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24. SHAPING CONSTITUTIONAL IMAGINATIONS: DEBATING THE INCLUSION OF SOCIO-ECONOMIC AND PROPERTY RIGHTS IN THE SOUTH AFRICAN CONSTITUTION¹

Heinz Klug²

1. Introduction

President Pena, Faculty, Ladies and Gentlemen, Good afternoon. I am honored to be presenting the Jorge Huneus Public Law lecture here at the University Diego Portales at this extraordinary constitutional moment in Chile. Before I begin, I want to thank University President Carlos Peña for the invitation and Javier Couso for extending it to me. I also want to thank Lucia Rizik and Simona Blanco for all their efforts to make sure I could get here today.

My lecture today is rooted in my own experience in South Africa's democratic transition and the debate over rights inside the African National Congress's Constitutional Committee. My specific focus will be on the inherent relationship between the protection of property rights and the inclusion of social and economic rights in the 'final' 1996 Constitution of South Africa. Despite there being no formal linkage, this relationship reflects the tension between those who wished to preserve their economic privilege and those who believed that it was necessary to transform the existing distribution of resources to establish a sustainable constitutional order. I will argue that the debates over these two sets of rights both shaped and reshaped the constitutional imaginations of the opposing actors and that over the last quarter century constitutional litigation and continuing patterns of inequality have continued to reshape the constitutional imaginations of social movements, litigants, and the judiciary itself.

1 La versión en español de esta conferencia se encuentra disponible en https://www.youtube.com/watch?v=TMmjF0NmH_c

2 Professor of Law at the University of Wisconsin Law School. S.J.D. University of Wisconsin Law School, 1997 J.D., University of California - Hastings College of the Law, 1989 B.A., University of Natal, 1977 (Honours in Comparative African Government and Administration, 1978). heinz.klug@wisc.edu

Debates over a future bill of rights began in earnest in South Africa in the mid-1980s, however, it was the publication of a *Draft Bill of Rights* by Nelson Mandela's newly unbanned African National Congress (ANC) in November 1990 that set the terms of debate.³ Published by the ANC's Constitutional Committee, this *Draft Bill of Rights* sought to both protect rights but also to place duties on the state and society to address the vast inequalities and other legacies of Apartheid. It is this balance, between the protection of rights, especially property rights, and the mobilization of rights to address unsustainable inequalities that is a defining feature of South Africa's constitutional transition.

Before turning to the question of the relationship between property rights and access to social and economic resources, I want to provide a little contextual background to South Africa's constitution-making process. South Africa moved from repeated states of emergency in the mid-1980s to a negotiated democratic transition and eventually a constitution adopted by an elected constitutional assembly in 1996.⁴ While the details of this often violent and contested process are important, there are a few significant factors that I believe provide context to the constitutional debate over rights. First, the end of the cold war and the inability of the apartheid regime to continue to effectively govern, or get international support, meant that neither of the major antagonists, the apartheid regime or the liberation movement, could achieve a direct victory over the other. Second, while the apartheid regime began negotiations seeking to guarantee "group" rights to secure the interests of the white minority, the African National Congress looked to the protection of individual rights to both provide security to all of South Africa's people but also to address the legacies of apartheid.⁵ Third, as the democratic transition unfolded, the regime was forced to give up its claim to "group" rights and instead focused on the protection of property and cultural rights, while the ANC was forced to accept a two-stage process in which an 'interim constitution' allowed for elections and the creation of a government of national unity before the convening of a democratically-elected constitutional assembly to write a 'final' constitution.⁶ Finally, acceptance by the old regime of an elected constitution-making process was facilitated by agreement that this body would be bound by a set of Constitutional Principles that were included in the 'interim' constitution.

3 ANC Constitutional Committee, *A Bill of Rights for a New South Africa* (Centre for Development Studies, University of the Western Cape), 1990.

4 Klug, Heinz, *The Constitution of South Africa: A Contextual Analysis*, (Hart Publishing), 2010, pp. 13-21.

5 Maharaj, Mac & Z. Pallo Jordan, *Breakthrough*, (Penguin Books), 2021, p. 133.

6 Klug, Heinz, *Constituting Democracy*, (Cambridge University Press), 2000, p. 104-105.

It was in this two-stage constitutional transition that the tension between rights that sought to preserve the existing distribution of resources and rights that promised a steady and legal process of social transformation played out. While the ANC sought to limit the Bill of Rights in the negotiated 'interim' constitution to only those rights necessary to guarantee a democratic election, the negotiators produced a complete bill of rights that protected property but failed to include significant social and economic rights.⁷ When challenged about the failure to address claims of restitution for land that had been taken by the white minority regime under racially discriminatory laws, the negotiators of the 'interim' constitution included a separate provision allowing for a process of land claims. This provision, along with an affirmative action clause, was placed in the equality clause rather than in the property clause itself (1993 Constitution, section 8(3)).⁸ In contrast to this 1993 'interim' Constitution the 'final' 1996 Constitution includes a property clause that specifically acknowledges the need for land and tenure reform, including restitution,⁹ as well as a range of social and economic rights, including rights to education, housing, health care, food, water, and social security.¹⁰ Furthermore, the 'final' constitution declared these rights fully justiciable, meaning that they would be enforceable in the courts within the limits established by the constitution.¹¹

The questions I want to address today are how South African constitution-makers came to adopt these specific forms of property and social and economic rights and how these rights have helped to shape access to essential social resources in post-apartheid South Africa?

2. How did South Africa come to adopt justiciable social, economic and property rights?

Given that colonialism and apartheid in South Africa had dispossessed and excluded the African majority from gaining access to economic resources, including land, there was initial concern in the ANC and among black activists inside South Africa that the purpose of a Bill of Rights would be to lock in the privileges and

7 Du Plessis, Lourens & Hugh Corder, *Understanding South Africa's Transitional Bill of Rights*, (Juta & Co) 1994, pp. 40-46.

8 Constitution of the Republic of South Africa, 1993, section 8(3).

9 Constitution of the Republic of South Africa, 1996, section 25.

10 Constitution of the Republic of South Africa, 1996, sections 26, 27 and 29.

11 Constitution of the Republic of South Africa, 1996, section 38.

property of the white minority. This concern led some student activists to reject the initial Bill of Rights proposals in the early 1980s, arguing that they would amount to what they termed a ‘bill of whites.’¹² However, the leadership of the ANC recognized in the mid-1980s that it was important to declare the organization’s commitment to both multi-party democracy and the protection of rights. It was in this context that the Constitutional Committee of the ANC began, even before the democratic opening, to formulate first a set of constitutional principles, that were issued in 1988, and then to publish a draft Bill of Rights in 1990, not long after the release of Nelson Mandela and the beginning of formal negotiations.

A few months later the South African Law Commission, an official government sponsored body, issued its own “*Interim Report on Group and Human Rights*”.¹³ What is clear from these two documents is the distance that existed between the two sides and their imagination of what role rights would play in a future South Africa. On the one hand the ANC’s Draft described “a Bill of Rights [as becoming] the fundamental anti-apartheid document”¹⁴ by protecting basic rights and freedoms. These the ANC described as not being created by the Constitution but rather as “rights which have been gained in struggle” and they included social, economic and educational rights which were seen as “responding to the social indignities and inequalities created as a direct result of State policies under apartheid.”¹⁵ On the other hand, the Law Commission’s Report explicitly rejected the inclusion of social and economic rights and instead emphasized “group rights” through its proposed “freedom of association” provision that would allow “groups” to disassociate, by prohibiting the legislature from “compel[ling] individuals or groups to associate with other individuals or groups”¹⁶ as well as proposing extensive guarantees for property rights and what it termed “economic enterprise”.¹⁷

These were incompatible proposals, and it would take another three years of negotiations and continuing violence around the country before the first elections

12 Sachs, Albie, *Oliver Tambo’s Dream*, (African Lives: Cape Town) 2017, p. 13.

13 South African Law Commission, *Interim Report on Group and Human rights*, (Government Printers: Pretoria), 1991.

14 ANC Constitutional Committee, *A Bill of Rights for a New South Africa* (Centre for Development Studies, University of the Western Cape), 1990, p. iii.

15 ANC Constitutional Committee, *A Bill of Rights for a New South Africa* (Centre for Development Studies, University of the Western Cape), 1990, p. ix.

16 South African Law Commission, *Interim Report on Group and Human rights*, (Government Printers: Pretoria), 1991, Article 17(b), p. 691.

17 South African Law Commission, *Interim Report on Group and Human rights*, (Government Printers: Pretoria), 1991, Article 23, p. 694.

in April 1994 under a new ‘interim’ Constitution. While the democratic transition in South Africa is often celebrated as a peaceful transition from apartheid, we should always remember that the period between 1985 and 1994 was the most violent period in the struggle against apartheid with around 25,000 lives lost. Thus even as the regime was forced to negotiate the end of apartheid it attempted to forestall the rising political authority of first the ANC-aligned United Democratic Front and then the newly unbanned ANC. It was in this context that the debate over the protection of rights began and then continued through the first democratic elections and into the Constitutional Assembly.

A key feature of the democratic transition in South Africa was its two-stage constitution-making process. The first phase involved two sets of what political scientist Andrew Arato terms roundtable talks.¹⁸ First, the Convention for a Democratic South Africa, which broke down in acrimony at its second session in May 1992. Second, the Multi-Party Negotiating Forum which survived the assassination of a popular ANC and Communist Party leader, Chris Hani, in April 1993 by finally setting an election date and agreeing to an elected Constitutional Assembly. An important aspect of this first phase was agreement on a set of constitutional principles that the parties agreed would be binding on the Constitutional Assembly.

The second phase, provided for in the ‘interim constitution’, saw the creation a Constitutional Assembly, formed by members of both houses of the newly elected democratic parliament, which had two years from its first sitting to produce a ‘final’ Constitution. If it failed to agree on the ‘final’ Constitution by a two-thirds majority within the required time, the ‘interim’ Constitution provided for a set of deadlock breaking mechanisms. These included referring a draft passed by simple majority to a panel of constitutional experts, a possible national referendum requiring a 60 percent majority, and if that had failed a completely new election that would produce a new Constitutional Assembly which would need only a 60 percent majority to adopt a ‘final’ Constitution. As it happened these deadlock breaking mechanisms were never required, and the Constitutional Assembly adopted the text of the ‘final’ Constitution with an 86 percent majority.

The constitutional principles, that had been agreed to in the Multi-Party Negotiating Forum and formally bound the Constitutional Assembly, provided with respect to constitutional rights that “[e]veryone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided

18 Arato, Andrew, *The Adventures of the Constituent Power*, (Cambridge University Press), 2017.

for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to . . . the fundamental rights contained” in the ‘interim’ Constitution.¹⁹ Significantly, this requirement for the recognition of rights was extremely broad. In the end, the Constitutional Court, after sending the draft Constitution back to the Constitutional Assembly on a number of grounds,²⁰ applied all 34 constitutional principles to certify that the Constitutional Assembly had in fact abided by the agreed principles.²¹

3. Alternative imaginaries – rights to Property and access to Social and Economic resources

Participants in the negotiations and debates over a future constitution in South Africa in the late 1980s and early 1990s looked to countries around the globe for examples of constitutional structures, rights and mechanisms that could be drawn on to address their different concerns. In considering the range of options that were advanced at different moments in the constitution-making process it becomes clear that the constitutional imaginations of the different parties, activists, and lawyers involved in the process were shaped and reshaped by how they understood the different examples from foreign jurisdictions and how they imagined these options would fare in South Africa’s political, social, and institutional environment. Before exploring these debates, it is necessary to briefly describe the available alternatives.

While property rights have been part of written constitutions from their earliest manifestations, debates over whether to include social and economic rights continue. Despite this historical legacy, it is important to recognize that the constitutional recognition of property rights is not uniform. While Professor James Ely has argued that “historically, property ownership was viewed as establishing the economic basis for freedom from governmental coercion and the enjoyment of liberty” he demonstrates in his book *The Guardian of Every Other Right* how property rights, even in societies committed to the protection of property, have been constantly transformed by social and economic developments.²² Today there

19 Constitution of the Republic of South Africa, 1993, Schedule 4, II.

20 Chairperson of the Constitutional Assembly, ex p: Certification of the Constitution of the Republic of South Africa, re 1996 (4) SA 744 (CC).

21 Chairperson of the Constitutional Assembly, ex p: Certification of the Constitution of the Republic of South Africa, re 1996, 1997 (2) 97 (CC).

22 Ely, James W., Jr., *The Guardian of Every Other Right* (Oxford University Press) 1992.

exists a wide range of ways in which constitutions protect and regulate property rights. This variation extends from the explicit rejection of constitutional property rights, such as in the 1982 Canadian Charter of Rights and Freedoms, to a variety of alternative formulations, including recognition of the social function of property in the 1949 German Basic law on the one hand, and on the other extreme, the constitutional limitation of the state's sovereign power to expropriate in Zimbabwe's 1979 independence constitution. In that case the new post-colonial government's powers of expropriation were subjected to the principle of willing buyer-willing seller, thus limiting the scope of land reform to those properties the government could afford to purchase on the open market from colonial settlers who were willing to sell. Significantly, such a restraint on the ability of the government to address access to land – a core demand of the liberation war – together with high levels of inequality proved to be politically unsustainable -- resulting in social and political conflict, economic collapse, and ultimately, further constitutional turmoil.

Compared to the long history of constitutionally protected property rights, the inclusion of social and economic rights is of a more recent vintage. In fact, the first comprehensive articulation of social and economic rights was by United States President Franklin Delano Roosevelt in his 1944 State of the Union Message to Congress in which he stated that “we have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence.”²³ Among the rights listed in his proposal for a Second Bill of Rights were: rights to work, a minimum wage, housing, medical care, security in old age and a good education. Significantly, FDR explicitly argued that these rights should be kept away from the judiciary who he did not trust after they had struck down his New Deal legislation in the 1930s. While Roosevelt's Second Bill of Rights was never formally adopted, many of its promises would be included in subsequent legislation in the form of Social Security and Medicare, that specifically benefitted the elderly. His broader vision of social and economic rights would also be reflected in the 1948 Universal Declaration of Human Rights and the subsequent United Nations International Convention on Social, Economic and Cultural Rights.

When it comes to national constitutions, the inclusion of social and economic rights has been an iterative process. In the first instance these rights were included not as fully justiciable rights but rather as principles meant to guide the formation

23 Franklin Delano Roosevelt, State of the Union Message to Congress, January 11, 1944, available at, <https://www.fdrlibrary.org/address-text>

of policy by democratic governments. This first occurred in the case of the Irish Constitution of 1937 when social and economic rights were included in the form of Directive Principles of State Policy. Thereafter, constitution-makers in India (1949), Portugal (1975), Brazil (1988), Namibia (1990) and Ghana (1992) recognized these rights by adopting either similar forms of directive principles or in the case of Brazil, simply including these rights in different sections of the Constitution. Since the mid-1990s, various countries, beginning with South Africa, have taken a further step by explicitly recognizing the justiciability of these rights.

Thus, despite their relative youth, the forms of recognition given to socio-economic rights are also quite diverse and the different experiences of enforcement have fueled a growing international debate over the recognition of these rights. As a result, we can identify three distinct forms by which social and economic rights have been constitutionalized: first, through the inclusion of “directive principles”; second, by the recognition of individual claims to specific rights, such as the right to access health care using the “*tutela*” procedure; and third, through the inclusion of social and economic rights as justiciable rights within constitutional bills of rights. Even within each of these three broad categories, countries and courts vary in their approaches so that there is an increasingly rich set of experiences from which to learn about the effects of constitutionalizing these rights.

4. The assertion of alternative constitutional imaginations in South Africa

If we examine the initial proposals of both the ANC and the apartheid government’s Law Commission, we can identify two very different visions based on alternative constitutional imaginations. In the case of the ANC in 1990 we see very detailed protections for social and economic rights including: freedom from hunger; the right to shelter; rights to education, to health, to work, to a minimum income and welfare rights. Furthermore, the *ANC Draft Bill of Rights* contained two articles that sought to ensure that the bill of rights could be used to transform the society. The first provision guaranteed the use of affirmative action, stating that “nothing in the Constitution shall prevent the enactment of legislation, or the adoption by any public or private body of special measure of a positive kind designed to procure the advancement and opening up of opportunities, including access to education, skills, employment and land, and the general advancement in social, economic and cultural spheres, of men and women who in the past have

been disadvantaged by discrimination.”²⁴ This article served as an exception to all other provisions of the Constitution, stating that “no provision of the Bill of Rights shall be construed as derogating from or limiting in any way the general provisions of this article.”²⁵

A second article entitled “positive action” sought to place direct duties on the state to further the explicit transformational goals of the Bill of Rights. Among its provisions was the requirement that “all organs of the State at the national, regional and local levels shall pursue policies and programmes aimed at redressing the consequences of past discriminatory law and practices, and at the creation of a genuine non-racial democracy in South Africa.”²⁶ Providing more detail, another section states that “such policies shall include the implementation of programmes aimed at achieving speedily the balanced structuring in non-racial form of the public service, defence and police forces and the prison service.”²⁷ The same article also called for the “judiciary to be transformed in such a way as to consist of men and women drawn from all sectors of South African society.”²⁸ It also required that when “taking steps to correct patterns or practices of discrimination, special attention shall be paid to rectifying the inequalities to which women in South Africa have been subjected, and to ensuring their full, equal, effective and dignified participation in the political, social, economic and cultural life of the nation.”²⁹ Finally, the “positive action” article empowered the legislature to require “non-governmental organizations and private bodies to conduct themselves in accordance with the . . . principles” enunciated in the article.³⁰

While the social and economic rights promised in the ANC Draft Bill of Rights were subject to the limitations common in the equivalent international instruments, including the provision that the “State, shall, to the maximum of

24 ANC Constitutional Committee, A Bill of Rights for a New South Africa (Centre for Development Studies, University of the Western Cape), 1990, Article 13(1), p. 28.

25 ANC Constitutional Committee, A Bill of Rights for a New South Africa (Centre for Development Studies, University of the Western Cape), 1990, Article 13(2), p. 28.

26 ANC Constitutional Committee, A Bill of Rights for a New South Africa (Centre for Development Studies, University of the Western Cape), 1990, Article 14(5), p. 30.

27 ANC Constitutional Committee, A Bill of Rights for a New South Africa (Centre for Development Studies, University of the Western Cape), 1990, Article 14(6), p. 30.

28 ANC Constitutional Committee, A Bill of Rights for a New South Africa (Centre for Development Studies, University of the Western Cape), 1990, Article 14(7), p. 30.

29 ANC Constitutional Committee, A Bill of Rights for a New South Africa (Centre for Development Studies, University of the Western Cape), 1990, Article 14(8), p. 30.

30 ANC Constitutional Committee, A Bill of Rights for a New South Africa (Centre for Development Studies, University of the Western Cape), 1990, Article 14(9), p. 31.

its available resources, undertake appropriate legislative and executive action in order to achieve the progressive realization of basic social, educational, economic and welfare rights for the whole population”,³¹ the individual provisions included additional details that were supported by the requirement that “State action shall establish standards and procedures whereby all men, women and children are guaranteed by law a progressively expanding floor of enforceable minimum rights, with special attention to nutrition, shelter, health care, education and income.”³² Furthermore, this Article also stated that “in order to achieve a common floor of rights for the whole country, resources may be diverted from richer to poorer areas and timetables may be established for the phased extension of legislation and minimum standards from area to area.”³³ Specific rights such as the right to shelter, provided explicit details explaining both positive and negative aspects of the right. Not only was the state to be under a duty to “embark upon and encourage an extensive programme of house-building” but the state was also required to “take steps to ensure that energy, access to clean water and appropriate sewage and waste disposal are available to every home.”³⁴ These provisions make clear how expansive the ANC’s constitutional imagination was and how its proposed draft sought to use the constitution to transform the society.

In contrast to this vision, the South African Law Commission questioned whether social and economic rights could be included in any way at all. In its report the Commission stated that it “avoids any attempt to make these rights justiciable and enforceable in a positive way, since this will prove to be judicially futile and may plunge the country into a serious constitutional crisis.”³⁵ It did suggest that “quite a number of these second generation rights . . . can and must, like the first generation rights, be protected in a ‘negative’ way – so that they cannot be infringed [upon] by the state.”³⁶ In effect the Commission suggested that the

31 ANC Constitutional Committee, A Bill of Rights for a New South Africa (Centre for Development Studies, University of the Western Cape), 1990, Article 10(2), p. 18.

32 ANC Constitutional Committee, A Bill of Rights for a New South Africa (Centre for Development Studies, University of the Western Cape), 1990, Article 10(3), p. 18.

33 ANC Constitutional Committee, A Bill of Rights for a New South Africa (Centre for Development Studies, University of the Western Cape), 1990, Article 10(4), pp. 18-19.

34 ANC Constitutional Committee, A Bill of Rights for a New South Africa (Centre for Development Studies, University of the Western Cape), 1990, Article 10(9) and (10) p. 20.

35 South African Law Commission, Project 58: Group and Human Rights, *Summary of Interim Report*, (Government Printers: Pretoria), August 1991, p. 19.

36 South African Law Commission, Project 58: Group and Human Rights, *Summary of Interim Report*, (Government Printers: Pretoria), August 1991, p. 19.

state should be prohibited from interfering with individuals or employees organizations which seek to provide for their own social and economic security “in accordance with supply and demand” or “to claim the available state assistance.”³⁷ This approach was reflected in the ‘interim’ constitution’s protection of education rights which did not guarantee access to equal education but rather protected the rights of those with resources to create private schools so long as they did not discriminate on the basis of race.

Facing demands to address the legacy of enforced racial inequality, the Law Commission did provide for an exception to their proposed right to equality before the law, in which the “highest legislative body” would be allowed “by legislation of general force and effect” to “introduce such programmes of affirmative action and vote such funds therefor as may reasonable be necessary to ensure that through education and training, financing programmes and employment all citizens have equal opportunities of developing and realizing their natural talents and potential to the full.”³⁸ In contrast to this very constrained vision of social and economic rights the Commission presented a more rigorous protection of property, stating that “everyone has the right individually or jointly with others to or to become the owner of private property or to have a real right in private property or to acquire such right or to become entitled to any other right.”³⁹ Even though the Commission recognized that the legislature “may authorize the expropriation of any property” this would need to be “in the public interest and against payment of just compensation, which in the event of a dispute shall be determined by a court of law.”⁴⁰ In contrast to the ANC’s imagination of a transformative bill of rights, the Commission’s vision was framed by a constitutional imagination of preservation, in which existing entitlements should not be disturbed even if the state would be allowed, using general funds, to provide some assistance to those who had been historically discriminated against – what the Commission considered justifiable “reverse discrimination” so long as it was a limited, remedial form of affirmative action.

37 South African Law Commission, Project 58: Group and Human Rights, *Summary of Interim Report*, (Government Printers: Pretoria), August 1991, p. 19.

38 South African Law Commission, Project 58: Group and Human Rights, *Summary of Interim Report*, (Government Printers: Pretoria), August 1991, p. 19.

39 South African Law Commission, The Bill Proposed by the South African Law Commission, Article 22(a), *Interim Report on Group and Human rights*, (Government Printers: Pretoria), 1991, p. 693.

40 South African Law Commission, The Bill Proposed by the South African Law Commission, Article 22(b), *Interim Report on Group and Human rights*, (Government Printers: Pretoria), 1991, p. 693.

3. The reshaping of constitutional imaginations and the 'final' Constitution

It was under these conditions of conflicting constitutional imaginations that the Constitutional Assembly began its work. Many assumed that the Bill of Rights that had been included in the 'interim' Constitution and which the Constitutional Principles required be given "due consideration" would simply be adopted unchanged into the final constitution. This assumption was however mistaken since it failed to consider how the 'interim' Constitution's Bill of Rights had been adopted in the Multi-Party Negotiating Forum over the concerns of the ANC, and the fact that it failed to include any of the social and economic rights that the ANC felt were central to the constitutional project to overcome the legacies of apartheid. In fact, the 'interim' Constitution's bill of rights not only failed to include social and economic rights, it also sought to protect property to a degree incompatible with the need to address the vast racial inequalities created by apartheid. Instead, the 'interim' Constitution sought to address the claims for social transformation by creating exceptions to its equality clause that would permit "measures designed to achieve the adequate protection and advancement of persons or groups . . . disadvantaged by unfair discrimination" and gave "every person or community dispossessed of rights in land" under discriminatory laws the right to claim restitution" through a process established in a separate section of the 'interim' Constitution.⁴¹ While this land claims process would lead to a significant and still ongoing process of land restitution in South Africa, it was limited to those who had been forcibly removed from the land after 1913, a date over two hundred years after the process of colonial dispossession had begun.

From the ANC's perspective, whose members made up around 64 percent of the Constitutional Assembly, the bill of rights in the 'interim' Constitution was never meant to be the final bill of rights. In fact, the ANC had sought to limit the 'interim' Constitution to only those rights necessary to ensure fair participation in the first democratic elections. As a result, the question of what rights to include and more specifically, whether to protect property rights in the constitution at all, became central to the debates and negotiations in the Constitutional Assembly. On the one hand, the parties representing the old order insisted that property rights had to be protected and they continued to question whether social and economic rights could be included in the Bill of Rights. On the other hand, the ANC questioned whether property rights, beyond the protection of individual

41 Constitution of the Republic of South Africa, 1993, Sections 8(3)(a) and (b).

possessions should be protected at all. The ANC also demanded that social and economic rights be included as fully justiciable rights. While the inclusion of social and economic rights, framed in terms similar to their protection in international human rights documents faced only limited resistance, the debates over the protection of property rights and how they should be balanced with the need to address access to land in particular, would continue throughout the Constitutional Assembly's life. Even the agreement achieved at the very last minute would be challenged during the Certification process in the Constitutional Court where some party's argued that the protection of property was too weak and violated the constitutional principles that bound the Constitutional Assembly.

4. Property, Land, and socio-economic rights in the 'final' 1996 Constitution

If we consider the rights to property and the socio-economic rights included in the 1996 South African Constitution we can see how the imaginations of the contending parties were reshaped as they sought formulations which would be acceptable to at least two-thirds of the constitutional assembly and which they imagined would produce a sustainable constitutional order for the new democracy. While the ANC's demand that the state have a constitutional duty to address the legacies of apartheid was reimagined through the lens of justiciable social and economic rights as well as rights to land restitution, land reform and a right to equitable access to land, the old order accepted that there would be no positive right to property so long as the expropriation of property would be compensated. When it came to compensation however the compromise allowed each side to imagine that the language of the clause ensured that their particular vision remained alive, while leaving conflicts to be resolved in the context of specific cases that would come before the courts in the future. This was achieved by the listing of a series of factors that the courts would have to consider when determining just compensation including: "the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property"; and finally, "the purpose of the expropriation."⁴² This formulation was neither as absolute as the old regime wanted nor as flexible as the ANC had initially sought.

When it came to social and economic rights, the ANC achieved its goal of having them included as justiciable rights however the form they took was

42 Constitution of the Republic of South Africa, 1996, Sections 25(3)(a)-(e).

now much closer to how they are guaranteed in the International Convention, including significant internal limitations based on the availability of resources. The ANC's original conception of "a progressively expanding floor of enforceable minimum rights"⁴³ was reimagined and reframed as requiring the state to "take reasonable legislative and other measures within its available resources, to achieve the progressive realization" of these rights.⁴⁴ At the same time the parties in the Constitutional Assembly who were opposed to the inclusion of social and economic rights reimagined that certain of these rights, to education and rights protecting cultural, religious and linguistic communities could further their interests. In the case of the right to education, for example, the assumption that there was a right to "educational institutions based on a common culture, language or religion"⁴⁵ which was included in the 'interim' constitution and thought to guarantee state funding for institutions claiming a specific culture, was reimagined as two separate rights. First, everyone has a right to education in a language of their choice, but only so long as it is "reasonably practicable" taking into account equity, practicability, and "the need to redress the results of past discriminatory laws and practices."⁴⁶ Second, the right to establish educational institutions was now generalized away from language, culture and religion and instead guaranteed to everyone "at their own expense" so long as they: do not discriminate on the basis of race; maintain standards not inferior to public educational institutions; and register with the state."⁴⁷

5. The transformation of both property and socio-economic rights since 1996

Democratic South Africa is no longer an abnormal country, however the legacies of apartheid continue to produce a land of vast inequalities in which access to property and other economic resources remain a source of social and political conflict. It is in this context that we can explore the role that constitutional rights have played in civilizing conflicts over access to resources. If pre-constitutional

43 ANC Constitutional Committee, *A Bill of Rights for a New South Africa* (Centre for Development Studies, University of the Western Cape), 1990, Article 10(3).

44 Constitution of the Republic of South Africa, 1996, Sections 26(2) and 27(2).

45 Constitution of the Republic of South Africa, 1993, Section 32(c).

46 Constitution of the Republic of South Africa, 1996, Sections 29(2)(b) and (c).

47 Constitution of the Republic of South Africa, 1996, Sections 29(3)(a)-(c).

property rights were considered absolute and land rights only accessible based on race, the last twenty-five years have, according to Stuart Wilson, a housing rights lawyer in Johannesburg, seen “some of the most basic structures of property law” undergo “substantial alteration . . . and that these alterations have created spaces in which ordinary people have begun to reshape the terms on which they access land, tenure and credit.”⁴⁸ Despite the fact that over a million people were evicted from white owned farms in the first ten years after 1994, a recent case decided by the Constitutional Court demonstrates how property rights are being reimagined. In this case an owner of land attempted to prevent a women, a former employee on the farm, who had long occupied a dwelling on the property, from making basic improvements so that she could live in dignity. While Ms Daniels was protected by the 1997 Extension of Security of Tenure Act (ESTA) from being evicted, the owner of the property sought to force her to leave by refusing her permission to make improvements, even as the dwelling fell into increasing disrepair. Holding that Ms Daniels had the right to make improvements the Constitutional Court rejected the argument of the land owner that it would be unconstitutionally imposing a positive obligation to pay compensation for the improvements if the owner was later able to legally evict Ms Daniels. The decision recognized that “people requiring protection” as occupiers of land “more often than not live on land owned by private persons” and acknowledged that in cases where it has “placed a direct, positive obligation on a private party by enjoining it to continue to house illegal occupiers who – if evicted immediately – would have been rendered homeless” it had placed an “onerous obligation on a private party.”⁴⁹ Such temporary obligations on private parties may however be contrasted with other cases in which the Court required the government to expropriate and pay compensation to a land owner after the property had been occupied by thousands of squatters and where the police refused to enforce the eviction order obtained by the owner.⁵⁰

The constitutional regulation of property rights has also enabled a reimagining of alternatives by both the government and social movements struggling against evictions. In the case of a social movement who at first rejected going to the courts and relied instead on land occupations, the adoption by a regional government of draconian anti-squatter laws led them to reimagine their strategy, resulting in a victory in the Constitutional Court when the Court declared the legislation

48 Wilson, Stuart, *Human Rights and the Transformation of Property* (Juta & Co), 2021, p. 11.

49 *Daniels v Scribante* 2017 (4) SA 341 (CC) paras 49 and 53.

50 *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40.

unconstitutional.⁵¹ In another case the Constitutional Court agreed that government could legally evict approximately 20,000 residents from an informal settlement in Cape Town, however the Court also required that the government provide alternative accommodation to everyone evicted and that seventy percent of the low income houses that the government planned to build on the site had to be made available to the former residents.⁵² Once faced with the costs of providing alternative accommodation the authorities reimagined their approach and so abandoned their plans to evict the residents⁵³ and have since engaged in a longer process of *in situ* upgrading which has produced 14,000 houses accommodating 70,000 people on the site.⁵⁴

Finally, in the same way that property rights have been reimagined in the new constitutional order, so has the struggle over access to other social and economic resources been reshaped through a complex pattern of political and legal engagements. While communities continue to demonstrate against the failure of service delivery by local governments, activists and social movements have used the legal process to challenge government failures or refusal to address social and economic needs. In the case of health care for example the courts were soon faced with a painful choice as an individual with kidney failure, asked the courts to ensure he could gain access to life saving renal dialysis. Given the shortage of dialysis machines the Court held that he was not entitled to relief and his death shortly thereafter seemed to confirm the arguments of those who questioned the enforceability of such rights.⁵⁵

Instead of focusing on individual claims to health care the Treatment Action Campaign (TAC), a social movement committed to challenging the government's failure to provide access to antiretroviral treatment in the face of a devastating HIV/AIDS pandemic, adopted a strategy that built on the Constitutional Court's decision in an early housing case that required the government to at least have a reasonable plan to address urgent social and economic needs.⁵⁶ In bring this

51 *Abahlali Basemjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC).

52 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC).

53 Ngcukaitobi, Tembeka, *Land Matters*, (Penguin Books) 2021, p. 224; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2011 (7) BCLR 723 (CC).

54 Chauke, Amukelani, N2 Gateway project provides new homes, Vuk'uzenzele (Government Communications) November 2015, available at: <https://www.vukuzenzele.gov.za/n2-gateway-project-provides-new-homes> (accessed October 3, 2022).

55 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC).

56 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

case the TAC focused on the question of mother-to-child transmission of HIV and asked that the government immediately give HIV-positive mothers access nevirapine, a drug that was available to the government at no cost and which was already being used in medical trials and was highly effective in preventing transmission of HIV to newborns. In its decision the Constitutional Court held that the government was required to provide the drug in public hospitals that had the capacity to do so.⁵⁷ The political effect of the litigation was to break the government's refusal to acknowledge that HIV/AIDS had become a manageable disease and that it was the government's duty to provide access to antiretrovirals. Within a relatively short time South Africa had the largest HIV/AIDS treatment program in the world and a pandemic that was devastating communities across the country was slowly brought under control.

As the new government has been forced to repeatedly reimagine its policies and actions so have social movements and activist lawyers been required to adjust their vision of the scope and application of the constitution's protection of social and economic rights. On the one hand, successful cases requiring the government to meaningfully engage with communities facing eviction or preventing the government from discriminating against non-citizen social welfare recipients, have encouraged claimants but overwhelmed the small numbers of lawyers who have been serving these communities. On the other hand, the litigants who succeeded in persuading a lower court to find that the government had a constitutional duty to provide a minimum amount of water, were sorely disappointed when the Constitutional Court upheld the water utility's program on the grounds that it was reasonable even though it did not guarantee a minimum amount. In this case the protection of social and economic rights was reimaged as a process in which instead of guaranteeing a minimum core of the right, the Court focused on the concept of reasonableness arguing that the right to sufficient water "will vary over time and context."⁵⁸ Detailing how these positive rights would be enforced by the Courts the Constitutional Court stated that: first, "if government takes no steps to realise the rights, the courts will require the government to take steps"; second, if the "measures adopted are unreasonable, the courts will... require that they be reviewed so that they meet the constitutional standard of reasonableness"; and third, "the obligation of progressive realization imposes a duty upon government continually to review its policies to ensure that the achievement of the right is

57 Minister of Health v Treatment Action Campaign 2002 (5) SA 721 (CC).

58 Mazibuko (Lindiwe) v City of Johannesburg 2009 ZACC 28 (CC), para. 60.

progressively realised.”⁵⁹ Highlighting the role of litigation in forcing the authorities to provide information and engage with claimants the Constitutional Court argued that “in this way, the social and economic rights entrenched in our Constitution may contribute to the deepening of democracy” by allowing citizens to hold the government accountable both through the ballot box and through litigation.⁶⁰

Conclusion

While the ANC was able to insist on the inclusion of social and economic rights in the Constitutional Assembly and the representatives of the old order were able to insist on the inclusion of a property clause in the final Constitution, the process of constitution-making required both sides to reimagine their demands in order to reach a more or less inclusive agreement on a new Constitution. Despite continuing conflict and significant disagreement, the outcome has been a new constitutional order that has proven to be sustainable despite being buffeted by a series of health, economic and political storms. As a “normal” country South Africa faces continuing social and economic challenges but for the last twenty-five years the Constitution has played a significant role in keeping open the space for continuing contestation. This has in turn provided the grist for there to be a continuing reimagining of relations of property and access to social and economic resources in a way which compared to the past, has to an important extent, civilized social and political conflict.

59 *Mazibuko (Lindiwe) v City of Johannesburg* 2009 ZACC 28 (CC), para. 67.

60 *Mazibuko (Lindiwe) v City of Johannesburg* 2009 ZACC 28 (CC), para. 71.