

CHALLENGING CONSTITUTIONALISM IN POST-APARTHEID SOUTH AFRICA

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ABSTRACT

Twenty years after the adoption of South Africa's "final" post-apartheid constitution there are increasing demands for constitutional change. Political parties, both in and out of power, challenge the legitimacy of the constitutional order and assert that its failures are a product of its origins rather than its implementation. This paper explores the attack on post-apartheid constitutionalism as a form of nullification in which critics are using both the constitution's origins and the failures of governance over the last twenty years to reject the existing constitution and to demand a new order. Arguing that the constitution is fundamentally flawed, these critics question the legitimacy of the constitution implying that nullifying the present constitutional order will offer a means to address the legacies of apartheid that continue to dominate the daily lives of most South Africans.

KEYWORDS: *Apartheid, Constitutional Principles, Constitutionalism, Expropriation, Post-Apartheid, Post-Colonial, South Africa*

TWENTY YEARS after the adoption of South Africa's "final" post-apartheid constitution there are increasing demands for constitutional change. Political parties, both in and out of power, challenge the legitimacy of the constitutional order and assert that its failures are a product of its origins rather than its implementation.

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From Julius Malema and his Economic Freedom Front (EFF) calling for radical redistribution to the ruling African National Congress (ANC) suggesting the need for a “second transition,” the claim is that present failings in governance and particularly increasing inequality is attributable to the “negotiated” status of the Constitution. While these claims fail to distinguish between the “interim” 1993 Constitution, which was the product of a negotiated transition from Apartheid, and the “final” 1996 Constitution that was produced by a democratically-elected Constitutional Assembly, the resulting challenge to the legitimacy of the constitutional order, and constitutionalism more generally, remains.

Critical debate over South Africa’s post-colonial legal order has increasingly devolved into two broad camps. On the one hand there is anxiety over what are perceived to be increasing threats to a “liberal” legal order that was the celebrated outcome of the 1994 “miracle” credited with saving the country from what many political analysts predicted would be a “blood bath,” or as Mahmood Mamdani noted, “[I]f Rwanda was the genocide that happened, then South Africa was the genocide that didn’t” (2001, 185). On the other hand there is increasing criticism of what is perceived to be the “liberal” legal order created by the historic transition from apartheid and now blamed for its failure to address the legacies of racism and economic inequality that survived the democratic transition. These latter concerns are reflected both in discussion within the ruling ANC about the need for a “second transition” and in the patterns of increasing political protest and conflict that erupt across the South African landscape—from Parliament and social media to the streets of towns and cities across the land.

Central to these divergent views of South Africa’s post-colonial legal order is a questioning of the “negotiated revolution” that enabled the democratic transition in South Africa. Speaking to the Oxford Union in late November 2015 Julius Malema, former President of the ANC Youth League and now leader of the opposition EFF in South Africa’s Parliament, criticized the legacy of Nelson Mandela stating that, “the Nelson we celebrate now is a stage-managed Mandela who compromised the principles of the revolution, which are captured in the Freedom Charter.” Explaining this characterization of Mandela and his assertion that, “[t]he deviation from the freedom charter was the beginning of selling out of the revolution,” Malema argued that while “perhaps it was necessary to have a cooling off period . . . we cooled off for too long—21 years.” The EFF, he continued, is “not going to compromise like Madiba did” (Meintjies 2015).

Less rhetorical but perhaps more threatening, given that the ANC remains the dominant political party in South Africa, have been the persistent attacks on the judiciary from within the ruling party as well as tensions over failure to follow the

laws governing state procurement, to respond to court orders meant to remedy government failures, or simple intransigence in the face of challenges to government malfeasance such as the refusal, until very recently, to properly address the findings of the Public Protector in the cases of Nkandla (in which President Zuma was found to have personally benefitted from security upgrades to his private residence) and Hlaudi Motseneng, the chief operating officer of the state broadcaster, the SABC (who was appointed despite not having the required formal qualifications for the position). It is in this context that concerns over the “rule of law” extend beyond individual legal challenges and begin to raise questions about constitutionalism and democracy in post-apartheid South Africa.

This paper explores the attack on post-apartheid constitutionalism as a form of nullification in which critics are using both the constitution’s origins and the failures of governance over the last twenty years to reject the existing constitution and to demand a new order. Arguing that the constitution is fundamentally flawed these critics from both the political opposition and from within the governing party question the legitimacy of the constitution implying that nullifying the present constitutional order will offer a means to address the legacies of apartheid that continue to dominate the daily lives of most South Africans. Constitutionalism emerged as an integral part of South Africa’s democratic transition both enabling the transition to democracy and framing the future constitutional order. A key element in this turn to constitutionalism was the debate over property rights and so this paper will focus in part on the question of expropriation as an example of how constitutionalism and democracy are increasingly entangled in struggles over the future of constitutionalism in South Africa. Before addressing this challenge to constitutionalism, the paper will first describe the emergence and role of constitutionalism in South Africa’s democratic transition. Second, the paper explores the rising challenges to the constitution and role of the courts which gained the power of constitutional review as a product of the embrace of constitutional supremacy. Finally, the paper uses the example of the debate over the protection of property rights to demonstrate the tension between the rhetoric of nullification and the legitimacy of the post-apartheid constitutional order.

TRANSITIONAL CONSTITUTIONALISM

While the ANC’s original conception of a constitutional order to dismantle apartheid—including a duty in Article 14(5) 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 laws and practices” (ANC Constitutional

Committee 1990, 30)—may have provided a promising basis of future legitimacy in a democratic South Africa, the ANC did not have the power to secure its immediate adoption. Instead, the transition unfolded through a series of negotiations held in the shadow of growing violence by those opposed to democracy. On the one hand the ANC, relying on the 1989 OAU-endorsed Harare Declaration as a blueprint for the democratic transition, called for particular steps—an all-party conference, the establishment of an interim government, and the holding of elections for a constituent assembly to draw up a new constitution. On the other hand, the apartheid government argued that legal continuity was essential and that any negotiated agreements had to be legally adopted by the undemocratic tricameral-Parliament, as required by the existing 1983 Constitution. Despite continuing violence the convening of multiparty talks, at the Convention for a Democratic South Africa (Codesa) in late 1991, gave the impression that the process of transition was well under way. However, it soon became clear that the government was determined to retain control of the process of transition and within six months the talks had broken down.

As a prerequisite to agreement on the nature of a future constitution-making body the apartheid government began to insist there be prior agreement that any future constitution be premised on a strictly “federal” system of government based on the Balkanization of the country into a number of all-but-independent regions. This demand and the regime’s insistence that a new constitution be adopted by a seventy-five percent majority of a proportionally elected constitution-making body, as well as seventy-five percent of regionally elected delegates, led to the collapse of the second plenary session of Codesa in May 1992. The response of the ANC and its allies in the labor movement and the South African Communist Party was to mobilize their supporters in a campaign of mass action demanding a democratically-elected constituent assembly. This ANC initiative was met with an upsurge of violent attacks on communities culminating in the Boipatong massacre in June 1992. In response the ANC announced a formal suspension of negotiations and demanded that the government take action to halt the escalating violence.

With negotiations on the brink of collapse, the ANC and the government reached agreement in the Record of Understanding on 26 September 1992, setting the scene for the creation of a new negotiating process. The apartheid regime’s concession of an elected constituent assembly and the ANC’s acceptance of a government of national unity under a transitional constitution provided the key elements of this agreement. By accepting a democratic constitution-making process, the apartheid government made it possible for the ANC to agree to the adoption of a negotiated interim constitution which would entrench a government of national

unity for five years and ensure the legal continuity the government required. The architecture of this agreement, reflecting continuity and change, allowed the multi-party negotiations—which eventually became known as the Multi-Party Negotiating Forum—to resume at the World Trade Center outside Johannesburg in early 1993. It was this process that led to the adoption of the 1993 “interim” Constitution and the first democratic elections in April 1994.

The consequences of a negotiated process were evident in the “interim” Constitution of 1993. In some instances, this led to the inclusion of rights unique to the South African transition, such as the right to economic activity and the employer’s right to lock out workers in the context of collective bargaining. In other aspects it led to a generous extension of rights and clarity of substantive issues such as the explicit recognition of sexual orientation among the grounds upon which unfair discrimination is prohibited; the specific provision guaranteeing affirmative action programs designed to enable full and equal enjoyment of rights; and the right to restitution of dispossessed land rights. Other consequences included the incorporation of conflicting elements and conceptions of the constitutional order being established. On the one hand, there was the tension between the guarantee of open and accountable government and the guarantee of existing civil service positions of bureaucrats whose training and professional culture had been opposed to openness and accountability. On the other hand, there was the inclusion of provisions empowering regions to establish their own constitutions subject to the terms of the Constitution; consociationalism was enforced at the local level through vetoes over local government budgets; and a Volkstaat Council was created whose constitutional mandate it was to consider the establishment of a “white homeland” or Volkstaat which its proponents would understand to be constitutionally autonomous from government at both the national and regional level.

Furthermore, confusion about the comparative meaning of particular constitutional terms led, for example, to the inclusion of a standard of permissible expropriation—“public purpose”—less empowering of government action than what was intended. The technical committee had incorrectly reported that the public purpose standard gave government more expansive powers of expropriation as compared with the public interest standard (Chaskalson 1995, 237–8). The outcome of this negotiated process was an “interim” Constitution which spliced together the different political and constitutional understandings of at least the three major power blocs engaged in the process. The effect was a Constitution which embraced competing constitutional traditions and principles (Klug 1994, 19–28). While this set the stage for vigorous debate over the true nature of the Constitution, these same tensions were extended into the next round of constitution-making

through the adoption of the Constitutional Principles set out in Schedule 4 to the Constitution, which were to guide the Constitutional Assembly in the writing of the “final” Constitution. Recognition of the importance of the Constitutional Principles deflected some of the different negotiating parties’ concerns with the “interim” constitution as they pressed to get their version of the future into Schedule Four.

The thirty-four Constitutional Principles that made up Schedule 4 were the key to South Africa’s two-stage constitution-making process. From the perspective of the different political parties who negotiated the democratic transition, these principles guaranteed that their primary objectives would be secured in the final outcome. For this reason, Schedule 4 and the requirement that the new Constitutional Court certify that the Constitutional Assembly abided by these principles in producing the final Constitution were the only parts of the “interim” Constitution that could not be amended by a two-thirds majority; in fact these provisions could not be amended or repealed and were thus set in stone as the core of the negotiated agreement. Among the general principles adopted by the parties were those guaranteeing a common citizenship and a “democratic system of government committed to achieving equality between men and women and people of all races” (Constitution 1993, Schedule 4, CP I), as well as the enjoyment of “all universally accepted fundamental rights” (CP II), the separation of powers (CP VI), and the supremacy of the Constitution (CP IV). In addition to principles protecting the political role of minority political parties (CP XIV) and special procedures and majorities for future constitutional amendments (CP XV), a large number of principles provided extraordinary detail on the structure of government, particularly on the definition and division of powers between the national, regional and local levels of government (CP XVI–XX).

Concern over the allocation of powers between the national and regional levels of government led to the inclusion of an elaborate set of criteria for determining the allocation of powers between these spheres of government (CP XXI). There were also a set of principles that ensured the establishment of a government of National Unity for five years and provided assurances to the civil service, police and military that these institutions would be non-partisan and that members of the public service would be “entitled to a fair pension” (CP XXIX–XXXIII). Most dramatic of the specific provisions were those requiring the recognition of “traditional leadership, according to indigenous law” (CP XIII) and “collective rights of self-determination” (CP XII). In addition recognition of the Zulu King and the provision of a Volkstaat Council were added by amendment to the main body of the constitution just prior to the April 1994 elections as a way to ensure participation of the Freedom Alliance, particularly the Inkatha Freedom Party (IFP) and

the Afrikaner right-wing led by ex-South African Defence Force General Constant Viljoen, in the elections. Finally, the constitutional principles were amended to provide that provincial recognition of a traditional monarch would be protected in a final Constitution (CP XIII(2) and that any territorial entity established through the assertion of a right to self-determination by “any community sharing a common culture and language heritage” (CP XXXIV(1)) shall be entrenched in the new Constitution (CP XXXIV(3)).

The predominant role of “constitutionalism” during the democratic transition in South Africa lay in the creation of institutional processes through which the opposing parties could seek common ground while continuing to pursue their often deeply conflicting goals. While the initial contacts and early negotiations may have been purely political in nature, as soon as the apartheid regime unbanned the ANC, and other liberation movements, there began a series of transitional legal processes—to free prisoners, enable the return of exiles, create legal institutions to provide forms of shared control over the transition, and ultimately to create an “interim” Constitution that would become the basic law of the transition to a democratic order. This “interim” Constitution was itself the epitome of a transitional law in that it was designed to have a limited lifespan and had at its core the provisions for achieving the creation of a democratically-constituted constitution-making body to produce a “final” Constitution. Three elements of the 1993 Constitution served as the basic structure of “constitutionalism” securing the transition to democracy in South Africa. First, the “interim” Constitution provided the legal basis for the election and empowerment of a democratic government. Second, it contained a number of provisions that ensured that there would be a process and framework for the creation of a “final” constitution to be written by a democratically-elected Constitutional Assembly—including the thirty-four Constitutional Principles contained in Schedule 4. Finally, in its postamble the “interim” Constitution promised that a new democratic legislature would pass legislation creating a process through which amnesty would be granted in the “pursuit of national unity” and out of a need to achieve national reconciliation.

The negotiation and adoption of various transitional laws also framed the context in which the democratic order would be initially constructed. The sunset clauses guaranteeing the official positions of apartheid bureaucrats as well as the local government law which ensured that fully democratic local government would only come into existence after the 1999 elections all added to the constraints that the new ANC government would face as it attempted to secure political, economic and social change at all levels of government. The subsequent passage of the Promotion of National Unity and Reconciliation Act in 1995 and the establishment

of the Truth and Reconciliation Commission (TRC) projected the process of transition and the role of transitional law into the democratic era (du Bois & du Bois-Pedain 2008). Although the TRC sought to achieve some level of national reconciliation through its three separate branches—the victims hearings, amnesty process and reparations committee—the focus of the TRC on the political conflicts of the past produced a process of limited amnesty, accountability and forgiveness but failed to address many of the fundamental injustices that the apartheid system produced (Mamdani 2002, 33–59). The refusal to address the harms of apartheid policies, including forced removals and the migrant labor system, may have facilitated the political transition but it has fundamentally undermined the legitimacy of the process in the eyes of many who recognize that the legacies of those policies continues to harm and affect the future of millions of South African citizens. It is in this context that the recognition of socioeconomic rights and the emphasis on restitution, employment equity and affirmative action, as means to address these legacies, gained greater political attention in the making and implementation of the “final” Constitution.

DEMOCRACY AND CONSTITUTIONALISM IN POST-APARTHEID SOUTH AFRICA

Unhappiness at the slow pace of social change and growing inequality has led both government and opposition parties to blame the Constitution and to imply that true democracy would produce a more equitable outcome. These claims are rooted in both the constitutional history of the country as well as the historic claims of the national liberation movement. On the one hand parliamentary sovereignty was central to the constitutional structure of the country from its founding in 1910 and the country’s constitutional history is marked by repeated instances in which decisions by the courts to restrain or limit the racist policies of the white governments were simply overturned by Parliament in the name of democratic authority. On the other hand, even as opponents of apartheid called for inclusion in the democratic process or made claims against the government—such as the adoption by the ANC of an African Bill of Rights in 1923, the African Claims document based on the Atlantic Charter in 1943 and the Freedom Charter in 1955—they remained within the tradition of legislative or democratic supremacy and made no call for or promise of constitutional supremacy.

Even the Constitutional Principles adopted by the ANC in 1988 and incorporated into the Harare declaration and UN Declaration on Apartheid in 1989 do not embrace constitutional supremacy but rather a weaker form of constitutionalism

represented by the idea of a constitutionally protected bill of rights (ANC Constitutional Committee 1990, 34). It was only as the negotiations progressed that elements on both sides recognized that a strong form of constitutionalism represented by constitutional supremacy could provide both the means to secure agreement on the transition to democracy (Klug 2000) as well as to allay fears among those within the anti-apartheid and liberation movements who had witnessed abuses of human rights at home and around Africa and were concerned about guaranteeing the protection of human rights, even from themselves (de Toit 1991; Sachs 1992). It was however the decision to use the negotiated Constitutional Principles as a check on the future democratically-elected Constituent Assembly that required the full embrace of constitutional supremacy. Only if the courts would be empowered to decide on the constitutionality of the very structure of government could there be a guarantee that the new democratic majority could not simply dispense with the limits on democratic decision-making that were imposed by both the “interim” constitution itself as well as the constitutional principles contained in Schedule 4 of the “interim” constitution. To this end the Constitutional Principles guaranteed that the “Constitution shall be the supreme law of the land . . . binding on all organs of state at all levels of government” (CP IV) and that the judiciary “shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights” (CP VII).

While the empowerment of the judiciary was an unexpected outcome of the democratic transition in South Africa, it was one that was perfectly in tune with the global expansion of judicial power and constitutionalism in the aftermath of the cold war. As the new status of the judiciary became clear in the transition attention quickly shifted to the structure and personnel of the courts. Faced with the claim by the old judiciary that constitutional matters could be decided by a special panel of the existing Appellate Division of the Supreme Court the ANC called for the establishment of a Constitutional Court which as a new institution would not be automatically dominated by the existing judges. The creation of the Constitutional Court whose justices were appointed by Nelson Mandela as the first democratic President, even if according to a carefully constructed compromise in which at least four of the new appointments had to have previously served on the bench, provided the legitimacy needed for the introduction of constitutional review. The significance of this new power was highlighted by the constitutional requirement that the new Constitutional Court would have to certify that the “final” constitutional text produced by the Constituent Assembly did not stray outside of the negotiated Constitutional Principles contained in Schedule 4 of the “interim” Constitution. This process of “certification” of the final constitution would be very contentious and,

yet coming as it did in the wake of the Constitutional Court's first decision to strike down the death penalty, served only to bolster the legitimacy of this new institution.

Two decades later the Constitutional Court continues to enjoy enormous legitimacy yet it, and the courts more generally, have come under increasing criticism by the ruling ANC, particularly under the Presidency of Jacob Zuma. One source of complaint focuses on the fact that the courts have become the foci of administrative and political battles in which every new piece of legislation and nearly every major action by the government is challenged as being unconstitutional. At the same time there is increasing contestation within the government and ruling party that ends up before the courts. Embracing the term "lawfare", elements within the ruling ANC have argued that the courts are being used to frustrate democratic governance. Yet, it was President Thabo Mbeki's inability to address the HIV/AIDS crisis, opposition to the economic program of global integration embraced by the government, and pressures to address evidence of corruption related to the procurement of arms, that led to a dramatic fissure between different factions in the ruling ANC, and an increasing turn to the courts.

After Jacob Zuma's dismissal as Deputy-President, because of his implication in the corruption trial and conviction of his close comrade and associate Schabir Shaik (*S v Shaik* 2007 & 2008), and his subsequent acquittal in a rape trial, he emerged as the leader of a concerted effort to remove Mbeki. The success of this campaign, first in the arena of party politics when Zuma defeated Mbeki in an election for president of the ANC at the party's national conference at Polokwane in December 2007, and then in the subsequent resignation of Mbeki as president of the country in 2008—under threat of removal by parliament which was now dominated by Zuma supporters—demonstrated how the goals of particular political factions could be secured within the framework of legal conflict (Russell 2009, 246–260). The finding by a High Court Judge that there had been political interference in the corruption case against Jacob Zuma, a finding later reversed by the Supreme Court of Appeal, only highlighted the role of "lawfare" in these factional conflicts (*National Director of Public Prosecutions v Zuma* 2009). At the same time this focus on internal faction provided the space in which governance, particularly at the local and provincial level, has begun to fray—where through lack of capacity or simple malfeasance there is a failure to implement the promises of delivery and transformation. The outcome has been a parallel increase in local frustration manifested in public demonstrations and violence.

Despite this fraying of effective governance, the institutions that were created and which underpin the legal idealism of post-apartheid constitutionalism have continued to function and serve as tools in struggles between competing factions,

between and within: political parties; sections of government, including the national police force; as well as by a range of social, political and legal actors struggling to uphold the constitutional order. The result is a constant unevenness in which different government departments seem at times to succeed and at other times to fail in their respective realms, be it health, home affairs, police or education. Even the constitutional institutions designed to support democracy, such as the Human Rights Commission, Gender Commission and the Public Protector have all gone through phases of internal conflict, inactivity or even scandal as well as moments when they have achieved marked success. Within this unevenness there is constant recourse to the courts, employment arbitration mechanisms or complaints to the Public Protector as different factions engage in what is characterized as “law-fare” designed to achieve political advantage or access to government resources.

As the ANC moved towards its National Conference at the end of 2012 there were repeated calls for greater government intervention in the distribution of property, particularly land. In the lead-up to the organization’s mid-year policy conference, which produced a draft policy document for the National Conference, there were repeated calls from various ANC constituencies, the youth league and trade unions in particular (Letsoalo 2012), for a constitutional amendment to remove what they understood to be a constitutional requirement of “willing buyer, willing seller” that they blamed for the slow pace of economic transformation and land reform in particular.² In response to these calls the official opposition, the Democratic Alliance, issued a press statement warning that the ANC government was “contemplating dramatic changes to the Constitution . . . which threatens the very foundation of our constitutional state” (Smuts 2012). Responding to these demands and concerns the Minister of Rural Development and Land Reform Gugile Nkwinti said the debate about changing the Constitution might be irrelevant, as “the ANC had come up with four proposals to transform land ownership in South Africa without changing the Constitution” (SAPA 2012). But at the same time the ANC Youth League called for “changing of the Constitution to do away with land expropriation with compensation” (Id).

Demands for constitutional amendments and threats that such amendments will undermine South Africa’s constitutional democracy are at one level easily understood as the product of continuing contestation over the distribution of economic resources in post-apartheid South Africa. Less understandable is the focus

2. “Willing buyer, willing seller” is used as a short-hand for the requirement that compensation be based on the market value of expropriated property but is also understood by some to require the existing owner to agree to sell, which would negate the sovereign’s power of eminent domain.

on “willing buyer, willing seller” as the target of vilification by those who feel that land reform has been hampered by the constitutional protection of property rights and as a marker of constitutional right by those who claim that the protection of property fundamentally underpins the country’s constitutional democracy. The fact that the Constitution makes no reference to the “willing buyer, willing seller” standard is reflected in the argument by Minister Nkwinti, who acknowledged that a lot more can be done by the government within the confines of the Constitution to advance the goals of land redistribution. However, the government’s own claims about the limits of land reform are questionable since the process of land restitution and redistribution has until now been largely carried out within the confines of a “willing buyer, willing seller” market-based policy approach. The puzzle then is to understand the persistence of this policy approach and the strength of the rhetoric that has until now undermined attempts, including legislative efforts, to shift towards a more aggressive use of state power, including using the power of eminent domain, to achieve the government’s stated goals of agrarian reform.

However, once the focus shifts to the question of expropriation, the focus on “willing buyer, willing seller” becomes more understandable. Although the constitution may not include a “willing buyer, willing seller” standard, the apartheid era Expropriation Act 63 of 1975 does in fact include this standard as a basis for determining the compensation to be paid in the event of expropriation. While the constitution is supreme in South Africa and explicitly provides a set of criteria for determining compensation in the event of expropriation, in application the state may only exercise its power of eminent domain within the terms granted by the legislature in the expropriation statute. This explains in part why the “willing buyer, willing seller” standard has some resonance in the South African debate over expropriation. However, a broader view of the debate, which includes an understanding of the conflict over land in the Southern African region more generally, provides a much clearer perspective on why this standard has such resonance in the political debates over land and the possibility of constitutional change most specifically. Only once the history of struggle over land in Zimbabwe, as well as the pattern of constitutional amendment and crisis in Zimbabwe, is taken into account, does it become clear why the “willing buyer, willing seller” language has such power and relevance. In this context the possibility of constitutional change and land reform may be equally linked to domestic law and politics as to broader international and regional conditions that shape the ways in which constitutional options and land policy might be understood and contested (Klug 2016, 149–178).

South Africa’s final 1996 Constitution protects the rights of property holders. Section 25(1) provides that “[n]o one may be deprived of property except in

terms of law of general application, and no law may permit arbitrary deprivation of property.” The property clause also explicitly recognizes the state’s power to expropriate property for “a public purpose or in the public interest . . . subject to compensation,” and includes provisions that attempt to both protect land reform from constitutional challenge and to ensure that the payment of compensation is tied to a recognition of the history and use of the relevant property.³ In the first major case challenging the failure of government to protect the rights of a landowner who had obtained an eviction order against thousands of settlers on his land, the Constitutional Court held that the state was under an obligation to either enforce the court-ordered eviction or else to expropriate the land and grant compensation to the land owner (*President v Modderklip Boerdery* 2005). In a second case the Constitutional Court was asked to decide whether the enforcement of a tax lien against an individual through the seizing of two vehicles amounted to a taking of the property of the bank which financed the purchase of the vehicles (*FNB v Commissioner, SARS* 2002). In this context the Constitutional Court laid out an elaborate scheme for deciding whether there had been an expropriation of property. First, the Court asked whether what was taken is recognized as property for the purposes of the constitutional protection of property. Second, if it was protected property did the actions of the government amount to a deprivation of that property? Third, if a deprivation is found then the Court will ask if the deprivation is consistent with the Constitution’s requirement in §25(1) that it be “in terms of a law of general application” and is “not arbitrary.” Fourth, if the Court finds there has been a deprivation but that it was not done in a manner consistent with §25(1) then the Court will enquire as to whether such a deprivation is justified as a limitation of rights provided for in §36 of the Constitution. Fifth, if the deprivation was consistent with §25(1), was the property expropriated under a law of general application as required by §25(2). Sixth, if so, then was the expropriation “for a public purpose or in the public interest” and was compensation, in which the amount, time and manner of payment was either “agreed to by those affected or decided or approved by a Court,” provided. Finally,

3. Section 25(3) of the Constitution provides that, “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 the 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.”

if the expropriation did not comply with the requirements of §25(2)(a) and (b) could it nevertheless have been justified as a limitation of rights as provided for in §36.

Despite this elaborate constitutional schema for determining the constitutionality of any deprivation of property, the practice of expropriation continues to be governed by the pre-democratic statutory law of expropriation (Expropriation Act 1975). Although no expropriation may be carried out in violation of the Constitution, the question is not whether the government is providing too little protection but rather if the statutory framework created by the Expropriation Act of 1975 does not in fact place higher burdens upon the state than required by the Constitution. Under the 1975 statute an expropriation must be “for a public purpose” (id: section 2(1)) and compensation is determined by the “amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a will buyer,” plus an “amount to make good any actual financial loss or inconvenience caused by the expropriation” (id. sections 12(1)(a)(i) and (ii)). Public purpose however is defined quite broadly in the act as “including any purposes connected with the administration of the provisions of any law by an organ of state” (id: section 1, definitions: “public purposes”). The net effect however is that in the case of both the reason for the expropriation, as well as the standard of compensation that should be awarded, the statute privileges the existing holders of freehold title as against both the state and the Constitution’s imperative to address past dispossession by providing the state with greater latitude and taking into consideration the benefits the previous owner may have accrued in a market, access to which was racially restricted and where the state often provided subsidies and other benefits to white land owners. The most important impact this continuance of past law has had on post-apartheid land law and policy has been the continued embrace of the notion of “willing buyer, willing seller,” which is neither required by the Constitution nor has it been helpful in furthering the process of restitution—whether in its impact on the actual bargaining power of existing title deed holders or as a matter of perception among those who feel that the process of restitution and land reform has been unacceptably glacial.

In an attempt to address the inconsistency between the statutory law and what is arguably a more permissive constitutional requirement, the government first introduced a bill to reform the law of expropriation in April 2008. In its explanation for the bill the government argued that the new law would create a “framework to give effect to the Constitution” and in particular the state’s “constitutional obligation to 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” (Publication of Explanatory Summary of the Expropriation Bill 2008, 3).

The new statute would also require the recognition of unregistered rights (Expropriation Bill 16-2008, Chapter 4, section 10) as well as providing new institutional mechanisms to regulate expropriations (id: Chapter 3, section 6). Significantly the draft law also revised the standards for compensation, including the range of factors that had been negotiated for during the democratic transition. Reaction to the bill was vociferous, particularly from those interests who had fought so hard to protect their property interests during the transition from apartheid (Mail & Guardian June 25, 2008, and ABSA 2008).

Many of the objections to the proposed legal reforms mirrored those that had been rejected by the Constitutional Assembly, yet the government withdrew the bill and political tensions continued to rise around criticisms of the slow pace of land reform as well as demands to reject the policy and practice of “willing buyer, willing seller” which is rhetorically-blamed for the failures of the state and market to address continuing racial inequalities in land ownership. At its June 2012 policy conference the ANC responded to these popular concerns by making a number of land-related policy proposals including replacing “willing buyer, willing seller” with the “just and equitable” principle in the Constitution when the state is acquiring land for land reform purposes, expropriating without compensation land acquired through unlawful means or used for illegal purposes, and keeping nationalization as an option (ANC 2012, 37). At the same time, however, there continued to be more strident demands that there be a constitutional amendment to remove the “willing buyer, willing seller” principle or even abolish the requirement that the government pay compensation for land taken in the name of redistribution. Responding to these internal pressures the government reintroduced the Expropriation Bill in 2013 but again it failed to progress through the legislature.

While there continue to be claims that it is the constitution that is preventing a more effective and speedy process of land reform, there is increasing recognition that it is political failure rather than constitutional limitations that is preventing the necessary reform. Even if the demands for constitutional change were to be heeded, there is increasing recognition that it is highly unlikely that the ANC would be able to unilaterally change the property provisions in the Constitution since any change to the Bill of Rights requires a two-thirds majority vote in Parliament, a level of support which the ANC no longer commands. Understanding both the limitations of constitutional change and the existing space for statutory change within the ambit of the constitution, the government reintroduced the Expropriation Bill in early 2015. Even in its revised form the new bill recognizes that there is broad scope for a more aggressive land reform policy within the present constitutional framework

for property and land reform. The bill was finally passed by the National Assembly on January 23, 2016, and after passage through the National Council of Provinces was handed on to the presidency on May 26, 2016. The President has however not signed the bill into law and instead the presidency referred it back to Parliament to ask whether the correct legislative procedures had been followed, since the bill was not sent to the House of Traditional Leaders and if signed into law is bound to be challenged before the courts (Presidency 2016).

CONCLUSION

Despite these conflicts and the accusations of “lawfare,” South Africa’s government, as well as the political and legal institutions created in the post-apartheid era, continue to express public allegiance to the goal of creating and sustaining a constitutional democracy, the core element of the country’s post-apartheid constitutional identity. Even as the political opposition as well as non-governmental and other social actors question the ANC government’s commitment to the Constitution and often insinuate that the government is actively undermining these new institutions by appointing office bearers who the opposition does not feel are sufficiently distanced from the ruling party, there has been little evidence of a concerted effort to undermine the existing constitutional order. This does not mean that the government has not failed, repeatedly, to meet the constitutional ideals enshrined in the new order, or that the Constitutional Court has not repeatedly struck down government decisions or expressed its concern about government’s failings. Rather, it is important to draw a distinction between the failings that are a result of incapacity or ineptitude and the structural or systemic disharmonies that are implicit in the various projects and processes of confrontation that have become such a prevalent part of the new constitutional order.

In this context the rhetoric of “nullification” continues to be a significant part of public discourse. Claims that the present order is illegitimate and thus “void”—as it is the product of a compromised negotiation process—is evident again in the recent university protests that have swept the country. It is however the repeated turning to the constitution and the courts, by all sides to these conflicts, that is enabling constitutionalism to become embedded in post-apartheid South Africa. Despite challenges to particular court decisions or to the application of apartheid era expropriation rules, it is the repeated reliance on legal challenges and the management of these challenges by the various institutions of constitutional democracy that is building constitutionalism in post-apartheid South Africa. From this

perspective, it is the very engagement in “lawfare” and its reliance on different interpretations of the constitution and law to support opposing positions that undercut the claims of nullification which threaten the very existence of the constitutional order.

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