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Inequalities and controversial aspects of land reform in South Africa before the Constitutional Court

Inequalities and controversial aspects of land reform in South Africa before the Constitutional Court*

Nota a sentenza Graham Robert Herbert N.O. and Others v Senqu Municipality and Others [2019] ZACC 31

1. The case.

The judgement in question has been triggered in order to confirm the declaration of invalidity made by the High Court of South Africa, Eastern Cape Division, Grahamstown, as provided for by section 167(5) of the Constitution of South Africa[1]. The core issue of the judgement is associated with the operation of the Upgrading of the Land Tenure Rights Act 112 of 1991 (Upgrading Act), as amended by the Land Affairs General Amendment Act 61 of 1998, in the entire Republic of South Africa.

The Upgrading Act is part of a land reform policy which has been carried out in South Africa from the final years of the apartheid and which is still ongoing[2]. It constitutes one of the so-called "three pillars" of the policy[3] and it focuses on granting secure forms of land tenure to black people who were deprived thereof in the apartheid era. Specifically, the Act provides, in section 2 and in section 3 (and the related schedules), for two different categories of tenure rights which can be converted following two different processes. When the Upgrading Act was passed (1991), its operation could not be extended to the entire country due to the so-called "balkanization" of the TBVC States (Transkei, Bophuthatswana, Venda and

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[1] Section 167(5), S.A. Constitution: "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force"; section 172(2)(a), S.A. Constitution: "The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court".

[2] For the essential features and effect of the South African land reform initiatives introduced by the first post-reform parliament, see D. L. CAREY MILLER – A. POPE, *South African Land Reform*, in *Journal of African Law*, Vol. 44, No. 2, 2000, pp. 167-194; more in general, see B. O'LAUGHLIN – H. BERNSTEIN – B. COUSINS – P.E. PETERS, *Introduction: Agrarian Change, Rural Poverty and Land Reform in South Africa since 1994*, in *Journal of Agrarian Change*, Vol. 13, No. 1, January 2013, pp. 1–15.

[3] See B. O'LAUGHLIN – H. BERNSTEIN – B. COUSINS – P.E. PETERS, Op. cit.

Ciskei). Indeed, in those States – which represented the final stage of the apartheid policy aimed at expelling black people from "white South Africa" – the Upgrading Act could not apply due to their "independence"[4]. In addition, this Act was not replicated within these States[5].

This situation did not change when the TBVC States were again embedded in the unitary South Africa by virtue of the Interim Constitution: section 229 affirmed the continuity of prior laws until amended or repealed by a competent authority. This is the reason why, in 1998, the Land Affairs General Amendment Act was passed, i.e., in order to extend the application of the Upgrading Act to the entire reunited country. Nevertheless, section 25(A) of the Upgrading Act, as amended by the Land Affairs General Amendment Act, excluded section 3 (and 19 and 20) from the extension provided for[6]. In other words, the application of section 3 has been excluded in the former "independent" States.

The applicants (Teba property Trust, through its Trustees) complained of the inconsistency of this specific provision with section 9(1) and 9(3) of the Constitution. The Trust claims indeed to be the holder of a permission to occupy – category ruled by section 3 of the Upgrading Act – related to a land in Sterkspruit, part of former independent Transkei. The High Court upheld the applicants' position, declaring the invalidity of section 25(A) (and of section 1 of the Land Affairs General Amendment Act which introduced it) to the extent that it does not extend the applicability of section 3 to the entire country.

The Constitutional Court has finally confirmed the decision passed by the High Court.

2. An overview to the evolution of tenure rights in South Africa.

The issue of equality in tenure rights in South Africa is considered one of the core questions related with the transition from apartheid to the new constitutional system.

It is indeed known that apartheid policies, aimed at removing black people from the "white South Africa", were put in place on the basis, *inter alia*, of a strong deprivation of their tenure rights. It was a gradual

[4] As described in the judgement in question, para. [4]: "These territories were excluded from the rest of the country and were not subject to the laws passed by the South African Parliament, from the date on which each territory attained "autonomy". This meant that when the Upgrading Act was passed, its application did not extend to the TBVC states. This continued to be the position even after their reincorporation into the rest of the country. When the interim Constitution came into force in April 1994, all homelands which were established by the apartheid state, including the TBVC states, became part of a unitary South Africa. But these states had their own legislative bodies with authority to pass laws over each territory. Those laws were limited to each territory, just like laws passed by Parliament of the old order whose application was restricted to the area constituting the old South Africa".

[5] As described at para. [5] of the judgement in question.

[6] Section 25(A), Upgrading of Land Tenure Rights:"As from the coming into operation of the Land Affairs General Amendment Act, 1998, the provisions of this Act, excluding sections 3, 19 and 20, shall apply throughout the Republic".

process aimed at ultimately creating "separate countries" for Africans within South Africa[7]. The policy started with the Native Land Act of 1913, which reserved 13% of land for occupation by Africans. Thereafter, the Native Administration Act of 1927 appointed the Governor-General as the "supreme chief" of all Africans; he could broadly and unlimitedly govern them thanks to his Proclamations. The Proclamations became one of the instruments used to force Africans to move into these territories; thus, their rights to land outside of the reserves were denied. In addition, the Native Trust and Land Act of 1936 deprived Africans of having secure tenure rights also in these territories: the lands were given to manage to the South African Native Trust and then to the "tribal authorities"[8]. As previously mentioned, the next stages were the establishment of ten ethnically based "homelands"[9] and the creation of "independent States".

As we can see, Africans were deprived of their land tenure rights both outside of the reserved area and inside it. specifically, as provided for by Proclamation 293 of 1962[10], inside this area, black people could not have property: they only could exercise certain insecure rights based on permits to occupy or deeds of grant, which could be cancelled for many different reasons by the authorities[11].

Thus, it is apparent to underline how important it is to re-establish equality for the benefit of tenure rights is in South Africa. This is the reason why, as early as at the end of the apartheid, the Upgrading Act was passed; the Interim Constitution and the Constitution of 1996 also focus on this topic in depth[12].

The Upgrading Act was passed in order for Africans to stabilise their insecure rights through their conversion into ownership. As the Constitution took effect, the land tenure right reform was embedded in an extensive policy described in the "White Paper on South African Land Policy" of 1997 as one of

[7] As outlined in DVB Behuising v North West Government [2000] ZACC 2, paras. from [41] to [51].

[8] As described by J. BEALL – M. NGONYAMA, *Indigenous Institutions, Traditional Leaders and Elite Coalitions for Development: the case of Greater Durban, South Africa*, in *Crisis States Research Centre. Crisis States working paper*, No. 2, 2009, p. 8: "The Black Administration Act (No. 38 of 1927) stripped traditional leaders of much of their autonomy and the Governor General of South Africa prescribed their duties, powers and conditions of service. For their part traditional authorities colluded in the segregationist policies of the South African government under the Union Government; and when the Nationalist Government came to power in 1948, introducing almost half a century of apartheid rule, chieftaincy fitted comfortably into its vision of 'separate development'".

[9] Promotion of Bantu Self-Government Act 46 of 1959.

[10] Issued in terms of the Native Administration Act 38 of 1927.

[11] As described by the judgement in exam, para. [7].

[12] Section 28 of the Interim Constitution, entitled "Property", states: "(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights. (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law"; specifically related to tenure rights, Section 25(6), of the S.A. Constitution affirms: "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress".

its three pillars. The others were: the restitution of lands and their redistribution[13]. The process is still ongoing with many struggles and it is ever present in the current political debate[14]. In fact, the restitution and the redistribution were not based on imposition, but, somehow, on the market and on compensation regarding white owners[15], with a role of financial support by the State[16]. This option[17] has not led to restore many black people[18].

Also, the stabilisation of tenure rights carries many different controversial aspects and difficulties when implemented[19]; one of them was highlighted by the analysed judgement.

3. The constitutional issue: the breach of the equality principle and the Harksen test.

As mentioned above, the Constitutional Court ended up confirming the High Court decision. It is interesting to point out the constitutional issue of the judgement, focusing on the constitutional parameters chosen and the method used by the Court. In fact, the decision in question dealt with the

[13] In order to achieve the provisions of section 25 (5) of the S.A. Constitution: "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis" and section 25(7): "A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress".

[14] For a general overview on South African's opinions, see M. MOOSA, *South Africans' views on land reform: Evidence from the South African Reconciliation Barometer*, in *Reconciliation & Development Working Papers Series*, No. 5, 2018; on the discussion about the amendment of section 25 of S.A. Constitution in order to repeal the obligation of compensation, see N. SIBANDA, *Amending section 25 of the South African Constitution to allow for expropriation of land without compensation: some theoretical considerations of the social-obligation norm of ownership*, in *South African Journal on Human Rights*, Vol. 35, No. 2, 2019, 129-146.

[15] As provided by Constitution, section 25(2): "Property may be expropriated only in terms of law of general application: (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court"; and section 25(3): "The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including: (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation".

[16] S. GREENBERG, *Land reform and transition in South Africa*, in *Transformation: Critical Perspectives on Southern Africa*, Vo. 52, 2003, p. 56, outlines that this model "was constructed around the World Bank's 1993 prescriptions of a willing-buyer willing-seller approach coupled with a limited state grant, the protection of private property, and compensation based on market value for any expropriated land"; C. ALLSOBROOK, *Tenure rights recognition in South African land reform*, in *South African Journal of Philosophy*, Vol. 38, No. 4, 2019, 408–418, highlights other limits due to the fact that "South African property law currently favours and privileges ownership of property that confers highly exclusionary powers of control in the hands of a single "legal person" ".

[17] Result of the difficult negotiations carried out between

[18] On the problematic issues of these policies, see B. ATUAHENE, *South Africa's Land Reform Crisis: Eliminating the Legacy of Apartheid*, in Foreign Affairs, Vol. 90, No. 4, 2011, pp. 121-129; V. GUMEDE, *Land reform in post-apartheid South Africa: Should South Africa follow Zimbabwe's footsteps?*, in *International Journal of African Renaissance Studies*, Vol. 9, No. 1, 2014, pp. 50–68, describes the weaknesses of South African land reform, defined as a "dismal failure".

[19] See C. ALLSOBROOK, Op. cit.

breach of the equality principle – enunciated by section 9(1) of the Constitution[20] – and made use of a well-known test in order to verify it.

Starting from the constitutional parameter, the Constitutional Court affirmed that the provision in section 25(A) of the Upgrading Land Act breached section 9(1) of the Constitution, it not being necessary to focus also on the breach of section 9(3) (prohibition of unfair discrimination)[21] nor of section 25 (dedicated to the protection of property rights)[22]. This conclusion is due to the application of the so-called "Harksen test"[23], "the culmination of the Constitutional Court's evolving equality jurisprudence"[24] which was built also on the basis of the comparison with other legal experiences[25]. The test has been broadly applied by the Constitutional Court[26], becoming a guideline for the Court when facing decisions in matters concerning equality. According to it, the Court has to pass different stages of enquiry in order to determine the inconsistency with section 9 of the Constitution.

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[20] "Everyone is equal before the law and has the right to equal protection and benefit of the law".

[21] "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth".

[22] Regarding to the analysed judgement, we refer to section 25(6): "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress", which must be read together with section 25(9): "Parliament must enact the legislation referred to in subsection (6)".

[23] Set up specifically in Harksen v Lane NO [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) from para. 53.

[24] As described by R. KRUGER, *Equality and unfair discrimination: refining the Harksen test*, in *South African law journal*, Vol. 128, No. 3, pp. 479-512; a jurisprudence that commenced with the judgement Brink v Kitshoff NO 1996 (4) SA 197 (CC).

[25] Indeed, section 39(1) of the S.A. Constitution affirms that: "When interpreting the Bill of Rights, a court, tribunal or forum: (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law; on the reasons and the consequences of this "pionieristic" clause that introduced the comparison with other legal system in order to interpret the Constitution, see A. LOLLINI, *La circolazione degli argomenti: metodo comparato e parametri interpretativi extra-sistemici nella giurisprudenza costituzionale sudafricana*, in *Diritto Pubblico Comparato ed Europeo*, No. 1, 2007, pp. 479-523; on the role of the Canadian courts, see also J. KRIEGLER, *The Constitutional Court of South Africa*, in Cornell International Law Journal, Vol. 36, No. 2, 2003, 361 ff.

[26] R. KRUGER, Op. cit., mentions: Larbi-Odam v MEC for Education (North West Province) 1998 (1) SA 745 (CC) para 15; East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council 1998 (2) SA 61 (CC) para 22; Pretoria City Council v Walker 1998 (2) SA 363 (CC) para 43; National Coalitionfor Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) para 17; Jooste v Score Supermarket 1999 (2) SA 1 (CC); Democratic Party v Minister of Home Affairs 1999 (3) SA 254 (CC) para 12; National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) para 32; Hoffmann v South African Airways 2001 (1) SA 1 (CC) para 24; Minister of Defence v Potsane 2002 (1) SA 1 (CC) paras 43-4; Satchwell v President of the Republic of South Africa 2002 (6) SA 1 (CC) para 20; Du Toit v Minster of Welfare and Population Development 2003 (2) SA 198 (CC) para 24; Khosa v Minister of Social Development 2004 (6) SA 505 (CC) paras 68 and 72; Mabaso v Law Society of the Northern Provinces 2005 (2) SA 117 (CC) para 38; Volks NO v Robinson 2005 (5) BCLR 446 (CC) para 48; Van der Merwe v Road Accident Fund2006 (4) SA 230 (CC) para 42; Union of Refugee Women v Director: Private Security Industry Regulatory Authority 2007 (4) SA 395 (CC) para 34 (endorsement by the majority) and para 112 (the minority); Hassam v Jacobs NO 2009 (11) BCLR 1148 (CC) para 23.

Firstly, the Court should answer the following question: "Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose?"[27]. If it does not, then there is a breach of section 9(1), due to an arbitrary and irrational limitation of the right to equality before the law. Then, it will be necessary to ensure whether the limitation of the right to equality before the law is justifiable in accordance with section 36 of the Constitution[28]. This section requires finding out whether the examined limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account many different factors (the so-called justification enquiry)[29].

Returning to the starting questions, if the differentiation does bear a rational connection with a governmental purpose, it is necessary to verify whether there is a discrimination and whether it can be considered unfair[30].

In the analysed case, the enquiry stopped at the first stage. In fact, the Court – after having analysed the meaning of the breached provision and the entire act[31] – firstly found out a double differentiation "between holders of land tenure rights by not allowing those who hold rights governed by section 3 to convert their rights to ownership if these people are in the homelands" and, within the homelands, "between the holders of rights which may be converted under section 2 and those whose rights may be converted in terms of section 3". Secondly, the Court demonstrated the lack of legitimate government purposes[32], which also formed the basis of the affirmation of the unjustifiableness and unreasonableness of the enquired provision.

Thus, thanks to this guideline, clarified by virtue of the *stare decisis*, the Court came to a clear decision. Nevertheless, it might be underlined that, if the strict application of this standard enquiry can lead to a rational conclusion limiting discretion or neglections, its use should be adapted to the single case. In this regard, it may be possible to denote that the decision ran into a superfluous stage, referring to the

[27] Harksen v Lane NO [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC), para. 53.

[28] It requires generally an evaluation regarding to the proportionality of the limitation, as outlined by T. LOENEN, *The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective*, in *South African Journal on Human Rights*, Vol. 13, No. 3, 1997, pp. 401-429: she refers to section 33 of the Interim Constitution and its interpretation, but, as confirmed by Brink v Kitshoff (1996) 6 BCLR 752 (CC) at para. 46-50 and President of the Republic of South Africa v Hugo (1997) 6 BCLR 708 (CC) Kriegler J at para. 77, section 36 of S.A. Constitution has been interpreted in the same way.

[29] Section 36, S.A. Constitution, requires to take into account: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

[30] According to Harksen v Lane NO [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC), para. [53].

[31] In the judgement in question, from para. [23] to para. [28].

[32] Basing its judgement on an affidavit filed on the behalf of the Minister.

evaluation of appropriateness in accordance with section 36 of the Constitution[33]. Indeed, is it ever possible to consider an irrational discrimination as justifiable in an "open and democratic society based on human dignity, equality and freedom"? The lack of motivation in the decision seems to confirm the idea that this last stage of enquiry can be considered as unnecessary in this case[34].

4. The role of the Constitutional Court in the achievement of the Constitution.

As described above, compliance with the equality principle, especially if associated with land tenure rights, constitutes a core issue in post-Apartheid South Africa. The equality jurisprudence is actually to be considered as one of the fundamental issues that characterise the Court's activity, in order to achieve what is has been defined as the "Constitution's focus and its organising principle"[35] of the South African legal system.

As regards this point, from the decision in question emerges the fundamental role of the Constitutional Court in the ongoing process of rebalancing the post-Apartheid legal system[36]: a role that the Court has played since its establishment under the Interim Constitution. The Court was indeed assigned, in addition to its other competences[37], to verify compliance with the principles agreed and written under the Interim Constitution by the Constitution of 1996[38]. Its duties were already broad in the original Constitution of

[33] About the risk of overlaps in the use of Harksen test (focusing more on overlap between unfair discrimination and justification enquiry), see R. KRUGER, Op. cit., pp. 503-505.

[34] As underlined by R. KRUGER, Op. cit., 503, the Court has already considered the justification enquiry unnecessary in some cases, as Satchwell v President of the Republic of South Africa (even if in that case it was a judgement on unfair discrimination).

[35] JUDGE KRIEGLER, in President of the Republic of South Africa v Hugo (1997) 6 BCLR 708 (CC) at para. 74.

[36] On this topic, see K. O' REGAN, *A pillar of democracy: reflections on the role and work of the Constitutional Court of South Africa,* in *Fordham Law Review*, Vol. 81, No. 3, 2012, 1169-1186; F.T. ENDOH, *Democratic constitutionalism in post-apartheid South Africa: the interim constitution revisited*, in *Africa Review*, Vol. 7, No. 1, 2015, 67–79; S.J. ELLMANN, *The Struggle for the Rule of Law in South Africa (Symposium: Twenty Years of South African Constitutionalism: Constitutional Rights, Judicial Independence and the Transition to Democracy)*, in *New York Law School Law Review*, Vol. 60, No. 57, 2015-2016.

[37] Section 98, Interim Constitution, entitled "Constitutional Court and its jurisdiction": (1) There shall be a Constitutional Court consisting of a President and 10 other judges appointed in terms of section 99. (2) The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution, including: (a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3; (b) any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state; (c) any inquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution; (d) any dispute over the constitutionality of any Bill before Parliament or a provincial legislature, subject to subsection (9); (e) any dispute of a constitutional nature between organs of state at any level of government; (f) the determination of questions whether any matter falls within its jurisdiction; and (g)the determination of any other matters as may be entrusted to it by this Constitution or any other law.

[38] As provided for by section 71 of the Interim Constitution; the principles are listed in Schedule 4, Interim Constitution; on this topic, see P. BISCARETTI DI RUFFÌA (ed. by), *Cositutuzioni straniere contemporanee*, Vol. II, *Le*

1996[39] and they did not already deal with strict constitutional matters: "In short, the Constitutional Court had armed itself early on with a doctrine, largely discernible only by inference from the text rather than from its explicit words, that gave it potentially incisive authority to review all governmental action"[40]. It is a fact that, thereafter, the Court was given (and took) an increasingly more central position in the implementation of the South African constitutional system, especially after the 17th amendment of 2012 came into effect[41]. It indeed gave the Court the power to confirm all orders of invalidity made by the Supreme Court of Appeal and the High Court. Still, from 2012, the Constitutional Court "may decide upon any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court"[42].

But, regardless of the formal competences, it can be argued that this judgement confirms, where necessary, a peculiar role of the Constitutional Court, linked to the achievement of the South African constitutional transition. Regarding to this point, it can be underlined that decision was also enhanced by these following strong remarks: "It is egregiously unfair to afford redress to some of the victims of discrimination under apartheid and withhold that redress from other victims on the basis of where they are currently located. Under our democratic order there can be no justification for denying secure rights to a large group of people on the account of where they live in the country. Nor can there be good reason for a land tenure that continues to entrench insecure land rights of the apartheid era. The Constitution guarantees equality to everyone. This means that people of all races are entitled to equal land rights, regardless of where they live in the country. Any land tenure system that affords people less secure rights in land on the basis of where they are located is inconsistent with the Constitution and the values on which our Constitution was founded". Many other paragraphs of the decision are aimed at underlining "the discriminatory differentiation to which millions of black people continue to be subjected in the former homelands", which "should have been remedied a long time ago". The quotations demonstrate

Costituzioni di sette stati di recente ristrutturazione, Giuffrè, Milano, 1996, pp. 12-13, who defines these principles as "superconstitutional".

[39] In general, it exercises the power of judicial review on constitutional matters; as highlighted by S.J. ELLMANN Op. cit, 67, the presence of an extensive Bill of Rights and the pressure on the Constitutional Court in order to encourage its wide activity are among the reasons for the broad extension of Constitutional Court's powers.

[40] S.J. ELLMANN, Op. cit., 71.

[41] As outlined by R. ORRÙ, *Il Sudafrica*, in P. CARROZZA – A. DI GIOVINE – G.F. FERRARI (ed. by), *Diritto costituzionale comparato*, Laterza, Roma-Bari, 2009, p. 712 ff. , the 17th amendment constituted the culmination of a stream of thought favourable to a rethinking of the South African judicial system in order to overcome the former dual system; the aim was to identify a "a single apex court" in order to, *inter alia*, put to an end to the uncertainties deriving from the distinction between "constitutional matters" and "non-constitutional matters".

[42] Section 167(3)(b)(ii), S.A. Constitution.

that the reference to the past inequalities is an unavoidable part of the Court's discourse[43]: it constitutes an element on which the Court relies in order to assist and to strengthen its interpretation of the Constitution. In this regard, it is possible to highlight that this kind of reasoning characterises specifically the South African Constitutional Court compared to other Courts.

5. Hidden controversial aspects within the decision.

It is also interesting to point out at least two controversial aspects associated with the judgement. Both can show how difficult and controversial the policy of transition can be regarding land rights.

Firstly, it is noted that the provision subject to the judgement does not stem from an Apartheid policy. It indeed stems from the Land Affairs General Amendment Act, passed in 1998. This issue was not clearly examined in the judgement. Indeed, on the one hand, the Court focused on the perpetuation "of the obnoxious apartheid policy of dividing the country into homelands which were nothing else but impoverished areas reserved for Africans" which "sustains the impairment of the human dignity of the affected black people". On the other hand, it analysed the *rationale* of the Land Affairs General Amendment Act, neglecting the verification of the specific purpose of the examined provision, affirming that the exclusion of section 3 had no explainable reasons. According to this approach, the Court declared the substantial inconsistency with the Constitution of the provision of section 25(A) due to its incoherence with the general purpose of equality of the Act in violation of section 9(1). The decision could not have deepened more the issue; however, it clearly reveals the contrasting aspects of land tenure policies in the post-apartheid South Africa and the risk of strengthening rather than weakening the past inequalities.

Secondly, another problematic issue can also be identified. It concerns the applicant, namely, Teba Property Trust: it was founded in 1902 under the name of Witwatersrand Native Labour Association and was a migrant workers recruiting agency. As pointed out by the Court, it is clear that "the Trust and its predecessors were actively involved in the implementation of shameful policies of the apartheid government by recruiting black workers to provide cheap labour for the mining industry. Those workers

[43] As explained in Brink v Kitshoff NO (CCT15/95) [1996] ZACC 9, at para. [40]: "Perhaps more than any of the other provisions in chapter 3, its interpretation must be based on the specific language of section 8, as well as our own constitutional context. Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted".

travelled long distances from their homes and families and were obliged to work under the most appalling conditions, whilst living in single-sex hostels, which exposed them to all sorts of illnesses and dangers associated with mining operations and resulting from their migrant status"[44]. Thus, the constitutional judgement was triggered by a subject that was somehow a beneficiary of apartheid policies, which was claiming the conversion of its tenure right. The Court stated that "the constitutional and legal question as to whether the Trust is entitled to claim conversion of rights under the Upgrading Act is not before this Court" and, naturally, did not express any opinion regarding this issue. Nevertheless, this aspect can, once again, show the complexity and the contentiousness that marks the South African legal system and its ongoing transition. Indeed, as explained by the Court, "the Upgrading Act targets, for conversion into ownership, tenuous land rights which were granted to Africans"; but, formally, could the Act be applied also to the advantage of other subjects? If so, the required affirmative actions[45] put in place in order to rebalance land rights could reveal another weak side.

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[44] Para. [24] of the judgement in question.

[45] Section 25(5), (6) and (9), S.A. Constitution: "(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. […] (9) Parliament must enact the legislation referred to in subsection (6)".