
GLOBAL PRESCRIPTIONS

*The Production, Exportation, and
Importation of a New Legal Orthodoxy*

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HYBRID(ITY) RULES: CREATING LOCAL LAW IN A GLOBALIZED WORLD

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Heinz Klug, a law professor at the University of Wisconsin and former South African activist, takes the relationship between international and domestic factors to a different setting—the making of the South African Constitution of 1996. Drawing on his own experience in addition to research, he shows the way that South African actors drew on foreign sources of legitimacy to try to support their own points of view in the process. The authority of expertises imported and exported from abroad, in particular, led the African National Congress ultimately to accept a very different property clause in the Constitution than their party program had long advocated. Indeed, the entire process of producing the Constitution was very much framed by the authority and the hierarchy of authorities legitimating and delegitimizing certain approaches and norms. What was accepted, therefore, was an internationally legitimate hybrid, but it did not put to rest the potentially explosive issue of how to address the vast racial inequalities in the ownership of property.

Similarly, in the South African context, the new constitution gave a large role to the Constitutional Court that in effect internationalized South African constitutional doctrine. As other authors in this book have suggested, this process potentially places the leading judges of the South African courts in an international context that facilitates exchange and dialogue—perhaps ultimately an international consensus on particular norms and approaches. Again, however, Klug's analysis makes it clear that participation in an international "community" of jurisprudence will not necessarily lead to solutions to the problems that still deeply divide South African society. The political struggles have been transformed by international events. As suggested by several other essays, the incorporation of the

prescriptions embodying the "best" international thinking in politics (or economics) will not necessarily lead to the desired changes. The impact of the changes will depend on how the international expertises interact with the local structures of power.



The construction of new rules, in the late twentieth century, is both unique and ubiquitous. Whether it is the making of a new constitution for South Africa or the negotiation of new regulations for the electronic transfer of capital in the global marketplace, the new rules reflect both unique attempts to address particular social, economic, or political problems and the historical and comparative experiences of our increasingly globalized world. I will argue in this essay for a dialectical understanding of the relationship between the global and local in which local agency deploys global forms and is both reshaped in the process and contributes to the continuing reformulation of global alternatives.

This dialectical interaction—between a global text constituted by the histories, practices, and normative prescriptions of nation-states, international bodies, and organizations (such as the United Nations, World Bank, and, increasingly, transnational corporate and non-governmental organizations) and the local struggles and processes through which new rules are created and applied—may be identified through the explication of five specific elements. These elements when taken together comprise the metaphorical life cycle/evolution of the "globalization of the rule of law." First, there is the deployment of existing global forms by local actors attempting to reformulate local rules. Second, this deployment has the effect of shaping the local imagination, whether posed as the only alternative or as a weight against local alternatives. Third, this deployment of global forms, whether as norms or as stories of success or failure, has the ultimate effect of setting the limits of available options—on pain of global marginalization, an isolation imposed by capital markets, governments, or the international human rights community. Fourth, while local options may be circumscribed by "global insistence" and the limits of "bounded imaginations," this does not prevent the emergence of a particularized and even "unique" local rule, shaped by the specificities of cultures, histories, and the politics of the moment. Finally, and completing the "life cycle," this adoption of

any local rule or process provides an experience that adds to the global text, both influencing the continuing reformulation of global forms and providing yet another example for the constant refrain "international experience shows . . ."

In short, these five elements or metamorphic stages may be characterized, in neither temporal nor hierarchical order, as, first, "local agency"; second, "bounded alternatives"; third, the pervasiveness of the global, or "global insistence"; fourth, the "hybridity of outcomes"; and fifth, local impact on the shape of the global, or "international experience shows . . ." A crude example of this process at the global level has been the use and reformulation of the story of Korea and the "Asian economic miracle" in which the experience of South Korean economic development was formulated and presented simultaneously as: culturally specific; a paradigm of modernization and free-market development from accumulation to takeoff; and, more recently, as the inefficient paradigm of state intervention, labor security, corruption, and personal patronage (*guanxi*).

Law and Development or Cut, Paste, and Tinker?

In the first half of the 1990s well over a billion dollars was spent on rule of law projects in every conceivable corner of the globe. A host of different institutions, from local and nationally based nongovernmental organizations through to the UN Human Rights Committee are engaged in this new rule of law movement.¹ While legal reform is not restricted to the dramatic developments in public law accompanying the enormous political reconstructions of the post-cold war era, the adoption of new, justiciable constitutions has been a major product of this movement.

The response of many scholars has been to herald a new age. David Beatty, a Canadian scholar of comparative constitutionalism, describes ours as "an age of constitutionalism" (1994: 1), while Bruce Ackerman (1997) has recently published an essay entitled "The Rise of World Constitutionalism." For these scholars, the significance of this new age is the adoption, by nations creating justiciable constitutions, of the universal principle—central to understandings of modern constitutionalism—of a "commitment to limitations on ordinary political power" (Greenberg et al. 1993: xxi).

That a "globalizing constitutionalism" should take this form, right now, is rather unremarkable in an age where the state is in retreat and where constitutionalism provides a means to attain the goals of both those struggling for human rights and those who argue that the market most efficiently mediates the demands of autonomous individual needs. While this confluence of antistate interests explains the popularity of this latest constitutionalist wave, it does not give us any reason to believe that this latest commitment to the rule of law should fare any better than the multitude of past law and development or judicial reform programs. Even if we accept the empirical evidence that more and more nations have adopted written constitutions with bills of rights and have empowered their courts to uphold these new charters as the supreme law of the land, it is not self-evident that the outcome or even the meaning of these new institutions is the same in all these societies. While we may recognize a globalizing constitutionalism, the challenge is to understand the specifics of its incorporation into particular national legal systems as well as to understand the potentially multiple roles that constitutionalism is playing in the reconstruction of different polities.

Law and development scholarship traditionally looked at this process in terms of a cultural diffusion model, at the motives behind and consequences of transporting legal systems to new contexts. In earlier debates over the transfer and imposition of law, scholars raised troubling concerns about the goals, consequences, and effects of these processes. On the one hand it was argued that local legal cultures "proved remarkably resilient in the face of American legal models" with the effect that "legal-transfer mechanisms" attributed to the law and development movement were seen as ineffective (Gardner 1980: 9). On the other hand, stinging critiques were mounted, condemning the movement as "an exercise in 'cultural imperialism,' one more manifestation of a desire to extend United States cultural and economic 'domination' through foreign aid and development assistance programs that reinforced American influence by strengthening the role of cooperating local elites, in this case local legal elites" (283). Questioning their own motives and roles in the law and development movement, some scholars withdrew from active participation and through their critiques played an active role in the movement's demise (see Trubek and Galanter 1974). Recent contributions to this debate, however, have looked beyond the particular experience of the law and development

movement in the United States. Accepting that efforts to export law have at times been the product of "misguided 'missionary' notions of sharing with the Third World the legal modernity and 'know-how' thought to have been realized in the United States" (Gardner 1980: 7), these new participants have called for continuing engagement "in concrete work in developing countries," as a way to get beyond the persistent crisis in law and development theory (see Tamanaha 1995).

While these criticisms and reevaluations may reveal some of the underlying motivations and problems of the law and development movement, they fail to acknowledge that "legal transfer" or the exchange of legal forms has been a hallmark of the creation and practice of law since at least the twelfth century, with the "revival" of the study of Roman law at European universities, particularly Bologna (von Mehren and Gordley 1977: 7). Indeed, the incorporation of new legal doctrines, in particular within the Anglo-American system, is a basic form of the common law method (Schlesinger et al. 1988: 231). Within the civil law system the transfer or adoption of complete legal codes, beginning with the Napoleonic Code itself, has also been unremarkable (Lawson 1955: 48–51). The widespread adoption of justiciable constitutions and bills of rights in the 1990s merely reflects, from this perspective, a continuation of legal exchange or the adoption by particular states or local elites of legal forms most applicable to their present goals and circumstances.

While critics of the law and development movement recognized that local elites in the host countries were deeply implicated in the transfer of legal forms, there has been little attempt to explore the role of local actors in shaping the reception of particular legal doctrines, or how these doctrines were deployed locally to achieve particular aims or to gain advantage in particular local contests over power and resources.² Thus, instead of focusing on the imposition of law and the competing interests of those engaged in the export of the rule of law, I wish to explore the specific contours of legal incorporation and exchange from an opposite, internal perspective, in order to understand the extent to which participants in postcolonial settings draw on and reinterpret legal forms (rules, doctrines, standards, and codes) from a variety of jurisdictions to suit their own locally defined ends. This will involve both an exploration of how different interests (social, economic, and professional) are furthered and shaped by the deployment of different incorporated rules and practices, as well as how the sources and local articu-

lation of these different rules and practices lend specific weight to their successful incorporation and hybridization.

While this focus may be compared to an earlier literature that focused on the reception of law and legal institutions (see Elias 1965; Seidman 1968; Thompson 1968), I believe that there is a clear distinction between the earlier phases of reception and the process of incorporation inherent in this latest "global" wave of political reconstruction. Both the colonial reception of imperial law and the postcolonial imposition of bills of rights in independence constitutions adopted at Westminster may be clearly contrasted with most of the recent democratic transitions. These transitions have been driven by social and political movements demanding the incorporation of human rights that have gained international recognition in the period since World War II.³ The embrace of constitutionalism in the context of these democratic transitions is, in this view, a complex form of reception where local competitors draw on available international resources in order to pursue their own local and ultimately transnational agendas.

In developing this analysis I will argue that the adoption locally of a globally bounded notion of democratic constitutionalism both enables political reconstruction or transition to proceed and tests the institutional capacity of the incorporated framework to address the conflicts arising from often irreconcilable political demands. The realm of bounded possibilities created by the introduction of constitutionalism is constantly infused with the incompatible constitutional imaginations of local contestants. In order to demonstrate this process of incorporation and to explore how it circumscribes the bounds of legitimate alternatives, I will focus on the construction of the property clause and the place of property in South Africa's new Constitution.

At the Core Is Property

The conflicts, debates, and final compromise on the inclusion of a property rights clause in the South African Constitution provide a window through which this particular interaction between global and local imperatives may be viewed. While the internationally endorsed process for the transition away from apartheid included a commitment to the rule of law and the inclusion of a justiciable bill of rights, there was no

clarity on the contents of this commitment. As a result, the different political parties and interest groups entered into a process by which they sought to shape the meaning of these commitments so as to achieve their particular goals. While this "debate" over the content of particular commitments or rights reflected the political goals and assumptions of the different parties, it was also substantially framed by the available intellectual resources. These included primarily the historical text of local experience as well as the text of international and foreign jurisdictions, which served simultaneously as exemplary resources in the pursuit of particular goals and as the bounded universe constraining the choices and options of the parties.

My own introduction to the debate over property coincided with de Klerk's February 1990 public announcement of the political opening that would set the stage for South Africa's democratic transition. At that moment I was at the headquarters of the African National Congress (ANC) in Lusaka, Zambia, helping to organize a workshop on the Land Question that had been initiated by fellow ANC activists Bongiwe Njobe and Helena Dolny. While the workshop focused on analyzing the state of rural South Africa, all the participants—ANC members who ranged from scholars and traditional leaders to peasant activists—seemed to assume that nationalization of existing landholdings, given the history of dispossession and the vast inequalities in landholdings between black and white (Claassens 1991; Robertson 1990), would be high on the agenda of an ANC government. This shared assumption was based in no small part on our commitment to the 1955 Freedom Charter—recognized by the ANC as expressing the will of the South African people—which declared in part that the "national wealth of our country . . . shall be restored to the people" and "all the land redivided amongst those who work it, to banish famine and land hunger" (ANC 1989a: 319).

Despite our assumptions and the liberation movement's general rhetoric on the Land Question, activists at the workshop had a realistic view of the low priority rural issues had on the mainly urban-based ANC's political agenda in the late 1980s. We were encouraged, however, by the "Economy and Land" sections of the ANC's Constitutional Guidelines, which had been issued in 1988 as part of the ANC's preparations for negotiations with the apartheid regime. Here, the ANC signaled its future intentions to both the international community and the apartheid regime, by announcing its intention to protect property con-

stitutionally. While this promise went further than might have been expected, given the rhetoric of socialization, nationalization, and redistribution so dominant in the ANC at the time, the limited focus on property for "personal use and consumption" allowed these conflicting visions of redistribution and property rights to coexist. This coexistence was aided by the document's commitment to "devise and implement a land reform programme . . . in conformity with the principle of affirmative action, taking into account the status of victims of forced removals" (ANC 1989b: 323–24). With the exact modes of implementation still open to debate, the Lusaka workshop opted to institutionalize the issue within the ANC by calling for the formation of an ANC Land Commission to address the lack of specific policies within the organization.

It was as a member of the ANC Land Commission's secretariat (first alone and joined later by two others)⁴ that I returned to South Africa in June 1990. In setting up the Land Commission we soon began to work with the already well-established community of lawyers, NGOs, and activists who had long struggled against forced removals in the courts and on the land.⁵ This informal coalition provided the organizational basis, knowledge, and experience that sustained the struggle for the recognition of dispossessed land rights during the political transition and constitution-making process. While the ANC Land Commission had access to the ANC's internal policy-making processes and could evoke strong public reaction as a voice of the ANC,⁶ it was the return to land campaigns of land claimants, and their lawyers' continued engagement with the de Klerk government, that frustrated the apartheid regime's attempts to preempt future claims. This the apartheid government attempted to do by repealing the Land Acts (Abolition Act 1991) in 1991 and establishing an Advisory Commission on Land Allocation (Section 89–96) with the purpose of settling all claims before the political transition to democratic rule could be completed.

It was from this perspective, then, that I was able to both participate in⁷ and view the debate over property rights and how the rules of the game were framed for the new South Africa. At first, discussion centered on the ANC's draft bill of rights, which was published in 1990 and contained a single article addressing the "economy, land and property" (ANC Constitutional Committee 1990: Article 11). Within the ANC, the Land Commission began hearing from its constituency and opening debates on land reform, nationalization, and restitution. This process began with newly formed ANC branches and communities locked in

land conflicts around the country, but increasingly focused on a series of internal discussions. Joined at times by activists and lawyers of the land movement, the Land Commission engaged with members of the Constitutional Committee⁸ as well as with other activists and sectors in a series of conferences initiated by the Constitutional Committee—at which special sessions or subgroups focused on the issue of land and property. Outside the ANC, the Land Commission built links and worked closely with lawyers and activists of the return to land movement and became engaged in wider public debates over land claims and land redistribution. Central to these debates was the status that property rights would have in a future constitution.

Although the ANC's draft bill of rights only protected, in our view, limited rights to personal property, it became clear at the May 1991 conference convened by the ANC Constitutional Committee that the ANC was under a great deal of pressure to grant greater recognition to property rights. In fact, attempts at that conference to question whether there should be any constitutionally protected property rights at all elicited a highly charged response from one member of the Constitutional Committee who warned that the rejection of property rights would directly endanger the democratic transition. In response the participants at the conference called for a reworking of the draft in which land would be recognized as a specific form of property and treated separately from property in general. Concern was expressed about the recognition of property rights as such before the implementation of the necessary process of redistribution. Furthermore, participants made a commitment to include positive rights to land for the landless (Centre for Development Studies 1991: 129–32).

While this internal debate sought simultaneously to limit the reach of existing property rights and to secure a more equitable distribution of property in the future, the response of the regime and the existing economic interests was expressed most clearly by the South African Law Commission—a nominally independent statutory body. In its August 1991 "Interim Report on Group and Human Rights," the Law Commission launched a sustained attack against the ANC Draft, charging that the "ANC's bill . . . provides, in a manner which hardly disguises the aim, for nationalization of private property without objectively testable norms for compensation," and that what the ANC intended was "in fact nothing but nationalization under the cloak of expropriation . . . designed to secure state control over property" (359–65).

Instead, the Law Commission called for the protection of private property and for the payment of just compensation in the event of expropriation in the public interest. Likewise, the Democratic Party, traditionally the party of big capital and white liberals, proposed a comprehensive right to property that could only be derogated by lawful expropriation in the public interest, and only then when subject to the "proper payment of equitable compensation, which in the event of dispute, shall be determined by an ordinary court of law" (Democratic Party 1993: Article 9). Neither of these proposals provided for the restitution of property taken under apartheid and as such failed to comprehend the threat to property rights, and even the very notion of constitutional rights, that the legal entrenchment of the apartheid's spoils entails.

While attention was focused on the question of property rights, the ANC Land Commission continued to hold meetings around the country to discuss land issues,⁹ both as a means to increase awareness within the ANC, as well as to begin the formulation of a land policy for adoption by the movement. The first target of this campaign was to commit the organization to a set of principles upon which a policy could be built. With this as its goal, the ANC Land Commission held a national conference in June 1991 at which we produced a set of guidelines for the development of land policy. These guidelines were then presented and adopted at the ANC's National Conference in July 1991. The most important features of the Land Manifesto were its simultaneous commitment to both land restitution and land redistribution, its recognition of a diversity of land tenure forms, and the advancement of a policy of affirmative action as the main device to achieve specific policy goals (ANC 1991). With these guidelines the ANC effectively endorsed a strategy against the simple constitutional recognition of private property as acknowledged by the apartheid state. First, by demanding both restitution and land reform, it questioned and threatened the legitimacy of existing property rights. Second, the acceptance of different forms of tenure decentered private land ownership and provided a basis for the recognition of communal and other forms of land tenure. Finally, the manifesto recognized that affirmative action-type policies would provide a structure in which the multitude of specific policy goals and claims of different constituencies within the ANC could be accommodated and targeted to address land issues and the interests of the rural poor.

At the October 1991 National Conference on Affirmative Action, convened by the ANC Constitutional Committee, I reported back to the

plenary session that the subgroup on land had concluded that a wealth tax would be necessary to fund land redistribution. Given the demand that any expropriation be compensated, we concluded that the only way to achieve the redistribution of land necessary to overcome the legacy of the 1913 Land Acts was to create a specific compensation account. In order to achieve the equitable redistribution required, this dedicated account would need to be funded by those who benefited from the limited land market created by the Land Acts, which had reserved 87 percent of land for white ownership and control. This could be achieved, I argued, by the imposition of a wealth tax, similar to the equalization tax adopted in the Federal Republic of Germany in the aftermath of World War II. While the idea of special taxes to overcome the vast disparities created by apartheid has continued to raise interest, in 1991 the reaction was immediate—the major white-controlled newspapers went ballistic, and within hours I was once again receiving death threats from those who had attempted to silence opposition during the height of apartheid. Although senior ANC leaders supported our right to conduct a debate on the wealth tax it also became clear that any attempt to conduct an effective redistribution of land rights would meet extremely stiff opposition from the ancien régime as well as conflict with alternative demands for resources among the ANC's own constituencies.

Despite this fierce public exposure, when formal negotiations began at Codesa in December 1991, it seemed as if the land issue would once again be pushed into the background as the parties clashed over the very nature of the political transition. As far as property issues were concerned, they were subsumed in the larger debate over whether the purpose of Codesa was to produce a detailed interim constitution or broad constitutional principles that would guide, but not frustrate the work of a future democratically elected constitution-making body. Despite this marginalization of substantive issues in the negotiations, for land claimants and those active in support of their demands, the struggle over land and property rights continued simultaneously on two planes: first, in actual land occupations and attempts to return to land from which communities had been forcibly removed—whether by occupation or legal and administrative negotiations with ACLA¹⁰ and the de Klerk government; second, at the level of ideas, with debates over different policy options continuing at a series of conferences and meetings, either organized by the ANC Constitutional Committee together with various university-based institutes or directly by the academy. One

of the most important of these was organized by longtime land activist Aninka Claassens through the Centre for Applied Legal Studies (CALS) to discuss “the effect that a constitutionally entrenched right to property might have on future land reform legislation and programmes” (1992: v).

The opening of a discussion on particular options for the recognition of land rights and the consequences a property clause might have on land claims was, at this stage, a vital intervention, making it clear that the issue of land rights could not be divorced from the wider question of property. Furthermore, when this conference is placed in the context of the series of conferences, meetings, and workshops held in this period,¹¹ its significance, as one in a series of intellectual loci of the South African transition, may be recognized. At these events, new substantive ideas were introduced into the public debate while simultaneously being framed through their presentation in the context of different international histories and examples. Among the important substantive interventions made at the CALS conference was the public floating of the suggestion for a land claims court—in the form of a report to the conference from a group of lawyers and activists from the “land claims movement” who were working on this option at the behest of the ANC Land Commission (Swanson 1992).¹² Other important substantive interventions at this conference included Geoff Budlender's construction of a legal right to land for the landless (1992),¹³ as well as the work of Catherine Cross, who demonstrated the continued vitality and existence of an alternative understanding of land rights in opposition to the prevailing legal notions of individual private property rights (1992). Presentation of the Canadian decision to preclude the explicit recognition of property rights from their 1982 Charter of Rights (Bauman 1992) and the history of constitutional conflict over land reform in India in the postindependence years (Murphy 1992) both introduced substantive examples of alternative approaches and provided grist for debate over the dangers of, and alternatives to, the constitutional enshrinement of property rights.

It was these interventions that forced the ANC to reevaluate its own proposed “Draft Bill of Rights.” After several meetings with land activists and members of the Land Commission, Albie Sachs proposed new sections on land and the environment as well as a separate property clause for the revised text of the ANC draft bill of rights. These new sections essentially expanded the ANC's proposals, making it clear that

land rights would remain a central claim of the antiapartheid movement and that the protection of property would remain subject to these claims. While property rights were given separate recognition for the first time in the new text, the text also suggested that these references to property, along with all other "principles governing economic life," might be better placed outside the bill of rights in a nonjusticiable section of the Constitution defined as "Directive Principles of State Policy"—which is the case with similar sections of the Irish and Indian constitutions.

By the time this revised text was first published in May 1992, negotiations with the de Klerk government had formally broken down—collapsing Codesa into a morass of mutual recriminations (Friedman 1993). At the same time, the government's land claims forum was being rejected by communities (Statement 1991) who were threatening to physically reoccupy their lands,¹⁴ and the ANC Land Commission was being thrust into an engagement with new actors—both national and international—who had recognized the centrality of land to the struggle over property rights. The first engagement, which culminated in a meeting in December 1992, was with the Urban Foundation, a policy institute funded by South African big business, which asked for a meeting with the ANC Land Commission to discuss land claims and the question of creating a land claims court. At this meeting the ANC delegation, which included members of the Constitutional Committee as well as the Land Commission and its allies in the land movement, was presented with the argument that while some form of limited land claims process might be necessary to legitimate future property relations, both the demand for land among the African majority and the reality of resource needs and allocations for future development required that this process be tightly circumscribed. While we recognized the problem of competition over resources under a future democratic government, we argued that any attempt to engage in an all but symbolic process of restitution would fail to build the legitimacy they seemed to recognize was needed to secure property relations in the new South Africa.

The second of these new engagements began in mid-1992 when the World Bank launched its own initiatives in South Africa. Our immediate response was to ask who had invited them to South Africa and to reject the notion of engagement with this institution. Soon, however, we realized that the World Bank was developing its own strategy toward

the "new" South Africa¹⁵ and would continue to do so whether or not we engaged. Refusal by definition meant lack of knowledge and influence. The Bank, at the same time, had been rebuffed by other sectors of the antiapartheid movement—particularly the urban sector activists—and responded to our own hesitations by organizing an initial seminar outside South Africa, in Mbabane, Swaziland, in November 1992. To this event they invited representatives from different South African political groupings, both government and nongovernment bodies, to discuss a set of papers prepared by the World Bank and its consultants (World Bank 1992).

These two engagements presented radically alternative possibilities and opportunities. While the Urban Foundation (UF) was convinced that the demand for land reform among Africans was being grossly exaggerated, Hans Binswanger, the senior World Bank adviser who dominated the Swaziland seminar, presented a vision of world development dependent upon the carrying out of a successful land reform.¹⁶ While the UF suggested a limited process of restitution in order to legitimate property rights, Binswanger argued that land claims and even land invasions would drive a process of land reform and suggested that by facilitating land reform the government would be providing an essential catalyst for sustained economic development. Although the ANC Land Commission remained extremely skeptical of the equities of the World Bank's proposals—for a market-driven reform focused on small-scale producers—we realized immediately that the World Bank's position could be deployed as a way to keep the issue of land reform on the political agenda. With this aim, we encouraged Hans Binswanger to persuade the de Klerk government that land reform was and should remain an essential part of South Africa's political transition. At the same time, we introduced Binswanger to members of the ANC's leadership, including the Constitutional Committee, facilitating ANC agreement to engage with the World Bank on these issues.

This engagement was pursued through the newly formed Land and Agricultural Policy Centre (LAPC) and was structured by the tension between the ANC's historic concerns about the role of the Bretton Woods institutions and by our concern to retain some influence over the Bank's activities in the political transition. As we began to negotiate our working relationship with the Bank's representative, Robert Christiansen, I attended a meeting of NGOs in Johannesburg at which Martin Khor of the Malaysian-based Third-World Network and representatives

of a World Bank monitoring group from Washington, D.C., explained the structure and workings of the institution. Although we had already experienced the dramatic impact that interest by the Bank could have on an issue, the understanding we gained from these activists of the manner in which the Bank's missions operated convinced us of the need to engage the Bank closely and to retain some influence over the Bank's own information-gathering and analytical process.

While the World Bank both wanted and needed our endorsement of their plan to prepare a rural restructuring program (RRP) for South Africa, we demanded that the initial research work be conducted by and remain under the control of South Africans. This was made possible through the creation of terms of reference for the preparation of a series of background reports that would form the basis of the preparation of the RRP. The resulting aide-mémoire was concluded on June 15, 1993; in it Robert Christiansen committed the Bank to a process that would "be fully transparent, consultative and collaborative at all stages" (1993). To this end, I was asked to head the legal research team and to prepare the report on the constitutional requirements of a land restitution and reform process. Later, as a member of the World Bank's mission to South Africa in late 1993, I participated in the formulation of the Bank's proposal for a rural restructuring program for the country. While there were many parts of the report with which I was not in complete agreement, its importance from the perspective of the ANC Land Commission lay in its clear assertion that both land restitution and land reform were central to rural restructuring (World Bank 1994c). Furthermore, even though our argument that a constitutionalized property right would impede land redistribution was excised at the last moment, in favor of the Bank's ideal of a market-driven process, we were able to obtain a clear statement in the report to the effect that land restitution and even redistribution were so important that in the event of market failure, government intervention would be both justified and necessary.¹⁷

However, prior to the beginning of substantive constitutional negotiations in early 1993, the ANC and government still held dramatically alternative notions of how property should be constitutionally protected. On the one hand, the ANC was willing to protect the undisturbed enjoyment of personal possessions, so long as property entitlements were to be determined by legislation and provision was to be made for the restoration of land to people dispossessed under apartheid (ANC 1993: Article 13). The government's proposals, on the other hand,

aimed at protecting all property rights and would only allow expropriation for public purposes and subject to cash compensation determined by a court of law according to the market value of the property (Republic of South Africa 1993). In response the ANC suggested that no property clause was necessary.¹⁸

As negotiations with the de Klerk regime gained momentum in 1993, conflict over the property clause began to focus on specific issues. Although the ANC had initially insisted that an interim constitution contain only those guarantees necessary to ensure an even political playing field, the momentum for entrenching rights could not be slowed, and before long we recognized that we were in the process of negotiating a complete Bill of Rights. It was in this context that the apartheid government insisted that property rights be included in the interim constitution and that the measure of compensation include specific reference to the market value of the property. In response the ANC insisted that the property clause not frustrate efforts to address land claims and that the state must have the power to regulate property without being obliged to pay compensation unless there was a clear expropriation of the property. Although the regime agreed that explicit provisions guaranteeing and providing for land restitution should be included, its negotiators insisted that such provisions should not be located within the property clause. Instead, it was proposed that if they were to be included, they should be incorporated into the corrective action provisions of the equality clause.

Mass action played an important part in the ANC alliance's campaign to shape the transition, and various forms of public display of claims, outrage, and strength were employed by groups on all sides to ensure that their concerns or demands be placed on the agenda at the multiparty talks. Marked by protests, demonstrations, campaigns, and even an invasion of the World Trade Centre in Kempton Park, the site of the multiparty negotiations, mass participation in the constitution-making process exhibited both a diversity of claims and a degree of popular frustration with an undemocratic negotiating process. Among these were representatives of communities who were forcibly removed under apartheid, who marched on the World Trade Centre protesting the proposed constitutional protection of property (which they saw as an entrenchment of the apartheid distribution of property), and who demanded constitutional recognition of their right to return to their land.¹⁹

Answering these demands and conflicts, the interim 1993 Constitution provided a separate institutional basis for land restitution, which was guaranteed in the corrective action provisions of the equality clause (Constitution 1993: Section 8(3)(b)), and compromised on the question of compensation by including a range of factors the courts would have to consider in determining just and equitable compensation (Section 28(3)). Significantly, as Matthew Chaskalson argues, the final outcome in terms of the specific wording adopted was as much a result of serendipity, legal ignorance, and the particular quirks and concerns of the individual negotiators as the logical product of an informed or even interest-based political debate and compromise (1995). This is demonstrated most aptly in the choice of the terminology of public purpose over public interest in the expropriation clause despite agreement among the parties to give the state as much leeway as possible in this regard.

Even then, however, the substance of the outcome reflects both the general contours of the political conflict over the property clause and the bounded alternatives available to the parties—from the recognition of existing property rights on the one hand to the recognition of land claims on the other. Significantly, the factors to be considered in the determination of just compensation reflect this outcome. On the one hand, they were directed at the problem of land claims and included “the use to which the property is being put, the history of its acquisition, the value of the investments in it by those affected and the interest of those affected” (Constitution 1993: Section 28(3)), while, on the other hand, the insistence of the *ancien régime* made possible the inclusion of other factors, in particular “market value.” It was under this constitutional regime that Mandela’s government and South Africa’s first democratic parliament began to address land claims. Acting in terms of the specific clauses of the 1993 Constitution, which provided for the establishment of a land claims process, parliament passed the Restitution of Land Claims Act in 1995, setting up regional Land Claims Commissions and the new Land Claims Court (Klug 1996b).

Despite predictions that there would be very little change in the Constitution during the second phase of the constitution-making process, particularly on such sensitive issues as the property clause and the bill of rights, the property issue, in fact, once again became one of the unresolvable lightning rods in the Constitutional Assembly. Although the committee charged with reviewing the Bill of Rights was at first reluctant to change the formulation of the 1993 compromise,

challenges centered on the question of land restitution and reform (see Constitutional Assembly 1995b; Constitutional Assembly, Theme Committee 1995b, 1995c) once again forced open the process. In this case the impetus came from the Workshop on Land Rights and the Constitution organized by the Constitutional Assembly’s subcommittee, Theme Committee 6.3, whose task was to resolve issues related to specialized structures of government such as the Land Claims Commission and Court provided for in the 1993 Constitution. Focusing on the land issue, this meeting once again raised the problem of property rights in the Constitution. While some participants raised the question whether there should be any property protection within the final Constitution, the major change from the period in which the 1993 Constitution was negotiated was that the participants in this workshop, even those representing long-established interests like the National Party and the South African Agricultural Union, now agreed on the need “to rectify past wrongs” and for land reform. Disagreement here was over the means. The South African Agricultural Union, for example, continued to assert that “it should be done in a way without jeopardising the protection of private ownership,” while the National Party now embraced the World Bank’s proposals, arguing that land reform should “be accomplished within the parameters of the market and should be demand-driven.”

The outcome of this workshop and the submissions made to Theme Committee 6.3 was a report to the Constitutional Assembly that both challenged the existing 1993 formulation of property rights and called for a specific land clause to provide a “constitutional framework and protection for all land reform measures” (Constitutional Assembly 1995b: 13). While Theme Committee 4, which was responsible for the Bill of Rights, had thus far uncontroversially adopted a property clause that merely incorporated the 1993 Constitution’s restitution provisions into the property clause itself, the report on Land Rights threw the proverbial cat among the pigeons. Some objected to Theme Committee 6.3’s discussion of property rights, while others sensed an opportunity to reopen the debate on property rights and to once again question their very inclusion in the Bill of Rights. As a result, the Draft Bill of Rights published by the Constitutional Assembly on October 9, 1995, included an option that there be “no property clause at all.”

It was in this context that an alternative option, a property clause that included specific land rights as well as a subclause insulating land reform from constitutional attack, began to gain momentum. While a

strategy to insulate land restitution and land reform from constitutional attack had been implicit from early on in the debate, it was my suggestion in a submission to Theme Committee 6.3 that the property clause include a specific subclause insulating state action aimed at redressing past discrimination in the ownership and distribution of land rights, which the negotiators were able to rely upon as a compromise between those demanding the removal of the property clause and those, like the Democratic Party, who remained opposed to even the social democratic formulation modeled on the German Constitution (Constitutional Assembly 1995c: 13–41). Still the debate raged, and the draft formulations of the property clause continued to evolve.²⁰ Political agreement on the property clause was only finally reached at midnight on April 18, 1996, when subsection 28(8), the “affirmative action” or insulation subclause of the property clause, was modified so as to make it subject to section 36(1), the general limitations clause of the Constitution (Nicol and Bell 1997).

The final property clause reflects the democratic origins of the Constitutional Assembly. It not only guarantees the restitution of land taken after 1913 (Constitution 1996: Section 25(7)) and a right to legally secure tenure for those whose tenure is insecure as a result of racially discriminatory laws or practices (Section 25(6)), but also includes an obligation on the state to enable citizens to gain access to land on an equitable basis (Section 25(5)). Furthermore, the state is granted a limited exemption from the protective provisions of the property clause so as to empower it to take “legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination” (Section 25(8)).

Despite agreement in the Constitutional Assembly, the property clause was presented to the Constitutional Court as violating the Constitutional Principles and therefore grounds for denying certification of the Constitution.²¹ Two major objections were raised: first, that unlike the interim Constitution the new clause did not expressly protect the right to acquire, hold, and dispose of property; second, that the provisions governing expropriation and the payment of compensation were inadequate (Ex parte chairperson of the Constitutional Assembly 1996: Paragraph 70). The Constitutional Court rejected both of these arguments. First, the Court noted that the test to be applied was whether the formulation of the right met the standard of a “universally accepted

fundamental right” as required by Constitutional Principle II. Second the Court surveyed international and foreign sources and observed that “if one looks to international conventions and foreign constitutions, one is immediately struck by the wide variety of formulations adopted to protect the right to property, as well as by the fact that significant conventions and constitutions contain no protection of property at all” (Paragraph 71). In conclusion the Court argued that it could not “uphold the argument that, because the formulation adopted is expressed in a negative and not a positive form and because it does not contain an express recognition of the right to acquire and dispose of property, it fails to meet the prescription of CPII” (Paragraph 72). The second objection met the same fate, with the Court concluding that an “examination of international conventions and foreign constitutions suggests that a wide range of criteria for expropriation and the payment of compensation exists,” and thus the “approach taken in NT 25 [new text section 25] cannot be said to flout any universally accepted approach to the question” (Paragraph 73).

Although it may be argued that the property clause in the final Constitution is unique to South Africa and is the product of South Africa’s particular history of dispossession, it is also important to note how resolution of the property question was framed by international options. While the Constitutional Court could argue that the particular formulation of the clause was compatible with global standards—given the variety of formulations in existence—it is also true that those who advocated that there should be no property clause in the Constitution were compelled by the politics of recognition of property rights to accept its inclusion.

The politics of constitution making in this instance were thus bounded on both sides. Both the option of widespread nationalization initially advocated by the African National Congress, which may have been facilitated by the exclusion of a property clause, and the demands for a strict protection of property guaranteeing market-value compensation for any interference were silenced. Instead the parties were able to use the international and foreign lexicon of treaties, constitutions, and case law to formulate a specifically South African compromise. This resolution both enabled the political transition and left open, for future fact-specific confrontations, the exact interpretation to be given to the new Constitution’s property clauses.

Globalized?

While South Africa's "final" 1996 Constitution has been profoundly shaped by the struggles—political, social, and intellectual—that continue to be waged over fundamental political and social arrangements, including the nature and extent of property rights, the adoption of a common constitutional framework has begun to trace the boundaries of these at times irreconcilable differences. Focusing on the making of the property clause, I have tried to demonstrate both the complexity of the interaction of "local agency" and "global insistence" through the emergence of "bounded imaginations" and the resultant "hybridized outcomes," as well as the particular role that constitutionalism played in South Africa's democratic transition by supporting and giving hope to those who held fundamentally conflicting goals.

This harnessing or civilizing of political conflict is, it seems, achieved in two primary ways. First is the inherently open form of the constitution, which, despite all attempts to the contrary, is interpreted by opposing factions as supporting, at least in part, their particular vision of what is either possible or mandated. Second, by incorporating external formulations of constitutional rights and structures, as well as explicitly providing for the use of international and foreign legal sources, the constitutional framework implicitly silences options that cannot be justified in terms of the constitution read in a global context.

While the new constitutional framework has enabled the political transition by allowing opposing forces to imagine the possibility of achieving, at least in part, their particular vision within the terms of the Constitution, it has also worked to shape these imaginings through the creation of external reference points that delegitimize incompatible alternatives or visions. There remain, however, fairly large and incompatible differences between the alternative yet viable interpretations advocated in the context of these different political and social struggles. The incorporation of "global rules and practices" of constitutionalism here provides the institutional space for repeated attempts to advance any particular vision that may conceivably be presented as a compatible interpretation of the Constitution. The courts and in particular the new Constitutional Court thus perform an essential political role by keeping alive alternative possibilities while employing globally legitimated "rules" and "practices" to establish the outer boundaries of competing constitutional imaginations.

Political conflicts over property rights were thus projected into the future where their resolution will continue to depend on local responses to, interpretations of, and remakings of global standards. The outcome is a forever changing but bounded interaction in which the legal standards will represent at once a hybridized incorporation of global standards and the local formulation and production of global options. Once framed locally in response to both local and global possibilities, the property clause in the 1996 Constitution is now an example to be globalized and hybridized by others.

Conclusion

While I have tried to trace the contribution that international forces, examples, and legal sources made to the property clause in South Africa's new Bill of Rights, as well as the impact of local histories, ideas, and struggles on its ultimate form, I will conclude by trying to specify the conditions that made such hybridity possible and the often unintended consequences of these developments. First, it is important to recognize why "the international" might have had such valence in South Africa's transition. While the specific examples drawn upon by the particular players had no individual significance—from the United States, German, and Canadian constitutional formulations, to the histories of the Indian Claims Commission in the United States, land reforms in Taiwan and South Korea, and the equalization tax in postwar Germany, to constitutional conflicts over land reform in postcolonial India and the affirmative land-rights provisions in the Papua New Guinean Constitution—their role as part of an international text had a major impact on the shaping of the alternatives open to the South African participants. The power of "international experience," I would suggest, came not only from a fundamental belief that international norms provide an external point of reference for conflicting parties, as well as the ANC's strategic commitment to international norms as a means of precluding some of the ancien régime's most cherished claims, but also from a history in which the antiapartheid movement had long looked to international norms to sustain its critique of apartheid. As Nelson Mandela argued in explaining the ANC's adoption of a "human rights programme" at the opening of the ANC's workshop on a future bill of rights in May 1991, "international human rights standards have

provided the legal and moral inspiration for the struggle against the antithesis of civilised values: apartheid. By characterizing apartheid as a crime, by protecting our combatants, by describing certain aspects of apartheid as genocide, international rules have validated our struggle. As a result, the apartheid regime has treated such developments with disdain and contempt. We have been cut off from full membership of the international community through South Africa's refusal to adhere to the basic international texts governing human rights" (1991).

Second, the process of negotiation and even serendipity (whether political or intellectual), in which the different interest groups and players posited alternative and often conflicting examples and formulations, created an unconscious process of hybridization. As some possibilities—such as nationalization or the total protection of all existing property rights—were precluded, other imaginable alternatives were produced from the remnants of past hopes and viable possibilities. These alternatives then became the building blocks of each successive formulation and reimagining.

Third, the two-stage constitution-making process adopted in the South African transition enabled the recognition of legitimate claims to restitution, even if narrowly defined, in the first phase, to become the basis for the explicit limitation of property rights in the final constitution. Not only was it possible to bring the right of restitution into the property clause, where it logically belonged, but the shift in power enabled the Constitutional Assembly—despite desperate struggles to the contrary—to include positive rights to land and an explicit affirmative exception for future land and water reform to be included within the property clause of the final constitution.

Finally, despite the obvious gains made by those of us who participated in the struggle for the restitution of land taken by the apartheid regime through acts of forced removal, which will always represent the darkest face of the crime of apartheid, we must also face up to the unintended consequence of our victory—the protection of the wealth of apartheid's beneficiaries. While it may be argued—and indeed was argued, at the ANC conference on a future bill of rights in 1991—that a peaceful transition to democracy required important compromises including the recognition of existing property rights, it is also true that the focus on land left the country's real wealth—now in companies, mines, stocks and bonds, as well as urban housing—completely unchallenged.

NOTES

Parts of this essay have been taken and elaborated from Heinz Klug, *Constituting Democracy: Law, Globalization, and South African's Political Reconstruction* (New York: Cambridge University Press, 2000), by permission of Cambridge University Press.

1. Programs range from that of the Ford Foundation, which has historically supported social movements struggling for democratic rights; to the United States Agency for International Development's programs "designed to support the creation of legal and political environments that will promote processes of democratization and market-based reform" (Rule of Law Consortium 1994: 1) in the former Soviet Union; to the World Bank's 1994 Economic Law Reform Project, assisting China in the reform of its legal framework. The World Bank noted that the "key to any market system is the reliance on a fair and credible legal framework; legal norms and procedures are needed to substitute for government control of economic decisions and to demarcate government's regulatory role in many areas of economic activity" (World Bank 1994a: 1).

2. For example, the work of Yves Dezalay and Bryant Garth on the construction of the field of international commercial arbitration is an example of recent sociolegal scholarship that has begun to examine the construction and transformation of particular systems of justice (1995, 1996).

3. For example, Boaventura Santos discusses the globalization of law and the role of counterhegemonic social forces in the advancement of human rights (1995: 250–377).

4. Bongiwe Njobe, now a senior civil servant in the Department of Agriculture, and Derek Hanekom, minister of land affairs and agriculture in Mandela's cabinet.

5. Richard Abel (1995) gives an excellent account of this activity.

6. As we experienced in the public furors over a suggested wealth tax to pay for compensation to landowners whose land would be expropriated for redistribution, or when suggestions were made about claims on land within the national parks.

7. Dolny and Klug (1992) give an example of an early contribution to the land reform debate from the perspective of the ANC Land Commission.

8. The Constitutional Committee was chaired by Zola Skweyiya, head of the ANC's legal department, under whose authority the land commission initially fell. Skweyiya's interest in and commitment to these issues are reflected in his 1990 article "Towards a Solution to the Land Question in Post-Apartheid South Africa."

9. It should also be noted that, at the same time, activists working in or identified by the ANC Land Commission were being exposed to international

experiences of land reform, including a Ford Foundation-funded six-week minicourse organized by the Land Tenure Center at the University of Wisconsin-Madison.

10. Elsewhere I have criticized the government's Advisory Committee on Land Allocations (ACLA) (Klug 1996a: 166-71).

11. These included the following conferences: "Towards a Non-Racial, Non-Sexist Judiciary in South Africa," Constitutional Committee of the ANC and the Community Law Centre, University of the Western Cape, Cape Town, March 26-28, 1993; "Structures of Government for a United Democratic South Africa," the Community Law Centre, University of the Western Cape, ANC Constitutional Committee, Center for Development Studies, University of the Western Cape, Cape Town, March 26-28, 1992; "National Conference on Affirmative Action," University of the Western Cape, ANC Constitutional Committee and Community Law Centre, Port Elizabeth, October 10-12, 1991; "Conference on a Bill of Rights for a Democratic South Africa," Constitutional Committee of the ANC and the Centre for Socio-Legal Studies, University of Natal, Durban, Salt Rock, Natal, May 10-12, 1991; "Constitutional Court for a Future South Africa," ANC/CAIS/Lawyers for Human Rights, Magaliesberg, February 1-3, 1991; and "Seminar on Electoral Systems," Centre for Development Studies (CDS)/ANC Constitutional Department, Stellenbosch, November 2-4, 1990.

12. While I participated erratically in the meetings of this group, I did submit a memorandum on the experience of the Indian Claims Commission in the United States as both an example of a land claims process and as a warning against limiting the claimants' remedies to monetary compensation instead of the return of land that was the basic demand of claimants. In the debates that followed we were able to use the experience of the ICC to argue that cash settlements could never satisfy demands for the return of land, pointing to the fact that after thirty years and millions of dollars Native American claims remained unsatisfied.

13. Budlender was director-general of the Department of Land Affairs, the highest-ranking civil servant in the department, from 1995 to 2000.

14. For example, a letter dated July 31, 1991, from J. De Villiers, minister of public works and land affairs, responding to a letter from lawyers representing a claimant community, stated in part, "I do appeal to you to advise your clients not to take the law into their own hands because that would unnecessarily complicate consideration of possible claims. It would only serve to increase the temperature of the debate rather than to arrive at a solution."

15. The World Bank published the series "Informal Discussion Papers on Aspects of the Economy of South Africa" between 1992 and 1994, including, for example, *World Bank Southern Africa Department, South African Agriculture: Structure, Performance and Options for the Future* (1994b).

16. This article was eventually published (Binswanger and Deininger 1993).

17. When the World Bank's Rural Restructuring Programme was presented in South Africa at the LAPC-organized Land Redistribution Options Conference in October 1993, it had to compete with a range of suggestions and received serious academic and political criticism. As a result, the program never gained a life of its own, but became yet another source of the smorgasbord of alternatives both enabling and constraining the options available to policymakers in the new South Africa. Its most enduring impacts may be its endorsement of land restitution and reform on the one hand, and the emphasis upon the market in achieving these reforms on the other.

18. As late as October 1995 the Draft Bill of Rights being considered by the Constitutional Assembly's Theme Committee 4 included as Option 2 "No property clause at all" (Constitutional Assembly, Theme Committee 1995a). The Constitutional Assembly, Constitutional Committee Sub-Committee Draft Bill of Rights includes a discussion of the nature of the right to property in international law (1995a: 126-40).

19. A group marching on the World Trade Centre in June 1993 delivered a land rights memorandum to the negotiators. It was followed by a march in central Pretoria in September 1993 in which about 600 people from 25 rural communities threatened to reoccupy land from which they had been removed by the apartheid government. Marchers demanded the unconditional restitution of land, the establishment of a land claims court, and guaranteed security of tenure for farmworkers and labor tenants. The Transvaal Rural Action Committee, which organized the march, also called for the rejection of the proposed property clause in the constitution (Adrian Hadland, "Demonstrators hand govt land ultimatum," *Business Day*, September 2, 1993).

20. New versions were published in the October 30, 1995, Refined Working Draft (2d ed.) of the Constitution (Constitutional Assembly 1995d). Another ANC proposal was published in the February 9-16, 1996, edition of *Constitutional Talk*—the official newsletter of the Constitutional Assembly. Still another was published in the April 22-May 18, 1996, edition of *Constitutional Talk*.

21. Under the original political compromise, the Constitutional Assembly was to be constrained by the Constitutional Principles negotiated between the parties and appended to the 1993 interim Constitution. The Constitutional Court was empowered to certify whether a draft constitution prepared by the Constitutional Assembly met the requirements of the Constitutional Principles. The Constitutional Court in 1996 first declined to certify the draft and then certified the new text adopted in response to the Court's first certification judgment.

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