations Millennium Development Goals by 2015" 26 *Netherlands Quarterly of Human Rights* (1): 9- 42

²⁰ Supra. n.11.

²¹ See also *Baphiring Community v Uys and others* (2002) - LCC64/98, Judgment of 29 January 2002; *Ndebele-Ndzundza Community concerning the farm Kafferskraal No 181JS* - LCC3/00, Judgment of 23 December 2002; *Nhlabathi and others v Fick* (2003) - LCC42/02, Judgment of 8 April 2003;

²² *Aspinas Makufa and Others v Minister of Home Affairs and Others*, Case No HC22/14, Judgment of 29 August 2014; *The Commercial Farmers Union v. Comrade Border Gezi and others*, Case No.H.C.3544/2000; *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement v Others* SC/132/2000; *Etheredge v. Minister of State for National Security Responsible for Lands, Land Reform and Resettlement*, HH 16-2009, HC 3295/08 Decision of 4 Feb 2009

²³ *Mike Campbell (Pnt) Ltd. and Others* SADC Case No. 2/2007 (Nov. 28, 2008).

²⁴ Communiqué of the 30th Jubilee Summit of Heads of State and Government, 17 August 2010.

²⁵ Discussing SADC States' post-apartheid reconstruction policy and emergence of the sub-regional customary international

Regional African Human Rights Court.²⁶ Most important of all the International Centre for the Settlement of Investment Disputes (ICSID) has been seized on the matter.²⁷

Intrigue with SADC fast track Land Reform Programmes

SADC land issues have elicited commentary of environmental scientists, archaeologists, economists, human geographers, lawyers, sociologists, statisticians and mathematicians, political scientists and many others including right wing and left wing minded individuals.²⁸ Most of these commentaries tend toward status-quo imperatives that emphasize the economic and social development benefits of maintaining apartheid-rule racialized land ownership paradigms. The argument is that perpetuation of racialized land outcomes of the apartheid-era will ensure economic competitiveness of SADC States within the WTO framework while fast-track de-racialization of land ownership only serves to undermine/threaten that competitiveness. But this argument completely ignores the social justice imperatives without which the stability and peace necessary for development could not be achieved while the majority agitated for their land, confiscated without compensation under apartheid-rule.

But merely substituting a black commercial farmer for a white commercial farmer by violent means – a key trait of the Zimbabwe LRP dynamic is equally inconsistent with Nozick's²⁹ entitlement theory. Rather, it results in the mere superimposition of black elites over former white elites without addressing apartheid-rule's alienation of native lands without compensation and gifting them to white enterprises for agricultural development. Thus, the real problem, namely, the exclusion of up to 95 per cent of the indigenous population from land ownership remains unresolved. De-racialization of land requires the restoration of lands to the indigenous groups that initially owned and used them. Unfortunately, main change consequent upon fast-track LRPs so far appears to be the reversal of elite titleholders from white to black but with the social and economic functions of land use unchanged.

However, genuine and sustainable land de-racialization requires first, the opening-up of the protectionist approach to land ownership, and second, the transfer of national agro-efficient farming zones to the people from whom colonial administrators had first alienated it from. Under this light,

law norm on black economic empowerment, see also Chigara, B. (2011) "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 *Journal of International Trade Law and Policy* No.3 : 213- 242

²⁶ On 23 November 2012, the African Court of Human Rights received an application from the Pan African Lawyers Union (PALU) and the Southern African Litigation Centre (SALC), requesting for an advisory opinion regarding the question of whether the suspension of the Southern African Development Community (SADC) Tribunal by the SADC Heads of State and Government was consistent with Article 26 of the African Charter on Human and Peoples' Rights on the independence of the Tribunal and judges – ACHR Ref. No. 103/11/2012. Documents of filing available at: <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/11/Request-for-Advisory-Opinion-before-AfCHPR.pdf>

²⁷ *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe* (2009) ICSID Case No. ARB/05/6 Judgment of 22 April 2009; *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa* (2010) ICSID Case No. ARB (AF)/07/01 Judgment of August 2010

²⁸ See also Woodhouse, P. (2012) "Reforming Land and Water Rights in South Africa" 43 *Development and Change* No.4 pp.847-68; Olubode-Awosola, O.O. et al. (2008) "Mathematical modelling of South African land redistribution for development policy" 30 *Journal of Policy Modeling* No.5 pp.841-55; Ntsebeza, L. and Hall R. (eds. 2007) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (Cape Town: HSRC Press); Hall, R. (2004) 'A Political Economy of Land Reform in South Africa' 100 *Review of African Political Economy*, pp.23 -37; Chigara, B. "The contest for labels in the Southern African Development Community (SADC) land issue, 72 *Nordic Journal of International Law* No.3 pp. 369- 397; Mufune, P. (2010) "Land Reform Management in Namibia, South Africa and Zimbabwe: A comparative Perspective" 6 *International Journal of Rural Management* No.1 pp. 1-31; Boudreaux, K. (2010) "Land Reform as Social justice: The case of South Africa" *Economic Affairs* pp. 13-20; Chigara, B. "Southern African Development Community (SADC) Tribunal: Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe: Introductory note" 48 *International Legal Materials* No. 3: 530- 548; Date-Bah, S.K. (1998) "Rights of Indigenous People in Relation to Natural Resources Development: An African's Perspective." 16 *Journal of Energy and Natural Resources Law* pp. 389-412; Fabricius, C.E. et al. (2001) "Towards Strengthening Collaborative Ecosystem Management: Lessons from Environmental Conflict and Political Change in Southern Africa." 31 *Journal of the Royal Society of New Zealand* No.4 pp. 831-844.

²⁹ Discussed in the following section.

LRPs would and should serve as a remedy for the social injustice authored under apartheid-rule but which could and should not subsist in the post-apartheid democratic dispensation. But who actually, almost a hundred years after the initial unjust alienation would be entitled to restoration of the contested lands?

Entitlement Theory and the human rights dimensions of SADC Land Reform Programmes

Nozick's³⁰ entitlement theory suggests that justice in holdings manifests two concerns, namely, original acquisition of holdings; and transfer of holdings. Accordingly, only a person who acquires a holding in accordance with the principle of justice-in-acquisition is entitled to that holding. The initial acquisition has to be just. It is just if it is an appropriation of unheld things in accordance with "... the process, or processes by which unheld things may come to be held, the things that may come to be held by these processes, the extent of what comes to be held by a particular process, and so on".³¹ The SADC was not *terra nullius* or uninhabited when European colonisers intervened. A network of well-established civilizations according to tribal kingdoms that ruled through Chieftainships and Headmen was very much in evidence and is well documented.³²

Apartheid-rule alienation of indigenous peoples' lands in the SADC was carefully and arbitrarily orchestrated.³³ Lands that had been held by indigenous populations from time immemorial were forcibly confiscated without either consultation or compensation, leading National Liberation Movements across the SADC to wage armed struggles for independence in order to reclaim their lands. Therefore, the initial acquisition of lands that were then parcelled into large-scale commercial farms for private Western enterprises under colonial apartheid-rule fail the 'justness-in-initial-acquisition' test of Nozick's entitlement theory.

Further, "A person who acquires a holding in accordance with the principle of justice-in-transfer, from someone else entitled to the holding, is entitled to the holding".³⁴ Thus, only justice-in-acquisition-sanctified holdings are entitled to enduring protection under the law according to Nozick's entitlement theory. The establishment of the disputed SADC commercial farmlands appears to have been inconsistent with requirements of justice-in-the-initial-acquisition principle. The *caveat emptor* principle of law insists that purchasers should 'beware what they are buying' because they bear responsibility at law in terms of its legal status and of any recognized rights associated with it, particularly those of third parties.

Lord Justice Davis stated in *Bryan Lloyd, Jacqueline Lloyd v William Browning, Maureen Browning* [2013]³⁵ that, any potential uncertainties revealed from investigations and enquiries during title searches in the lead to the purchase of land "... would reinforce the desirability of the claimant purchasers either making more detailed enquiries of the District Council or instructing their solicitors of the point identified by the planning consultants: so that written confirmation could be sought from the vendors' solicitors as to the permissions before the claimants committed themselves to any contract".

In that case, the claimants had purchased farmland that turned out to be unsuitable for the purposes which they had in mind, and which they had persistently made clear to the vendors of the farm, while for their part the vendors had continuously made misrepresentations about the suitability of their farm to the purchasers' declared reasons for purchase. The appeal against possible unreasonableness of the

³⁰ Nozick, R. "An Entitlement Theory" in Matthew Clayton and Andrew Williams (eds. 2006) *Social Justice*, Blackwell Publishing, Oxford, pp.85-109.

³¹ Ibid. p. 86.

³² See also Fyle, M. C. (1999) *Introduction to the History of African Civilization: Precolonial Africa*, University Press of America, Oxford; Diop, C.A (1988) *Precolonial Black Africa: A Comparative Study of the Political and Social Systems of Europe and Black Africa, from Antiquity to the Formation of Modern States*, Lawrence Hill Books, Chicago;

³³ See Chigara, B. (2004) *Land Reform Process: The Challenge of Human Rights Law*, Ashgate, Aldershot pp.12-27.

³⁴ Ibid.

³⁵ [2013] EWCA Civ 1637; 2013 WL 5826335

exclusion clause that had rendered the purchasers responsible for failing to ensure the veracity of the vendors' misrepresentations regarding the suitability of the farm for their declared interest in the farm appears to have been dismissed on the grounds of the *caveat emptor* principle.

Nozick writes that no one is entitled to a holding except by repeated applications of (i) just original acquisitions in accordance with principle of justice-in-acquisition; and (ii) evidence of application of the principle of justice-in-transfer, that evidences the transfer of a legitimate title from one with a just title to another.³⁶ SADC commercial farmlands continue to lack the certainty of sustainable and enduring entitlement under Nozick's entitlement theory. Until, SADC governments begin to ensure that their de-racialization of land ownership practices are compliant with Nozick's entitlement theory, they risk perpetuating an unending cycle of fast-track LRPs that each succeeding government seeking to rectify the 'capture of land' by its predecessors and their supporters would almost certainly institute. The consequences of such a turn of events would be economic instability and also a consequent inadequacy of property rights as a vehicle for commercial transaction.

Social justice and the legacy of racialized land relations in post-apartheid SADC States

Harvard University Professor David Miller³⁷ defines social justice as a people oriented distributive idea that is centred on a community's will, and leading to legitimate expectations that the authorities of the day must deliver on or risk being challenged by its populace for their failure. It is about:

... how the good and bad things in life should be distributed among the members of a human society. When more concretely we attack some policy or some state of affairs as socially unjust, we are claiming that a person, or more usually a category of persons, enjoys fewer advantages than that person or group of persons ought to enjoy (or bears more of the burdens than they ought to), given how other members of the society in question are faring.³⁸

Social justice is an idea quite antithetical to the legacy of racialized land ownership and land use in post-apartheid-ruled SADC. This view is consistent with that expressed in the writings of most contemporary political philosophers in that, "social justice is regarded as an aspect of distributive justice, and the two concepts are often used interchangeably".³⁹

Distribution refers not to some central distributing agency assigning resource quotas to persons. Rather, it refers to the ways in which a range of institutions (including national and Regional Constitutional Courts like the SADC Tribunal) and practices (in a democracy presumably) "... together influence the share of resources available to different people, With the distributive effects of what Rawls calls 'the basic structure of society'".⁴⁰ Thus, when national and regional courts of the SADC give or make decisions that seek to frustrate the Executive's de-racialization of land ownership and land use in the sub-region, the social justice redistribution is thwarted for unless the institutions of the superstructure of the SADC recognise de-racialization of the economy in post-apartheid SADC as a priority, they will commit differently to it and the distribution may not occur as desired by the populace. In turn, such a situation would undermine the SADC populace's trust and dependence on the law.

Trust and compulsion are necessary to effecting of social justice as a guide to everyday behaviour.⁴¹ That trust and compulsion depend in part on the basic structure of the community ensuring that the restraint shown by community members in following fair principles and procedures will be matched by similar restraint on the part of others.⁴² "There is little point in pursuing social justice singlehandedly if everyone else is taking part in a free-for-all."⁴³

³⁶ Ibid.

³⁷ (1999) *Principles of Social Justice*, Harvard University Press, Cambridge, Massachusetts.

³⁸ Ibid. p.1.

³⁹ Ibid. p.2

⁴⁰ Ibid. p.11.

⁴¹ Ibid. p.19.

⁴² Ibid. p.19.

⁴³ Ibid.

Thus, the granting of political independence to SADC States supposedly assured each of those States great potential for much needed peace but only on condition that the social injustices that had led each of them to wage liberation wars against their apartheid masters would be undone through peaceful means. When the organs of a State/Region, including the SADC Tribunal fail in their role to serve as handmaidens of de-racialization they undermine the 'community's trust capital' invested at the point of independence that the continuing injustices of alienation of native lands and racialization of land use would be undone. War on Zimbabwe's farmers broke out in 2000 because the social structure had failed to ensure social justice.

Significance of social justice imperatives to possible de-racialization of SADC land relations

Social justice imperatives to the SADC land issue arise also from the fact that SADC fast-track land reform processes have become a prime resource for international dialogue on topics ranging from poor leadership, black domination of whites - sometimes casually referred to as the new apartheid, abuse of power, failure of democracy and the rule of law, etc. Western satirical movies⁴⁴ and internationally acclaimed theatrical productions like Fraser Grace's *Breakfast With Mugabe*⁴⁵ are a serious international intellectual reaction to SADC fast-track land reform processes. These types of reactions are probably similar to those observed in response to the indignities of apartheid-rule⁴⁶ in Southern Africa especially during the 1970s and leading to the adoption of numerous UN Declarations and treaties prohibiting,⁴⁷ and ultimately criminalising apartheid-rule⁴⁸ under international law. But are the two really similar, or is the similarity misplaced in a way that betrays impartiality?⁴⁹

Increasingly, SADC fast-track land reform processes get mentioned in the same breath as economic mismanagement, racism, dictatorship, corruption, human rights abuse, injustice, and just about any other negative or pejorative word pointing towards lawlessness and abject depravity of those insisting upon de-racialization of land ownership. There are several reasons for this which point to the matter as a social justice issue that has to be addressed by each of the affected communities before they can progress to other issues.

The first arises from the significance of land wherever one looks, especially among the agro-centric economies of the SADC. In *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994]⁵⁰ Lord Browne Wilkinson observed that domestic lawyers are acutely aware that "... in the case of real property (land) there is a defined and limited supply of the commodity." International lawyers too recognize the fact that in the relations between States title to territory is the single most important signifier of sovereign status. It demonstrates independence in regard to a portion of the globe to exercise therein, and to the exclusion of any other State, the functions of a State - per Judge Huber, *Island of Palmers Case* (1928).⁵¹

⁴⁴ Including: "Mugabe and the White African". See also The Guardian website: <http://www.guardian.co.uk/tv-and-radio/tvandradioblog/2010/may/13/zimbabwe-robert-mugabe-land-reform>

⁴⁵ See also the international bestseller production of 'Breakfast with Mugabe' Aurora Productions at: <http://www.stageandcinema.com/2014/11/10/breakfast-with-mugabe-aurora/>

⁴⁶ See also Davros Films and Sundance Productions (1989) "A Dry White Season" a film directed by Euzhan Palcy and produced by Paula Weinstein et al.; Hollywood Pictures, Miramax Films and BBC (1992) "Sarafina" a film directed by Darrell Roodt; Marble Arch Foundations (1987) "Cry Freedom" a film directed and produced by Richard Attenborough; Alan Paton (1948) *Cry the Beloved Country*, Jonathan Cape (UK)

⁴⁷ International Conventions on the Elimination of All Forms of Racial Discrimination (1965), entered into force 4 January 1969, 660 UNTS195; International Convention Against Apartheid in Sports, G.A. Res. 40/64, U.N. GAOR, 40th Sess. Supp. No. 53, at 37, U.N. Doc. A/40/53 (1985), 1500 U.N.T.S. 161, entered into force April 3, 1988.

⁴⁸ 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 Dugard, J. (2008) 'Convention on the suppression and punishment of the crime of apartheid', United Nations Audio-visual Library of International Law, available at UN website: <www.un.org/law/avl>.

⁴⁹ See also Posner, R.A. (2010) *How Judges Think*, Harvard University Press, pp5-15.

⁵⁰ 1 AC 85 at 107D.

⁵¹ (*Netherlands v. US*) (1928) 2 R.I.A.A. p.829. See also Harris, D.J. (6th ed. 2004) *Cases and Materials on International Law*, Sweet and Maxwell, London, pp.190-200.

All of us – even the truly homeless live somewhere, and each therefore stands in some relation to land as owner-occupier, tenant, licensee or squatter.⁵² Human existence is premised on the very existence of land itself. Without it, we could not exist. We exist in relation to it. The relationship of man to land in the SADC was shaped by severe, discriminatory, expropriatory regimes of colonial and occupying regimes that championed both apartheid and the subjugation of the indigenous populations with no regard to human rights whatsoever. This makes human rights claims to effectively protect outcomes of the crime of apartheid-rule a real contradiction with the object and purpose of human rights, which is not to legalise criminal acts but to promote social justice.

The second, appears to be Western States' own unhelpful reaction to their own irrational choices during colonial, apartheid-governance of affected SADC States when the current underlying⁵³ indignities arising from legal racialization of land ownership were instituted and developed with such rigour and determination that the native populations were alienated from land that they had held from time immemorial, and left with no meaningful relationship to land.⁵⁴ Western States appear to have wrong footed themselves on this because their moral arguments for opposing these LRPs are contradicted by their own linked histories in the establishment of the land issue in affected SADC States, making their claims to being pro-human rights in these situations both hollow and severely hypocritical in that they either were co-creators of the SADC land issue, or unwilling/ambivalent sympathisers with it. Their own sense of social justice on this matter needs to either be awakened or be reconciled with the modern international law that nullifies their own positions regarding justness in the alienation of native lands during colonization and apartheid rule of the SADC. Per Brennan J in *Mabo case No. 2*⁵⁵

If the international law notion that inhabited land may be classified as terra nullius no longer commands general support, [then] the doctrines of the common law which depend on the notion that native peoples may be 'so low in the scale of social organization' that it is 'idle to impute to such people some shadow of the rights known to our law' ... can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.

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. ... 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.

The third, though least possible is that this international focus is driven by Western consciousness of the Millennium Development Goals (MDGs)⁵⁶ imperatives according to which States must cooperate to end poverty and preventable diseases as a means to ensure a minimum universal standard of living for all. Alternatively, it could also, realists argue, be aligned to the WTO deeper economic integration agenda⁵⁷ according to which goods, capital and services should move unhindered throughout the world in order to maximise wealth creation and benefit the consumer worldwide. Proponents of the latter position regard fast-track land reform programmes as unsustainable threats to the economic fortunes of affected States.

⁵² See Gray, K and Gray S. F. (5th ed. 2009)) *Elements of Land Law*, OUP, p. 2.

⁵³ Chigara, B. "What Should a Re-constituted Southern African Development Community (SADC) Tribunal Be Mindful of to Succeed?" 81 *Nordic Journal of International Law* No.3 pp.341- 377.

⁵⁴ Chigara, B. (2004) *Land Reform Process: The Challenge of Human Rights Law*, Ashgate, Aldershot pp.12-27.

⁵⁵ No. 2 [1992] HCA 23 paras 41–42.

⁵⁶ The eight MDGs set specific targets on poverty alleviation, education, gender equality, child and maternal health, environmental stability, HIV/AIDS reduction, and a 'Global Partnership for Development'. Discussing Africa's situation in this context, see also UN Secretary General Ban Ki-moon's address to the African Union, Addis Ababa, 27 January 2013 "Secretary-General's address to the African Union Summit" available at UN website: <http://www.un.org/sg/statements/index.asp?nid=6572>

⁵⁷ See especially Dunkley, G. (2001) *The Free Trade Adventure*, Zed Books; Leary, V.A. (1997) "The WTO and the Social Clause: Post-Singapore" 1 *European Journal of International Law* pp.118-22.

Hall writes that current South African macroeconomic policy factors favour limited state involvement in the agricultural sector.⁵⁸ She argues that:

The limitations of land reform relate not only to its scale but also to how resources are to be allocated, for what purpose, and to whom. Transferring land in isolation from wider changes in access to resources and infrastructure has also left beneficiaries with constrained choices: to engage in low input agriculture that they can reasonably finance themselves or to engage in joint ventures with public or private sector partners. Where land has been transferred, some have started to farm it themselves as a group, often combining resources. In other cases, they have leased it back to its previous white owners, as they lack the capital to farm it commercially. [Consequently,] ... [t]he *privileging of large-scale capital-intensive uses of agricultural land, particularly for export, makes sense in the context of GEAR* [i.e. government's growth, employment and redistribution strategy]. The special status of commercial agriculture is about scale and capital intensity, and explains the state's continuing unwillingness to confront the issue of subdivision of agricultural landholdings in a proactive manner. The commercial emphasis within land reform is a product of the balance of social forces that is tipped in favour of gradual *de-racialization without a restructuring of property relations*.⁵⁹

If de-racialization of land ownership is the dominant issue of the SADC, it seems curious that discourse on the matter shies away from indicating how if at all the gradual de-racialization of land might be achieved without a restructuring of property relations on the one hand, and on the other, while the State remains true to its commitment not to overspend 'in order to address national debt'. Such sterile and unrealistic recommendations appear to be pro-status-quo and incapable of moving the SADC toward social justice regarding land ownership.

One possible outcome of this conundrum is that land redistribution becomes stifled and the legitimacy of the new order unsustainable in the eyes of the dispossessed majority population that regards de-racialization and access to land as a matter that is overdue repair after the end of both colonial and apartheid-rule in the sub-region. A second possible outcome is that it may inspire new violent revolutions aimed at the de-racialization of land particularly because the new order appears incapable to orderly ensure de-racialization of land. Thirdly, law's failure to guarantee restitution by restoring land to its 'critical date theory' would further mystify its role as guarantor of fairness, equal treatment, transparency and justice in the estimation of the majority that had experienced most only as the tool of expropriation, denial of their humanity, subjugation and oppression during colonial and apartheid-rule.

In particular, if SADC law does not swiftly apply to restore indigenous land rights snatched away upon colonization, it would risk contradiction with UN Human Rights Committee General Comment No. 18 para. 5;⁶⁰ UN Committee on the Elimination of Racial Discrimination General Recommendation No. 23;⁶¹ Brenam J's seminal decision in *Mabo No.2*;⁶² and with Public International Law doctrine on acquisition of territory.

Public International Law Doctrine on Acquisition of indigenous people's territories

It has been noted⁶³ that the enduring principle is that a State may still acquire title to new territory if it could demonstrate that, until the arrival of its agents, that land was *terra nullius* - that is to say vacant and belonging to no one else. Those first to arrive on vacant territory enjoy full ownership rights over that particular piece of land because they have no competing rights to observe previous to theirs. The principle sets a strict test the determination of which is simple but decisive in the equal protection of the human rights of everyone regardless of their status - be they poor and weak or, wealthy and powerful. According to Oppenheim,⁶⁴ "The only territory which can be the object of occupation is that which

⁵⁸ Hall, R. (2004) 'A Political Economy of Land Reform in South Africa' 100 *Review of African Political Economy* p.29

⁵⁹ Ibid. pp. 31-2.

⁶⁰ See OHCHR website: www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf

⁶¹ U.N. Doc. A/52/18, annex V at 122 (1997), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 212 (2003)

⁶² *Mabo and Others v Queensland (No 2)* [1992] HCA 23

⁶³ Chigara, B. (2008) *Terra nullius*, Oxford Handbook of International Law pp.1160-61

⁶⁴ Oppenheim's International Law (9th ed. second impression 1997) Vol. II 687

does not already belong to any State, whether it is uninhabited, or inhabited by persons whose community is not considered to be a State; for individuals may live on a territory without forming themselves into a State proper exercising sovereignty over such territory. The territory of any State however is obviously not a possible object of occupation; and it can only be acquired through cession or, formerly by subjugation”.

This principle supports the view that indigenous populations enjoy the perpetual right of ownership of their land regardless whether they are rich and powerful enough to defend it or, poor and unable to fend off invaders. It is consistent with the critical date theory, which requires that where there are competing claims to ownership of any territory, time between the contesting Parties should be stopped on that significant date that they both point to. Whatever were the Parties’ respective positions and corresponding rights then should be enforced now.⁶⁵

If one of them had indigenous rights over the territory, that party is deemed to have those rights now. Nothing that happens afterwards can operate to change their rights, as they then existed. Whatever the situation was, it is deemed in law still to exist; and the rights of the Parties are governed by it.⁶⁶

Brennan J’s seminal decision in *Mabo case No.2*⁶⁷ is unequivocal that the experience of colonisation does not at any point extinguish indigenous claims to lands alienated from them by their coloniser. In his *ratio decidendi* Brennan J. stated that:

- a) “... a mere change in sovereignty does not extinguish native title to land.”
- b) The indigenous inhabitants of a settled colony are equal to the inhabitants of a conquered colony “... in respect of their rights and interests in land”.⁶⁸
- c) The notion that, when the Crown acquired sovereignty over colonial territory it thereby also acquired the absolute beneficial ownership of the land therein is incongruous with common law.
- d) Rather, the correct view is that: “... the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory *survived the change in sovereignty. Those antecedent rights and interests thus constitute a burden on the radical title of the Crown*”.⁶⁹
- e) Finally, it must be acknowledged that, this judgment overrules cases which have held the contrary because “*To maintain the authority of those cases would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land*”.⁷⁰

Status-quo, tranquilizing, gradual de-racialization argumentations

Status-quo and gradual de-racialization campaigns are often characterised by a mistaken, incomplete intellectual misappropriation of the dictates of the requirements of the venerated rule of law principle. They invoke legal formalisms to bolster the primacy of legal protections over social justice claims, as in the apartheid era, in a bid to maintain the economic and social legacy of apartheid-rule. The only difference being that, unlike in the apartheid-era where decisions of foreign, regional Courts, and international tribunals could not be invoked because they condemned apartheid, this time around foreign interpretations of the requirements of such principles as non-discrimination, equal treatment and respect for human rights are invoked to either nullify or justify gradual de-racialization of land ownership only through market forces – more than a quarter of a century after independence for

⁶⁵ Chigara, B. (2008) *Terra nullius*, Oxford Handbook of International Law p. 1160-61

⁶⁶ Ibid.

⁶⁷ N0. 2 [1992] HCA 23 para. 41-2

⁶⁸ Para 61 (my emphasis)

⁶⁹ Para 62 (my emphasis)

⁷⁰ Para 63 (my emphasis).

affected SADC States, and over a century since the initial forcible expropriation of natives of the same land without any form of compensation.

This approach, which is often championed by beneficiaries of apartheid-rule's racialization of land ownership and by others, favours jurisprudential transplants of interpretations and applications of the rule of law principle from foreign Courts and distant Tribunals whose contexts are not in the least proximate to that of the SADC. Affected SADC States are seeking a way away from apartheid-rule racialization of land ownership; racialization of their economies and of every social good in their countries. Status-quo and gradual de-racialization arguments are intellectually squinted and significantly underdeveloped. They need to learn also from Cambridge University's Professor John Bell who writes that:

... the foreign decision provides a reflecting mirror to observe our own system and the options it has for development (and not a directive). It provides a counterfactual world in which consequences can be tested, not merely hypothetically, but in some form of grounded reality. The argument of the paper, however, has been that *the force of the eventual argument that is presented to justify a new judicial decision should remain firmly grounded in domestic law. If the reasons are not convincing in domestic law, then no amount of foreign law is going to make them good enough. Only where there is a sufficient body of formants with authority available in the host legal system can the lustre added by foreign law do any good.* Foreign law is not a completely new argument, but provides additional support to the arguments already available in the host domestic legal system.⁷¹

In his 2009 Lecture on the 'Universality of Human Rights'⁷² Lord Hoffmann argues that the universal scope of human rights is ideally suited for the abstraction of human rights while the interpretation and application of those same rights is best left for local/domestic determination in order to ensure the full consideration and integration of contextual points that are relevant to those universal abstractions. That approach would ensure less confrontation, conflict and confusion between the domestic (applying) and the universal (formulating) spheres of the human rights movement.

Thus, internationally negotiated transitional agreements adopted to end apartheid-rule, could not be regarded as sacrosanct nor their mandate to ensure the protection of private property rights immutable regardless of whatever else, and in spite of empirical evidence that constitutions do change and must change in order to remain socially relevant to the communities that they seek to serve.⁷³ Not a single constitutional order in the world has a forever clause. And constitutions should never be interpreted in the same way as any ordinary statute. They must always be read within the context of society to ensure that they both adapt and reflect change in order to protect against disuse on account of possible failure to reflect society.⁷⁴

In his study of the constitution as a process of continual negotiation and how that inevitably can transform and limit human rights claims, Webber observes that "The constitution of a democratic constitutional State, and especially constitutional rights, ought to remain open, on an ongoing basis, for democratic re-negotiating. ... This claim is structured around the idea of political legitimacy. ... [and] ... a constitution seeks to approximate a reconciliation of two principles of political legitimacy: the principle of democracy and the principle of human rights".⁷⁵ This is clearly supported by the UN whose International Bill of Human Rights emphatically proscribes discrimination of individuals.

⁷¹ Bell, J. (2012) "The Argumentative Status of Foreign Legal Arguments" 8 *Utrecht Law Review* No.2 pp. 18-19.

⁷² 125 *Law Quarterly Review* pp.416-342

⁷³ See especially Kelsen, H. (1934) "The Pure Theory of Law: Its Method and Fundamental Concepts, Part I" *Law Quarterly Review* p.475; Kelsen, H. (1935) "The Pure Theory of Law: (Part II)" *Law Quarterly Review* p.518; Kelsen H. (1945) *The General Theory of Law and State*, Russel and Russel, New York.

⁷⁴ Per Lord Sankey in *Edwards v. Canada (Attorney General)* [1930] *A.C.* 124

⁷⁵ Gregoire C.N. Webber, (2009) *The Negotiable Constitution: On the Limitation of Rights*, CUP, p.13

Article 2 of the Universal Declaration of Human Rights (1948) – (UDHR) provides that: ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty’.

Article 2(1) of the International Covenant on Civil and Political Rights (1966) - (ICCPR) obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁷⁶ Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁷⁷

Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (1966) – (ICESCR) provides that the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

However, after years of interpreting the content of this prohibition in cases brought before it, the UN Human Rights Committee which monitors State compliance with the ICCPR crystallized its jurisprudence and offered the following guidance in its General Comment No.18 on Discrimination:

The enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance.⁷⁸ Moreover,

The Committee also wishes to point out that the 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.⁷⁹

Further, in its General Recommendation No. 23 of 8 August 1997⁸⁰ the UN Committee on the Elimination of Racial Discrimination (CERD), which is the body of independent experts that monitor Member States Parties’ implementation of the UN Convention on the Elimination of All Forms of Racial Discrimination (1969), crystallized its interpretations of the convention regarding indigenous peoples’ land rights:

The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation

⁷⁶ Article 2 para.1.

⁷⁷ UN Human Rights Committee General Comment No. 18, 10 November 1989.

⁷⁸ Para. 8.

⁷⁹ Para.10.

⁸⁰ U.N. Doc. A/52/18, annex V at 122 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 212 (2003)

should as far as possible take the form of lands and territories.⁸¹

Thus, the requirement to restore confiscated land to its pre-colonial holders is made, and is not to be confused with any other interest. Nevertheless, pro-status-quo argumentations plead to, and can easily be mistaken for pro-social justice claims, which they are not. Proponents insist that to retain any chances of realising as many of their MDGs targets, SADC States must ensure continued economic growth that is based on maintaining current commercial farm sizes to maintain crop and animal husbandry outputs.

Olubode-Awosola, van Schalkwyk and Jooste⁸² insist that given the challenges of a free market, South Africa's land reform programme should be based on efficient practice, which the decrease in the number of large farm units and corresponding increase in small farm units threatens 'a decline in crop and animal product supplies. Such declines (about 15.3%) will overwhelm the increase of more than 1600% in supplies as a result of increased small farm units'.⁸³

It is argued further that such a turn of events would threaten *food security* and convert South Africa from a food exporter to a net food importer. Commodity prices would rise astronomically as agricultural components become scarce. Instead of progressing the fight against poverty – a key MDG target for 2015, South Africa would actually regress. The health of more children would be put at risk by such inefficient equity driven land reform programmes. This is because the difference between black subsistence and white commercial farming is huge in relation to farm resource use and output supply.⁸⁴ But such alarmist arguments are unhelpful and attempt to displace historical social justice issues with food security threats hitherto unconfirmed. They attempt to conflate land issues with globalization matrix resulting, if allowed, in needless incommensurability in the discourse. Incommensurability arises when two or more incomparable values, goods, rights or principles (e.g. economic competitiveness in a globalized economy v. duty to restore stolen property); are subjected to a judicial determination in the absence of a common measure that applies equally to all of them.⁸⁵ Commentators sense an inevitability of *balancing* in the adjudication of constitutional or fundamental rights claims.

Research shows that the US Supreme Court has developed a range of *balancing tests* in freedom of expression cases while the German Constitutional Court has directed courts to 'weigh the values to be protected against each other'.⁸⁶ Jurisprudence of the European Court of Human Rights persistently refers to balancing of individual rights against public interests.⁸⁷ Some argue that balancing, that is, the weighing up of competing interests or values or goods – what others also refer to as incommensurabilities has become an emblematic characteristic of entire legal systems and cultures.⁸⁸ Gross summarises the estimation of balancing as a conceptual methodology and form of constitutional interpretation, reasoning, and adjudication among its proponents as follows:

We may continue to debate about particular outcomes of balancing, but there seems to be little, if any, point in arguing about the need to balance. It has even been suggested that the concept of balancing constitutes an element of the ultimate rule of law. Indeed since the terrorist attacks of September 11, 2001, the metaphor of balancing

⁸¹ Para.5.

⁸² (2008) "Mathematical modelling of the South African land redistribution for development policy" 30 *Journal of Policy Modeling* No.5 pp.841-55

⁸³ Ibid. p.841.

⁸⁴ Ibid. p.842.

⁸⁵ See also Bomhoff, J. (2008) "Balancing, the Global and the Local: Judicial Balancing as a Problematic topic in Comparative Constitutional Law" 31 *Hastings International and Comparative Law Review* pp.555-86; Alder, J. (2001) "Incommensurable values and Judicial Review: The Case of Local Government" *Public Law* pp.717-35; Da Silva, V.A. (2011) "Comparing the Incommensurable: Constitutional Principles, Balancing and Rational decision" 31 *Oxford Journal of Legal Studies* No.2 pp.273-301.

⁸⁶ Bomhoff, J. (2008) "Balancing, the Global and the Local: Judicial Balancing as a Problematic topic in Comparative Constitutional Law" 31 *Hastings International and Comparative Law Review* p.555-6.

⁸⁷ Ibid. p.556.

⁸⁸ Ibid. See also Gross, O. (2009-2010) "The process of Balancing" 45 *Tulsa Law Review* pp.733-44.

has been invoked so regularly to explain the need for a trade-off between liberty and security that it has become an ambient feature of our political environment.⁸⁹

Adherents of balancing methodology must concede severe weaknesses in the inherent assumptions that underpin their claims regarding balancing as an appropriate methodology for settling incommensurate and incomparable claims, such as the requirement of restitution of land to indigenous peoples of the SADC on the one hand, and on the other, and that of building a strong national economy, in a logically sustainable manner.

The first assumption is that 'balancing is the product of a process of rational decision making by actors who possess both the requisite information and the capacity to assess the potential outcomes and consequences of their actions and decisions.'⁹⁰ Proponents hardly venture into the process by which balancing actors accurately estimate both the possible future benefits and harms involved in juggling the probabilities of uncertain outcomes, beyond making references to terminologies around utilitarian cost-benefit analysis.⁹¹ The danger is that balancing may take the law away from the realm of strong objectivity to weak objectivity, or even to subjectivity with disastrous consequences for individual liberties even. This is because of the second inherent assumption underlying balancing methodology, namely, that balancing tests are based on the relevant decision makers' ability to correctly 'identify competing interests, to assign each of them appropriate weight, and to compare the respective weights of the relevant interests'.⁹² This is probably where the SADC Tribunal failed dismally in the *Campbell Case*.

There was not a single attempt made by the Tribunal to problematize the Zimbabwe land issue in terms of relevant competing interests among the parties; nor was any effort made to assign each of them appropriate weight and significance, and then compare the assigned weights of relevant interests. Consequently, the real competing interests were never listed, ranked according to their relevant weights to the case - not according to international law doctrines of impact to property rights of change of sovereignty if any, and the effect if any of colonisation on indigenous claims to land rights. In the short case report of some fifteen pages, and which carried the expectation of over 75 affected farmers and others, the SADC Tribunal failed even to determine the values of both underlying history of land ownership in Zimbabwe on the one hand, and on the other current history; but only stated rather casually that, although land issues in Zimbabwe had a long history, it was the current history of dispossession of land of white commercial farmers only that mattered.

The arbitrariness and perhaps subjectivity of the SADC Tribunal's hand in this matter lies in that it gave not a single reason for such discounting of its responsibility to demonstrate the rationality of its choices and decisions. This confirms Gross' chief critic on balancing methodology according to which, 'determining which interests and what factors are relevant in any given case and which ought to be balanced against each other may prove highly problematic, leading, according to some, to outcomes that are inevitably subjective and manipulable'.⁹³

Gross is convincing about the real difficulties in admitting cost-benefit balancing analyses to settling of incommensurate and incomparable claims. Neither the mystical powers of the balancing actors to determine which interests and what factors are relevant in any given case, and therefore ought to be balanced against each other, in particular rationalised ranking order are sustainable in the context of responding to violent crises of which the Zimbabwe land issue is one.

Cognitive theory of individual decision-making under conditions of uncertainty and theories of collective and

⁸⁹ Ibid. p.733.

⁹⁰ Ibid. p. 734.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

institutional decision making processes raise significant concerns about balancing tests and their outcomes under such circumstances. When faced with violent exigencies, the public and its leaders are unlikely to be able to assess accurately the risks facing the nation. In those circumstances, an act of balancing between security and liberty is likely to be biased in ways that ought to be recognized and accounted for. The pressures exerted in such circumstances on decision makers (and the public at large), coupled with *undervaluation of one interest* (liberty) and *overvaluation of another* (security) so that the ensuing balance would be tilted in favour of security concerns at the expense of individual rights and liberties. Our ability to analyse and measure risk accurately is prone to suffer from endemic distortions, and the systematic nature of those biases suggests that failure to address them may turn mistakes and errors into ‘cognitive pathologies’ – that is, decision methods that are not only ‘mistaken’ but ‘irrational’.⁹⁴

John Alder⁹⁵ cogently insists that balancing principles is a disguised form of judicial intervention. The resolution of problems that are linked to competing problems through balancing presupposes a comparison between them, and in the absence of a common measure that applies to all of them, the outcome of any such balancing is an irrational and fully subjective choice of the actors behind the determination – the judge. The law’s lure as a forum for dispute resolution, power and significance to its users lies in the rationality of its determinations, consistency with general principles of natural justice, fairness and consistency in the application of its values. The *Campbell* decision is at odds with the rationale of all of the following:

1. UN Human Rights General Comment No.18.
2. UN Committee on Racial Discrimination General Recommendation No. 23.
3. International Law Doctrine on enduring quality of indigenous land right claims in spite of colonial experience.
4. International Law Doctrine on critical date theory regarding the resolution of historical counter claims to land between indigenous populations and settler communities.
5. The *Mabo Case* doctrine disowning the previous legal fictions that had held that upon colonization, the new sovereign substituted his own interest over indigenous land rights.

In this sense, it appears unhelpful to the enterprise of developing understanding on the SADC land issue. If it were an attempt at balancing the interest of prohibition against discrimination enshrined in Article 6 of the Constituent treaty of the SADC (1992), it unequivocally demonstrates by its opposition to the jurisprudence above, the subjectivity that balancing methodology can if unchecked import to cases where comparison is made about incommensurable principles. The *Campbell case* shows the undervaluation by the SADC Tribunal of underlying history of SADC land issues and the overvaluation of the individual’s protection against racial discrimination but only from a current historical perspective; and not, from an underlying historical perspective. This clearly confirms the concerns of bias infused by the balancing methodology in the determination of incommensurable principles.⁹⁶ It also shows their failure to correctly ‘identify competing interests, to assign each of them appropriate weight, and to compare the respective weights of the relevant interests’.⁹⁷

Unpreparedness and gradualism argumentations

Another argument often advanced in favour of a deceleration of SADC campaigns to de-racialize land ownership in the SADC is that emergent black commercial farmers and resettled peasants both lack market access and credit and management competencies successfully to utilise any land that they might end up with. They are said to ‘... operate below competitive levels, probably because they lack experience and were confined to subsistence operation for a long period. Their constraints include inadequate technology and lack of entrepreneurial skills, marketing infrastructure and information while the risks in the liberalised markets could be having some damning impacts on their production

⁹⁴ Ibid.

⁹⁵ (2001) “Incommensurable values and Judicial Review: The Case of Local Government” *Public Law* p.718.

⁹⁶ Supra. n.6.

⁹⁷ Supra. n.86.

level'.⁹⁸ Implicit in such arguments is the view that economic efficiency trumps all other considerations, including restorative justice and social justice. This line of argumentation makes the open and free market the god of all social organization. These become the new discriminatory tools for ensuring against the de-racialization of land ownership in the SADC.

Nonetheless, quite apart from its policy of resettling landless peasants, the South African government inaugurated in February 2000 the Land Redistribution for Agricultural Development (LRAD) programme. LRAD targets the transfer of white commercial farmland to emergent black farmers as a means of dealing with apartheid's legacy of unequal land distribution on racial lines. A key objective of LRAD is to ensure that at least 2.2 million hectares of commercial farmland is transferred annually until 2015 so that 30% of the nation's commercial farmland will have reverted to the emergent black commercial farmers by 2014.⁹⁹ LRAD is an aspect of the SADC's emergent customary international law norm of black economic empowerment¹⁰⁰ (BEE).

Efficiency argumentations

Pro-status-quo analysts not only attempt efficiency arguments against accelerated de-racialization of land but also attempt moral ones too. Proponents¹⁰¹ presume and on that basis question the value of privileging equitable distribution of land resources when a possible short-term outcome of that would be havoc in the market and actual deterioration of living standards for the majority. They appear to ignore completely the social justice element that had acted as a catalyst for liberation movements in the SADC to wage civil war for the return of their stolen lands.¹⁰² Their argument in this sense is that they must not balance the equation of (conquest + minority rule + land thefts + apartheid) = (civil war for independence + overthrow of apartheid + majority rule + de-racialization of land, economy and social amenities and minds). Their reason for that could be summarised as follows:

- 1) Colonisation of the SADC and the subsequent racialization of land ownership was a benevolent experience for natives of the SADC and it must not be tainted with reckless pursuits of restorative justice.
- 2) If the thief uses the stolen good well beyond the capability of its original owner, then there is no legal justification for restoring the good to the victim. In fact it would be wasteful to return it to him/her.
- 3) Quite apart from making the most of the stolen good, if the thief actually enhances the condition of community by his exploitation of that good, something that cannot be said for its original owner who inherently lacks any capacity to apply the good to the optimum benefit of his/her own and his community, then there is no logical reason for restoration of the good to its original owner, particularly as that would reduce the utility of the good for the benefit of the majority, also by way of contribution toward the UN MDGs effort.
- 4) The thief's own condition would be imperilled if he/she were compelled to give back that good. Moreover, he/she has held it for so long that it feels inaccurate to regard the good as anything but his own property now and not that of the original owner.
- 5) To have any chance of restoration of the good to himself, the original owner must demonstrate not only that he is entitled to the same good by virtue of it being his, but also that if it were

⁹⁸ (2008) "Mathematical modelling of the South African land redistribution for development policy" 30 *Journal of Policy Modeling* No.5 pp.843

⁹⁹ Ibid. p.843.

¹⁰⁰ Discussing the emergence of BEE as a sub-regional customary international law norm of constitutional value, see especially Chigara, B. (2011) "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 *Journal of International Trade Law and Policy* No.3 pp. 213- 242. See also *Asylum case, (Columbia v Peru)* ICJ Reports (1950) 256.

¹⁰¹ See also Olubode-Awosola, van Schalkwyk and Jooste (2008) "Mathematical modelling of the South African land redistribution for development policy" 30 *Journal of Policy Modeling* No.5 pp.841-55

¹⁰² Hall, R. (2004) 'A Political Economy of Land Reform in South Africa' 100 *Review of African Political Economy* p.29

restored to him, the same social value of the good as it had attained under the thief would be maintained at the very least if not improved.

Moreover, in a world where economic success is the basis for human development, peace and security, and the advancement of human rights and the promotion of democracy and the principle of the rule of law, the predominantly agrarian nations of the SADC have no option but to maximise performance of their agricultural sectors. In the allocation of the limited lands with the most agricultural potential only the best players should be picked. No nation has ever picked its national football, rugby or Olympic team on a quarter-system to ensure the equitable or historical representation of the recognized demographically critical categories. Merit alone is the criterion that is aspired to by serious nations.

However, both examples above ignore the fact that one addresses the question of efficiency and the other, the question of justice. Efficiency can be defined as the minimization of the expense of the production of goods or services so that the consumer does not pay for wastage of time or resources allocated to the production of his/her purchase. Free trade economists point to efficient business practices as a natural outcome of trade liberalization whose main advantage is the liberation of the consumer from paying high commodity prices solely to compensate for inefficient business practices.¹⁰³ Nonetheless, if efficiency trumped justice, then the most efficient murderer, arsonist, torturer or even burglar – depending on the measure of efficiency adopted would always walk free. His/her defence being that he/she had done the perfect job.

Rawls writes that justice as fairness is evidenced by practice of principles which, “free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established”.¹⁰⁴ According to Lucas justice is about “... not doing people down and a person is being done down if his interests are being damaged. ... Injustice is done as much if a person’s rights are overridden as if his interests are damaged”.¹⁰⁵ Purist economic arguments fall short of both Rawls and Lucas tests of fairness because the property rights that they seek to countenance and protect lack Rawls’ legitimacy test of collective communal approval and Lucas’ requirement not to continue to deny interests of blacks in land.

In a sense, purist economic arguments presume that blacks either have forgotten about their interest in the land ruthlessly confiscated from them upon colonisation and later during apartheid rule or, that they are infinitely gifted with patience beyond endurance so that they should wait for the natural process of de-racialization of land which will only restore land to those able to buy it and those that can prove their worth by demonstrating that they would use it to achieve optimum economic national advantages because they have acquired necessary agricultural and entrepreneurial training.¹⁰⁶

Further, the logic of the ‘utilitarian thief’ above is weakened by its inconsistency with natural justice. The power that it invokes, that is, the power to suspend arbitrarily recognized rights of one and substitute another’s is akin to what the House of Lords recently described in *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] as anathema in any country which observes the rule of law.¹⁰⁷ Per Lord Hoffmann:

¹⁰³ See also Dunkley, D. (2001) *The Free Trade Adventure*, Zed Books, London and New York, pp.10-14.

¹⁰⁴ Rawls, J. (1994) “The Main idea of the Theory of Justice” in Singer, P. *Ethics*, Oxford University Press, Oxford, p.362

¹⁰⁵ Lucas, J.R. (1980) *On Justice*, Clarendon Press, Oxford pp.7-19

¹⁰⁶ The chief complaint against de-racialisation of land made by Olubode-Awosola, van Schalkwyk and Jooste (2008) “Mathematical modelling of the South African land redistribution for development policy” 30 *Journal of Policy Modeling* No.5 p.843. See also Hall, R. (2004) ‘A Political Economy of Land Reform in South Africa’ 100 *Review of African Political Economy* p.31.

¹⁰⁷ *Judgments - A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56

This is one of the most important cases which the House has had to decide in recent years. It calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention. 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.¹⁰⁸

Frustratingly enough for the native who has been robbed of his land and kept away from it for almost a century, and been disempowered in the process from being able to participate in the economic development of his own country, this approach empowers his robber against him by insisting that because he appears unprepared yet, to get his land back from the robber; and also that the robber should set the conditions that will attest to the native's readiness in light of the nation's economic needs, environmental concerns, requirements of the rule of law, etc. This is another example of Lucas' doing down of people to deny them justice as fairness. Where there has been 'a total collapse' of the basis of the recognised arrangements, withdrawal of any associated privileges was fair and not unfair practice.¹⁰⁹ The counter argument is that of justice as economic efficiency, which I have not encountered anywhere yet.

Moreover, even if the thief in the example above could prove the economical benefit to his/her community of his/her continued control of the good that he had stolen from the victim because he/she unfortunately was now less able than he/she to apply it for the greater good, there is something to be said for a society that recognised, promoted, and ensured justice as fairness for justice's own sake. Re-united with his good, the system would have justified the proprietary dignity of the victim over the illegal conduct of the thief. *Mabo No. 2* is unequivocal that: "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 of this country. ... Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted."¹¹⁰

Rule of law centred arguments

The High Court of Australia's rejection of legal bigotry and unfairness regarding aboriginal land claim rights in the *Mabo Case No.2* overturned a previously long-established jurisprudence that had for many decades served to do down aboriginal claims to lands confiscated from them upon colonisation. The High Court's recognition of enduring aboriginal land claim rights regardless of claims that occupation and colonization had obliterated those claim rights is consistent also with the UN Human Rights Committee's jurisprudence on the rule of law, and with the CERD's interpretations regarding prohibited discriminatory conduct under international law.

Para74.

¹⁰⁸ Ibid. paras 86-7.

¹⁰⁹ See *Fiaz (Cancellation of Leave to Remain – Fairness); Fiaz v Secretary of State for the Home Department* [2012] UKUT 57(IAC); [2012] I.N.L.R. 385 (decision of 22 February 2012) para 3.

¹¹⁰ Per Brennan J in *Mabo and Others v Queensland (No 2)* [1992] HCA 23, para. 42

Yet, rule of law counter-arguments are regularly advanced against SADC fast-track LRPs, often in ways that are inconsistent with the tenets of the principle of the rule of law itself. Discourse on the rule of law points to two models of the idea. The one, associated with Aristotle and which regards the ‘rule of law’ as ‘the rule of reason’. Proponents of this model include Professor Ronald Dworkin,¹¹¹ whose holistic interpretive theory has been misunderstood and unfairly criticized by some as being both naïve and parochial.¹¹² Yet it remains persuasive, influential and mostly accurate in its explanation of legal phenomena. According to Dworkin, the holistic interpretive theory of law asserts that there must be at least *prima-facie* moral grounds for claims of the existence of legal rights and duties, such as for instance historical and customary and existentialist grounds.

For the purposes of this discussion, it is pertinent that we remind ourselves that international law had itself unequivocally outlawed and criminalized apartheid-rule. That step recommends the view that international law does not uphold or glorify the legacy of apartheid which must be undone, and in the words of General Comment No. 18 of the UN Human Rights Committee also through positive discrimination until the imbalances established under apartheid-rule have been rectified. Paragraph 10 provides that:

The Committee also wishes to point out that the 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.

In this sense legal rights are as Dworkin has argued a species of moral rights¹¹³ that apartheid-rule land rights severely lack. Dworkin refutes one of positivism’s central claims that, the existence and content of the law can be identified by reference to social sources of the law¹¹⁴ without reference to morality except of course, where the law thus identified has itself incorporated moral criteria for the identification of the law.¹¹⁵ Dworkin would have enormous difficulty with the SADC Tribunal’s decision in Campbell where the Tribunal stuck to the narrow interpretation of Article 6 of the Treaty Establishing the SADC and rejected the historical, and existentialist grounds underpinning Amendment Act No.17 of the Constitution of Zimbabwe which authorized the Government of Zimbabwe to nationalize commercial farms to facilitate de-racialized distributions.

Thus, to resolve a hard case, a judge must “... choose between eligible interpretations by asking which shows the community’s structure of institutions and decisions – its public standards as a whole – in a better light from the standpoint of political morality”. In doing so the judge directly engages his own moral and political convictions in the determination of a case arriving at a decision that reflects “... not only his opinions about justice and fairness, but his higher order convictions about how these ideals should be compromised when they compete”¹¹⁶ - a process summed up in the exploits of Judge Hercules.¹¹⁷ The link between moral claims and legal reasoning is strong and not to be taken lightly by any Judicial body worthy of its title. Judge Richard A. Posner, in his reflective evaluation on *How Judges Think* sums this link neatly: “The Public is barely aware of most decisions of lower Courts. But is is

¹¹¹ See Dworkin, R. (1990) *Law’s Empire*, Fontana Press, Glasgow.

¹¹² See Dyzenhaus, D. (1999) *Recrafting the Rule of Law: The Limits of Legal Order*, Hart Publishing, Oxford, pp.1-12 at pp.1-2. See also Shklar, J.N. (1987) “Political Theory and the Rule of Law” in Hutchinson, A. C. and Monahan, P. eds. *The Rule of Law: Ideal or Ideology*, Carswell, Toronto, p.1.

¹¹³ See Dworkin, R. (1990) *Law’s Empire*, Fontana Press, Glasgow, pp.258-60.

¹¹⁴ These include legislation, judicial decisions, social customs.

¹¹⁵ Hart, H.L.A. (second ed. 1994) *The Concept of Law*, Clarendon Press, Oxford, p.269.

¹¹⁶ Dworkin, R. (1990) *Law’s Empire*, Fontana Press, Glasgow, p.256.

¹¹⁷ *Ibid.* pp. 239.

aware of many Supreme Court decisions, and its response to them, if sufficiently tense and widespread, can precipitate a political change to the Court”.¹¹⁸

The other, associated with Montesquieu regards ‘the rule of law’ as “... those institutional restraints that prevent governmental agents from oppressing the rest of society”.¹¹⁹ It is the latter that impressed Tocqueville¹²⁰ whose 1835 treatise *Democracy in America* continues to inspire discussion of the idea. He writes:

... In America the principle of the sovereignty of the people is not either barren or concealed, as it is with some other nations; it is recognized by the customs and proclaimed by the laws; it spreads freely and arrives without impediment at its most remote consequences. If there be a country in the world where the doctrine of the sovereignty of the people can be fairly appreciated, where it can be studied in its application to the affairs of society, and where its dangers and its advantages may be foreseen, that country is assuredly America.

Of the US Supreme Court he remarked that: “...a more imposing judicial power was never constituted by any people”.¹²¹ Judges have enormous power, and people are proudly conscious of their rights and are ready to demand their enforcement at public gatherings and in law courts. The courts have enormous power even in “... the absence of what we [Europeans] term the Government, or the Administration. Written laws exist in America, and one sees that they are daily executed [despite the fact that] ... the State has no administrative functionaries of its own stationed in the different points of its territory”.¹²² Tocqueville attributed this social arrangement to three factors all of which combined to result in the rule of law that can be described as those institutional restraints that prevent governmental agents from oppressing the rest of society. To paraphrase O'Donnell, the first refers to what he calls “the behaviour and beliefs of individuals”. Generally, people did not question the reason for complying with judicial decisions. Perhaps the courts that guaranteed their civil liberties had to be supported if their rights were to be sustained.

The second factor that facilitated the rule of law, and which pointed to the source of individual rights was the institutional design of American society. The federal structure and the practice of holding frequent elections for all public offices were pivotal in restraining the executive.

... federalism created several legal jurisdictions and many potential conflicts among them. This required an institution placed above the contending parties – even above the federal government – with the authority to establish what was the law of the land. ... this institution – the judiciary – had to have its authority vested in it by the supreme law of the land, the Constitution.¹²³

Restraint of executive power was strengthened by the fact that public office bearers everywhere were elected or appointed for a fixed period only, after which they retired to private life. According to Tocqueville, Communities “... in which secondary functionaries are elected are inevitably obliged to make great use of judicial penalties as a means of administration”.¹²⁴ Further, the authority to declare statutes unconstitutional was vested in all courts. Thus, “... the American Magistrate ... gives rise to immense political influence. ... Few laws can escape the searching analysis of the judicial power for any length of time”.¹²⁵

¹¹⁸ (2010) How Judges Think, Harvard University Press, pp.150-1

¹¹⁹ See Dyzenhaus, D. (1999) *Recrafting the Rule of Law: The Limits of Legal Order*, Hart Publishing, Oxford, p.1-2.

¹²⁰ Tocqueville, A. (Commager, H.S. ed. 1946) *Democracy in America*, (Translated by Reeve, H.) Oxford University Press, Oxford, p.51.

¹²¹ Tocqueville as cited in O'Donnell, G. (2000) “The Judiciary and the Rule of Law” 11 *Journal of Democracy* No.1 pp.25-31, at p.25.

¹²² Ibid. p.25-6.

¹²³ Ibid. p.26.

¹²⁴ Ibid. p.27.

¹²⁵ Ibid. p.26-7.

The third factor that facilitated the rule of law as constraint of the executive derives from macro-social factors.¹²⁶ The first settlers in America had arrived in pursuit of freedom and personal autonomy.¹²⁷ That spirit remained in their society and was imbedded in their culture. It underpinned the Constitution when it was written. This, according to Tocqueville fostered first, the view that, every individual is a career of rights that public officers must respect and foster, and second, that "... Providence has given to every human being the degree of reason necessary to direct himself in the affairs which interest him exclusively".¹²⁸

Thus, the rule of law model based on institutional restraints that prevent governmental agents from oppressing the rest of society is premised on existence of a legitimate, independent and active judiciary on the one hand, and a vigorous civil society that possesses rights which it is ready to go to great lengths to enforce through the courts. Absence or rejection of these attributes in any setting results in an atmosphere inimical to the social equality of conditions conducive to enforcement or justification of basic human rights of individuals.

To sum up, incommensurability in the SADC issues manifests and arises from judicial interventions and other argumentations that insist on the recognition and maintenance of the status-quo regarding racialized land ownership in post-apartheid transitional SADC States even though:

- 1) Public International Law doctrines of occupation and critical date theory both reject the status-quo argument that indigenous populations of the SADC had lost all and any claim over their lands that had been alienated by enforcement of colonial and apartheid constitutional land laws. In fact these two doctrines which reflect the position in international law insist that indigenous peoples' right claims to lands alienated upon colonisation still persist today even where colonial and apartheid-rule constitutional law measures had sought to obliterate such right claims by superimposing new right holders/claimants.
- 2) UN Treaty-body jurisprudence regarding the interpretation of the protection from discrimination (Article 6 of the SADC Treaty which is the material provision in the land issue) in CERD's General Recommendation No.23; and also in Human Rights Committee General Comment No. 18 both insist that in situations where States are in transition from totalitarian rule to egalitarian rule, requirements of both restorative justice, and social justice lead to the legitimate expectation that more favourable treatment or positive discrimination will trump equal treatment in order to balance economic opportunities previously skewed in this case by apartheid-rule racialization of land policies. Fast-track LRPs of the SADC seek to do just that by de-racializing land ownership in these typically agrarian and mining centric economies.
- 3) It is a logically abhorrent that Western States that had led the campaign to end apartheid-rule in the SADC through UN channels until 1994 when South Africa's apartheid regime finally collapsed, would now impose and maintain unilateral coercive measures not authorised in the slightest by the UN, against majority rule governments of the SADC in protest against fast-track LRPs in support of continued racialized land ownership outcomes of apartheid rule. If Western States have their way, then indigenous peoples will remain alienated from their lands more than thirty-five years after achieving political independence from Britain (Zimbabwe) and twenty-one years after the collapse of apartheid-rule in South Africa.
- 4) Rejecting of majority-rule governments' counter-racialized land ownership constitutional land laws such as Zimbabwe's Act No.17 of 2005 by the SADC Tribunal in the *Campbell* Case, while upholding the outcomes of colonial apartheid constitutional land laws recommends the view that the former governments lack the same constitutional competencies that apartheid-rule

¹²⁶ Ibid.

¹²⁷ See Tocqueville, A. (Commager, H.S. ed. 1946) *Democracy in America*, (Translated by Reeve, H.) Oxford University Press, Oxford, p.85.

¹²⁸ See O'Donnell, G. (2000) "The Judiciary and the Rule of Law" 11 *Journal of Democracy* No.1 p.25p at p.28.

governments had, or that they lack the moral authority which apartheid governments had. Such an absurdity leads to the false conclusion that colonial, apartheid constitutional land laws are superior over any post-apartheid, majority-rule constitutional land laws.

- 5) Insistence in the commentaries that SADC LRPs are inconsistent with the requirement of the rule of law which insists upon recognition, promotion and protection of human rights of individuals is at best pretentious. Western States have not covered themselves in glory with the raft of unilateral coercive measures imposed against SADC LRPs. In fact they may have undermined their own impartiality credentials in matters relating to SADC States and the legacy of apartheid rule. Their insistence upon application of a formalistic version of the rule of law that is clearly anathema to instincts of justice, particularly to the tenets of social justice as enunciated by expert UN Human Rights Treaty bodies raises serious questions about their ethical considerations regarding majority rule governments of the SADC.

Conclusions

Legal racialization of land ownership for almost a century during apartheid-rule in affected SADC States has created a problem for post-apartheid majority rule governments. The issue is how to resolve their mandate to de-racialize land relations on their territories but without risking the wrath of the European Community, the USA, Canada, Australia and other Western States that have quickly adopted the view that SADC LRPs are an attack on the principle of the rule of law that champions the recognition, promotion and protection of the human rights of individuals, including their property rights.

Because SADC LRPs inevitably target beneficiaries of apartheid-rule the most (white communities), the claim that these LRPs are contrary to the human rights prohibition against discriminating individuals on the distinction of race has led to the adoption by some Western States of unilateral coercive measures against LRP enforcing States. However, this development risks entrenching for many, particularly the indigenous populations of SADC, perception of the law as a biased tool of subjugation and domination that is to be resisted and overthrown. Such a development would be counterproductive to EC and others' claim that their counter LRPs coercive economic measures would lead to a 'return to rule of law and respect for human rights' in target States.

International law had approved the conquest and colonization of these populations and of their territories. Thereafter, ruthless regulations and statutes were developed, inaugurated and reinforced by successive colonial and apartheid governments to deny these populations of any sense of dignity qua human beings. Land tenure Acts were passed and ruthlessly implemented across the SADC to alienate indigenous populations from lands that they had held from time immemorial. Secondary regulations made it compulsory for tribal leaders to ensure continuous forced labour supply for settler white enterprises that had emerged on alienated lands. Tax regulations were developed to ensure the conversion of indigenous populations from land owners in their own right to wage earners on mining and farming ventures established by settler white enterprises.

Consequently, for Western States to maintain thirty-five years later in the case of Zimbabwe, that land de-racialization should only be diminished gradually through the hand of market forces is perplexing for any human rights conscious society. Rhodesian Courts had ruled against any claim-rights that natives had submitted before them, *Mdzimbamuto v Lardna-Burke*¹²⁹ being the seminal decision. So too had the Privy Council, *In Re Southern Rhodesia*¹³⁰ being the seminal case. The Lancaster House Independence Charter which had ended the sixteen-year struggle for independence had deliberately tied the hands of the incoming black majority rule government regarding possible social justice inspired

¹²⁹ [1969] 1 AC 645; [1968] 3 All ER 561; [1968] UKPC 2; [1968] UKPC 18

¹³⁰ *In Re Southern Rhodesia* [1919] A.C. 211

LRPs by requiring that the provisional Zimbabwe Constitution would remain unchanged for the first ten years. Secondly, the majority-rule government would acquire land through the market on a willing seller, willing buyer basis. This had the effect of frustrating the legitimate expectation of the indigenous majority that land would be restored back to them at independence. The rejection by SADC Courts and International Tribunals of fast-track LRPs of SADC States appears to be incomprehensible in the light of this context. It appears to threaten incommensurability in law, human rights and social justice for affected native populations of the SADC.

Western States' unilateral coercive measures against SADC LRPs risk barking a trend that is contradictory to both international and regional human rights values of equal treatment and equal opportunity in a free and democratic society because first, they are entirely inconsistent with established jurisprudence of the UN HRC and of the UN CERD regarding transitional States that have just emerged from totalitarian rule. Second, they are contradictory to the SADC constitutional law norm of Black Economic Empowerment, (BEE) which is intended as a counter-measure against continued racialization of economic opportunities - the dominant legacy of apartheid-rule in the SADC.

At his second inauguration as President of South Africa, Jacob Zuma pointed to this legacy as the main object of his administration because even twenty years after the formal collapse of apartheid-rule in South Africa, the indigenous population was still largely excluded from mining and agriculture and other sectors of the economy. "Economic transformation will take center-stage during this new term of government as we put the economy on an inclusive growth path....' ... He promised to promote 'broad-based black economic empowerment' to address government concerns that much of the economy remains in the hands of South Africa's white minority."¹³¹

Western States' unilateral coercive economic measures against SADC LRPs are incommensurable because of their logical inconsistency with requirements of restorative justice, which requires parties to be restored to the positions they would have been in but for the mischief of occupation and apartheid-rule in the SADC. According to the critical date doctrine, international law insists upon the parties' status to contested lands as it stood at the point of occupation. Whomsoever had the land then is deemed to still have claim rights to that land regardless of whatever may have transpired during colonial apartheid-rule.

These unilateral coercive economic measures against SADC LRPs are incommensurable also because of their logical inconsistency with tenets of social justice as a people oriented idea that requires the law to honour legitimate expectations of indigenous populations of transitional SADC States that have suffered immeasurably from the indignities of both colonization and apartheid-rule. Social justice requires the disavowing of what Brennan J in *Mabo No.2* referred to as the legal fiction and legal bigotry according to which 'the rights and interests of indigenous inhabitants in land were treated as non-existent ... and justified by a policy which has no place in the contemporary law'.

By opposing SADC fast track LRPs through such actions as maintenance of severe unilateral trade embargos against Zimbabwe, Western States risk immense incommensurability in their own values. The same Western States had supported international efforts to end apartheid in the SADC, leading to the criminalization of apartheid and the maintenance of severe sanction regimes against South Africa, Rhodesia, Namibia, Angola, and Mozambique's apartheid administrations. How could they on the one hand fervently reject apartheid-rule in the SADC, and on the other, so passionately defend the legacy of apartheid-rule in the SADC, especially racialization of economic opportunities in these agro-centric and mining-centric economies, and still remain true to democratic and egalitarian rule, and human rights protection of socially and economically vandalized societies?

¹³¹ See also the Daily Mail website: <http://www.dailymail.co.uk/wires/ap/article-2638122/South-Africa-inaugurates-president-2nd-term.html#ixzz3NfG6Unza>

By imposing and maintaining harsh unilateral coercive economic sanctions against Zimbabwe until 2014 in opposition to fast-track land reform in that country, Western States, including the USA, the EU, Australia and Canada, have created an incommensurability dimension to their foreign policy values. This has raised serious questions about their own commitment to equal human rights protection. They may seriously need to reconcile their historical rejection of apartheid-rule in the SADC with UN institutional support for de-racialization of economic opportunities in transitional States that are seeking a way from their repugnant past towards egalitarian rule. They can achieve this by committing themselves to support post-apartheid SADC governments in their efforts to de-racialize land ownership on their territories.

However, SADC States themselves must realize that to be sustainable over time, their fast-track LRPs must not merely de-racialize land ownership but demonstrate definite, empirically ascertainable and measurable land development and land use policy. Merely substituting a new black elite minority commercial community for a white elite minority commercial community without justifying how doctrines of 'occupation' and 'critical date' justified such an outcome while many remained alienated from the best agro-efficient lands is equally unjust under Miller's social justice theory; Nozick's entitlement theory; and under UN treaty body human rights jurisprudence. Failure to ensure social justice in the LRP sponsored land redistribution may threatens another land revolution in the future, similar to the current one with new militants seeking to overthrow the 'unjustified' capture of the country's best lands by a previous regime. Such a cycle would hinder generational accumulation of value to both the development and application of land use strategies in the now drought prone sub-region of Africa. SADC States must ensure that land's full commercial utility and transferrable value is protected at all times so that landholders can benefit from using it also as viable collateral in securing land development loans from lending institutions.