

## FOREWORD

In great part the history of humanity has been about wars for scarce resources and kindred struggles for human freedom and equality within societies. Most domestic struggles were no more than peaceful protests and demands, whilst others were civil wars, violent revolts, or bloody revolutions. Even so, after millennia the world remains a place of startling contrasts and unevenness of a wide variety both within and between countries of the world. The material and social divide between the Global North and Global South requires no further description. Much of the economic contrast and relative underdevelopment is attributable to a prolonged colonial and imperialist project. Within countries too, inequality and exclusion on the grounds of race, gender, religion, disability, sexual orientation, migration, and above all class or socioeconomic status is prevalent.

The vexed question that *Advancing Equality* must and does ask is: Has the advent of constitutionalism, particularly since the 1948 Universal Declaration of Human Rights, made the world a better place to live? Are the markers of exclusion and discrimination like gender, race, religion, sexual orientation, and socioeconomic status and disability any more mitigated than before many of the constitutions of the world proclaimed fundamental rights and freedoms due to everyone?

South Africa's 1996 constitution—which enshrined both comprehensive protections against discrimination and a wide range of social and economic rights—offers insights. It was Arthur Chaskalson, the first President of the Constitutional Court and later the Chief Justice of post-apartheid South Africa, who warned against the effusive optimism that our brand-new aspirational democratic constitution would firmly shut the door on the inhumanity and toxic inequality of our apartheid past. Chaskalson was counseling against my more youthful revolutionary zeal, that the

constitution and other related new law could and must be harnessed to erase the past and immediately install equality and justice. It is indeed so that we may not hang all our quests for advancing equality in the world on one peg. Some deep causes of inequality are embedded in history or are structural or systemic. The inequality may well be the product of inflexible power relations within a society that would rather increase than arrest, say, racial or gender or socioeconomic inequality. At the same time, strong constitutional protections can provide a foundation for addressing many of inequality's core contributors.

*Advancing Equality* does not stumble into the pitfall of arguing constitutions are the sole solutions but rather demonstrates the powerful role they can play in addressing inequality. This remarkable evidence-based study readily identifies the important uses of written constitutions around the world. Expectedly some constitutions are older and sparse or at best only implicit in recognizing the equal worth of all people. Other constitutions are newer and more open in their commitment to secure the equal worth of human beings. These constitutions have drawn from global notions of human decency that have firmed up into international humanitarian law.

This work reminds us that the achievement of equality in any society or in the world is a work in progress and certainly not an event. To that end a domestic constitution is a covenant between the people and their state. It serves as a minimum set of protections below which no state or its people may drop. It is a preexisting and collective agreement by all within a society that certain safeguards and entitlements may not be violated, and that if they were to be limited in their scope of protection it would be by a law of general application which must be reasonable, the least invasive and justifiable in order to achieve one or other public purpose. Put more simply, a protection or right may not be taken away arbitrarily, and if its enjoyment is reduced, the curtailment of it must be clearly justified.

Constitutions and other laws have an important aspirational role. This is particularly so in post-conflict societies. The aftermath of a social upheaval or a war presents the real possibility of revisiting myriad entrenched power relations in a society. Constitutions of that kind are not written to record the existing societal patterns and arrangements but rather to end or to alter them radically and lift the nation's eyes toward renewal. The inequalities of the past cannot in theory escape full scrutiny and radical adaptation. This explains in great part the replete and explicit constitutional guarantees against historical and irrational exclusions and prejudices. Newer constitutions tend to place fundamental rights and freedoms at the center of their democratic governance and social enterprise. Then the obsession is rightly to alter society irreversibly.

Clearly not all constitutions bear the same backdrop or mission. Others merely record preexisting arrangements and conventions. What matters is whether on a proper reading the constitutions of that kind provide sufficient precepts that embrace the democratic enterprise of an open and just society

that cares for all human beings and their equal worth and opportunity to realize their full potential.

*Advancing Equality* reminds us with remarkable clarity, chapter after chapter, of the historic and persisting inequality in the world, and the critical need to address its causes and consequences. The book opens with the history of entrenched legal inequality predicated on race and ethnicity. Discrimination of this kind and indeed of any kind stubbornly persists long after its formal end and leaves its victims with deep scars and social disability. Long and calculated impoverishment of people on account of race and ethnicity is likely to leave them hurt, broken, undervalued, and poor.

Astute constitutional change should acknowledge such a horrific past and provide for appropriate relief such as reparation, restitution, and other remedial interventions. Constitutional protections for core social and economic rights can also accelerate progress: quality, useful, and accessible education and training comes to mind as the single most potent catalyst toward equality and self-worth and escape from poverty. Much the same must be said about the right of access to health care. Study after study has shown that ill health is closely allied to inadequate education and challenged socioeconomic conditions. Lack of adequate access to healthcare can only deepen and reinforce poverty and inequality. *Advancing Equality* powerfully addresses each of these in turn.

*Advancing Equality* correctly points to the foundational nature of gender equality. It is indeed so that addressing gender is a core, if not the most vital, component of equalizing society. This work reminds us of the profound impacts of gender inequality that stem from a simple observation: that the largest group facing inequalities in the world are women and girls, a group that has historically been denied the right to vote, and continues in some settings to be excluded from workplaces and schools, facing frequent violence, and in many countries is still prevented from full participation in the economy. We are all the poorer for it. What is more, gender inequality tends to be intersectional because it is reinforced by other exclusion grounds such as race, pregnancy, marital status, and cultural or religious exclusions. This means in most societies women have to endure multiple jeopardies.

This systematic exclusion of half the global population is intolerable and must stop. Most world constitutions say so and yet so much more has to be done in the ordinary lives of most women and girls. Most men worldwide are indeed the biggest culprits in demeaning the equal dignity and respect women and girls are plainly entitled to. Strong and effective legislation must be used to combat patriarchy and push back against toxic masculinity.

It is indeed instructive to learn from this work that in 1991 there were 100 million migrants worldwide, and by 2017 that number had increased to nearly 258 million migrants. It is plain, despite the narrow, homegrown chauvinism and nationalism rearing its head around the world, that we may not talk about human

dignity and equal worth of all people to the exclusion of the world's migrants. In smaller oases of democracy and constitutionalism such as where I come from, there is a considerable inflow of migrants from diverse parts of the world. Ours was a long struggle to restore inclusion and advance equal worth of all and yet there are occasional outbursts against or hatred of migrants. Migrants are sometimes viewed as unwelcome competitors for scarce resources. Even so, world constitutions and progressive world activists must remain steadfast in recognizing the inevitability, value, and human dignity of migrants and extending them equal protection under the law.

I welcome the affirmation of the need for explicit protection of sexual and gender minorities, including those who identify as lesbian, gay, bisexual, or transgender. I agree entirely that "achieving equality for the LGBT+ community is no less urgent and no less fundamental." Constitutional guarantees of fundamental rights regardless of sexual orientation and gender identity are rightful human dignity and equality claims that are worthy of assertion and protection. In South Africa we did the right thing. In our supreme law we prohibited unjustified discrimination on the ground of sexual orientation as a legitimate part of our equality protection. Our courts rightly enforced these protections and construed them to embrace same-sex marital unions. A variety of courts and law-making chambers around the world are properly, albeit slowly, recognizing equal rights on the basis of sexual orientation and gender identity as worthy of protection.

As I conclude I make a few observations about class inequality. Arguably this is the most vexed and contested part of the equality discourse. This work opts for the tag socioeconomic status (SES), which it defines as "an individual's social and economic position relative to others. Income and wealth, educational attainment, occupation, and inherited statuses are all aspects of SES. Like disability status, SES can be lifelong, and it can change over the life course. National economic troubles can push increasing numbers into poverty."

Of course, one's class is an aggregate of the identified attributes. Clearly, some attributes are within the grasp and control of the individual. They can be ameliorated by personal agency, which may enhance the opportunities of access to quality education, training, and experience. The rest of the attributes of SES are embedded in a history of past privilege such as inherited status and wealth, which often is an outcome of prolonged accumulation. The national economy too is usually beyond the individual's influence and is a function of the development and ownership of the means of production peculiar to that economy.

All of these intricacies tend to pose the difficult question: When, for historical and other structural reasons, socioeconomic inequality persists within a national economy, can equality promises in a constitution and other laws help bridge the gap? Several radical scholars think not. They argue that only fundamental economic changes may reduce socioeconomic inequality.

Whilst I recognize the force of that contention in relation to socioeconomic inequality, I think it lacks nuance. It ignores the potential for equalizing society by way of shifts in laws, their implementation, and social norms—a process that requires the engagement of the state, citizens, civil society, and all concerned. Also equality rights properly asserted may serve as a catalyst for economic growth and in turn socioeconomic upward mobility.

The better approach is to be found in *Advancing Equality*, which opts for an evidence-based approach that asks how far has the world come, under the influence of equality protections in world constitutions. This work argues that while protections have strengthened in many areas, significant gaps remain. With the support of data the work provides a comprehensive analysis of these trends over time, paired with a deep discussion of key cross-cutting questions and ongoing challenges that policymakers, civil society organizations, engaged citizens, and researchers must take up to fully protect and fulfill equal rights in all our countries.

The abiding task to provide for and advance equality under world constitutions and the law is worthy and must continue. While substantial work remains, South Africa's experience over the past two decades offers examples of the types of constitutional action that can lead to meaningful change. Our decision in a 2002 case on the constitutional right to health, spearheaded by a movement of citizens and civil society organizations, brought life-saving treatment to expecting mothers living with HIV across the country. In a 2004 decision, we upheld a law designed to advance racial equality by temporarily providing increased pension contributions to parliamentarians elected after apartheid, illustrating how constitutional equality provisions can provide a foundation for restorative justice. Two years later, our decision in *Home Affairs v. Fourie* made South Africa the first country on the continent—and just the fifth in the world—to legalize same-sex marriage, building on a precedent ending discrimination against same-sex couples in immigration law from a few years prior. And in 2009, we cited the right to education to successfully urge a school district to abandon its Afrikaans-only language policy, which for 93 years had served as a tool of racial exclusion. Constitutions, together with communities and courts working to fulfill the constitutions' promises, have great power to shift the trajectories of individual lives and countries.

Dikgang Moseneke

Deputy Chief Justice, Constitutional Court of South Africa (2005–2016)

Justice, Constitutional Court of South Africa (2002–2016)

Tshwane, South Africa

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