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THE SOUTH AFRICAN CONSTITUTIONAL COURT AND SOCIO-ECONOMIC RIGHTS AS ‘INSURANCE SWAPS’

Rosalind Dixon & Tom Ginsburg***

1 Introduction

Socio-economic rights are a central terrain of struggle in new democracies.¹ Often deemed essential for the legitimacy of the constitution at the time of adoption, they are subject to downstream pressures at the implementation stage as governments confront limited budgets and the need for macroeconomic credibility. The result is a gap between promise and reality. It is not surprising that, in an age of judicialisation, socio-economic rights have become a central topic of constitutional adjudication in many new democracies, as courts struggle to balance normative commitments with democratic prerogatives.²

The South African Constitutional Court, in the 2010 Term, heard a number of important cases involving the socio-economic rights provisions in sections 26-29 of the Constitution. In *Nokotyana v Ekurhuleni Metropolitan Municipality*,³ the Court considered a claim by the applicants to have access to upgraded toilets and lighting, as

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¹ The division between socio-economic and other rights is, of course, an artificial one: see eg T Daintith ‘The constitutional protection of economic rights’ (2004) 2 *International Journal of Constitutional Law* 56 - 90. We use the labels, however, simply as a short-hand for denoting a distinct set of rights.

² RU Yepes ‘The enforcement of social rights by the Colombian Constitutional Court’ in R Gargarella, P Domingo & T Roux (eds) *Courts and social transformation in new democracies* (2006) 127; C Rodriguez-Garavito ‘Colombia: The new left: Origins, trajectory and prospects’ in P Barret *et al* (eds) *The new Latin American left: Utopia reborn* (2008) 129 - 157.

³ *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC).

part of the right of access to housing under section 26 of the Constitution. In *Juma Masjid Trust v MEC*,⁴ the Court considered a challenge to an order evicting a public school from privately-owned land, based on the right to 'basic education' under section 29 of the Constitution, and its potential horizontal application, under section 8(2), to a privately-owned trust owning land on which a public school was located.⁵ In *Tongoane v National Minister for Agriculture and Land Affairs*,⁶ the Court heard a challenge to various aspects of the Communal Land Rights Act (CLARA) based on their inconsistency with the right to legally secure land tenure under section 25(6) of the Constitution.⁷ And in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*,⁸ the Court considered a challenge to the grant of prospecting rights to the respondents, based on both a failure to comply with relevant statutory provisions and the right of 'equitable access' to natural resources in section 25(4) of the Constitution.⁹

The 2010 Term was also book-ended by numerous cases involving sections 26-29. In 2009, in *Mazibuko v City of Johannesburg*,¹⁰ the Court issued one of its most significant decisions to date involving socio-economic rights, dismissing a challenge under section 27(1)(b) of the Constitution (the right of access to sufficient water) to the free-water allowance and pre-paid meter policy of the City of Johannesburg (and Johannesburg Water (Pty) Ltd). In *Mpumalanga Department of Education v Hoërskool Ermelo*,¹¹ the Court dismissed a challenge under section 29(2) of the Constitution to the decision of the Minister to revoke the power of a public school board to determine its own language policy. And in *Joe Slovo v Thubelisha Homes (Joe Slovo I)*,¹² *Joseph Leon v City of Johannesburg*,¹³ *Abahlali v Premier of KZN*,¹⁴ and *Machele v Mailulu*,¹⁵ the Court addressed a variety of questions relating to the scope of section 26(1).

⁴ *Juma Masjid Primary School v Essay N.O.* 2011 8 BCLR 761 (CC).

⁵ The reasons for decision in *Musjid* were handed down in 2011, but the initial decision in the matter was given in 2010. See n 4 above, para 6.

⁶ *Tongoane v National Minister for Agriculture & Land Affairs* 2010 8 BCLR 741 (CC).

⁷ Constitution of the Republic of South Africa 1996 sec 25(6). The Court did not ultimately find it necessary to address this claim, on its merits, because of its finding that the legislation was invalid in its entirety, based on a failure to comply with the proper procedures for enactment in terms of sec 76 of the Constitution: see *Tongoane* (n 6 above) paras 109 - 116.

⁸ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 3 BCLR 229 (CC).

⁹ For the relevant constitutional arguments, see *Bengwenyama* (n 8 above) paras 3 & 28.

¹⁰ *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC).

¹¹ *Mpumalanga Department of Education v Hoërskool Ermelo* 2010 3 BCLR 177 (CC).

¹² *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 2009 9 BCLR 847 (CC) (*Joe Slovo I*).

¹³ *Joseph v City of Johannesburg* 2010 3 BCLR 212 (CC).

¹⁴ *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2010 2 BCLR 99 (CC).

¹⁵ *Machele v Mailula* 2009 8 BCLR 767 (CC).

In 2011, in *Gundwana v Steko Development CC*, the Court again confronted arguments based on section 26(1), this time in the context of a dispute over the executability of mortgaged property under various procedures for the ordering of default judgment in the High Court.¹⁶ And in *Joe Slovo II*, it revisited questions raised in *Joe Slovo I* about the right of the applicants to housing in terms of section 26(1).¹⁷

In several of these cases, the Court also confronted a potential direct *conflict* between various socio-economic rights, such as the right of access to land, housing and education, and the right to property under section 25(1) of the Constitution. The best example of this, in the 2010 Term, was *Musjid*, where the Court found that the Trust was *both* under a duty not to impair relevant children's 'access to basic education' under section 29 *and* entitled to maintain and enforce its right to private property under section 25.¹⁸ A similar pattern also arose, however, in numerous cases decided in 2009 and 2011 involving the right of access to housing under section 26(1) of the Constitution.

In *Abhalali*, the legislation in question was challenged by the petitioners as in direct conflict with both section 26(1) of the Constitution and the provisions under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) giving effect to this right.¹⁹ At the same time, by requiring municipalities to expend the political and economic resources necessary to institute eviction proceedings against unlawful occupiers in various circumstances, the legislation in question was also designed to protect the right to property in section 25(1). Similarly, in *Gundwana*, the petitions relied on section 26(1) to challenge various High Court Rules permitting a High Court registrar to declare mortgaged property specially executable, as part of granting default judgment, when such rules were clearly designed to protect the right to property, by allowing for more expeditious forms of legal enforcement of this right.²⁰

¹⁶ *Gundwana v Steko Development CC and Others* 2011 8 BCLR 792 (CC).

¹⁷ *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes* 2011 7 BCLR 723 (CC) (*Joe Slovo II*).

¹⁸ A similar potential for this kind of direct conflict also arose in *Bengwenyama*, given that, as part of its reasoning, the Court clearly affirmed both the 'preferent right' of the second applicants – as a community that had previously been deprived of formal title to their land by racially discriminatory laws, but then had those rights reinstated – to be granted prospecting rights over their own land; and also the existence of both statutory and constitutional support for this position, in light of constitutional provisions such as sec 25(4) that guarantee a right of equitable access to mineral resources. The respondents, however, did not explicitly rely on sec 25 in arguing that their prospecting rights should not be set aside.

¹⁹ Act 19 of 1998.

²⁰ n 16 above, para 37.

The 2009-2011 Terms, therefore, provide a natural opportunity to revisit the political relationship between the origins of socio-economic rights guarantees such as sections 26-29 and the right to property, in section 25 of the Constitution. While the political origins of rights such as section 25 have been theorised in prior work on the 'insurance-based' function of judicial review, the political origins of other socio-economic rights have received relatively little attention.²¹ A key aim of this essay, therefore, is to begin to fill this gap in the literature – by expanding existing insurance-based theories of judicial review so as to account for the political origins of various socio-economic rights, other than property, and in particular: rights of access to housing, land, mineral resources and collective organisation and bargaining.

For left-wing parties to constitutional negotiations, the inclusion of a constitutional right to property carries a clear risk: that courts and others will interpret such a right to impede legislative attempts to redistribute resources, or realise basic socio-economic rights, such as the rights of access to housing, land or collective bargaining. One solution to this problem will be for left-wing parties to argue for the *exclusion* of a right to property from a constitution. This was the strategy successfully adopted, for example, by the National Democratic Party in Canada, in the negotiations leading up to the adoption of the *Charter of Rights and Freedoms* 1982.²² Such a strategy, however, will also often be impractical, given the demand for political insurance on the part of conservative parties to constitutional negotiations. Attempts by left-wing parties to 'carve out' certain limits to constitutional property rights guarantees may also fail for similar reasons, relating to bargaining costs.²³

A more realistic alternative for such parties, therefore, will in many cases be to argue for the inclusion of certain socio-economic rights guarantees as a form of 'insurance swap', which insulates forms of progressive legislation from future constitutional invalidation in return for concessions on the constitutional protection of property rights. This idea of an insurance swap has a close resemblance, we suggest, to other forms of financial swap, such as interest-rate swaps, exchange-rate swaps and credit default swaps: it can allow parties to

²¹ See T Ginsburg *Judicial review in new democracies* (2003); compare also R Hirschl *Towards juristocracy: The origins and consequences of the new constitutionalism* (2004). On socio-economic rights, see A Ben-Bassat & M Dahan 'Social rights in the constitution and in practice' (2008) 36 *Journal of Comparative Economics* 103 - 19.

²² See A Alvaro 'Why property rights were excluded from the Canadian Charter of Rights and Freedoms' (1991) 24 *Canadian Journal of Political Science / Revue canadienne de science politique* 309 - 29.

²³ For this idea of constitutional 'carve-outs', see R Dixon 'Constitutional definitions' (Working Paper, 2011-12).

bargain in a way that is more efficient than in the case of a one-way exchange.

This account of socio-economic rights is also helpful to understanding the South African context in 1995-1996. The African National Congress (ANC) had a number of reasons to support the inclusion of socio-economic rights (or directive principles) in any democratic constitution; but among these was a concern to prevent an overly expansive reading of first generation rights, such as the right to property. In 1995, opposition parties were also more willing to make concessions to the ANC on socio-economic rights than on the core of the right to property itself, which was viewed as a deal-breaker. On one reading, therefore, provisions such as sections 26-29 had an important capacity to lower the decision costs, for all parties, of reaching agreement on the final text of the Constitution.

For the Constitutional Court, an insurance swap-based theory of this kind has potentially important implications for the interpretation of sections 25-29. From a historical or 'originalist' perspective, it suggests that a key task facing the Court will be the need to maintain a balance between the right to property and other socio-economic rights, which may potentially conflict with a right to property. To do this, the Court will also need to do two things: one, invalidate any statutory or common law presumption in favor of one or other sets of right; and second, adopt reasoning that is as narrow and context-sensitive as possible in all cases involving such rights. This will also mean the Court avoiding broad statements in favor of either highly expansive or deferential, or 'strong' or 'weak', approach to the definition and enforcement of such rights.²⁴

Our suggested approach also accords surprisingly well, we suggest, with the actual approach of the Constitutional Court in both recent and earlier cases involving socio-economic rights. This may be pure coincidence, but nonetheless, points to an important source of potential additional support for the Court, in the face of criticism of certain aspects of its approach, such as its rejection of the idea of a 'minimum core' to various socio-economic rights.²⁵

The essay proceeds in four parts, following this introduction. Part 1 outlines the basic contours of an insurance-based theory of judicial

²⁴ On the distinction between strong versus weak-form review in this context, see M Tushnet *Weak courts, strong rights: judicial review and social welfare rights in comparative constitutional law* (2008); R Dixon 'Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited' (2007) 5 *International Journal of Constitutional Law* 391.

²⁵ See D Bilchitz 'Giving socioeconomic rights teeth: the minimum core and its importance' (2002) 119 *South African Law Journal* 484, and discussion in Dixon (n 24 above).

review, and explains how such a theory can be expanded to account for the origins of various socio-economic rights, in addition to the right to property, as forms of 'insurance swap' for left-wing parties to constitutional negotiations. Part 2 applies the theory to the South African context in 1993-1996. Part 3 considers the implications for such a theory for the interpretation and enforcement of various socio-economic rights in South Africa and elsewhere. Part 4 offers a brief conclusion, focusing on the potential further extension – and limits – of insurance-based theories in the context of socio-economic rights provisions.

2 Socio-economic rights as insurance swaps

Our theory draws from earlier work on the 'insurance' function of constitutional review.²⁶ The idea assumes, in a rational choice vein, that constitutional designers will choose institutions based on their prospective position in the post-constitutional order. A designer who believes she is likely to be in the majority in a post-constitutional election will favour majoritarian institutions. One who believes she will be in the minority, on the other hand, will prefer to have institutions that can check the majoritarian legislature. These might include rights protections, judicial review, supermajoritarian requirements, and guardian institutions such as human rights commissions.

The insurance model has been applied with some success in several contexts.²⁷ On its face it predicts that constitutions written by dominant parties, such as the African National Congress (ANC), will have fewer rights protections, unless (as proved to be the case in South Africa) the minority demands them as the price of agreement. But as has been argued elsewhere, the veto power held by minority parties in South Africa meant that there had to be some negotiated compromise between the two sides. This is a standard account of the reason for the inclusion of a constitutional right to property in South Africa: it was a line in the sand for the National Party (NP).²⁸

Socio-economic rights present some challenge for basic insurance accounts because they are, generally speaking, majoritarian and redistributive rather than minoritarian in character. We thus need a different account of the inclusion of judicially enforceable socio-

²⁶ Ginsburg (n 21 above).

²⁷ J Finkel *Judicial reform as political insurance* (2006). But see SI Oseguera 'Judicial reform in Mexico: Political insurance or the search for legitimacy?' (2009) 62 *Political Research Quarterly* 753 - 66.

²⁸ See M Chaskalson 'Stumbling towards section 28: Negotiations over the protection of property rights in the Interim Constitution' (1995) 11 *South Africa Journal of Human Rights* 222 - 240.

economic rights in a constitution. It is perfectly understandable why a dominant majority party with a left-wing ideology would seek to use the language of rights to signal their policy goals;²⁹ it is equally understandable why a right-wing party faced with sure electoral loss would find judicial power attractive, along with property rights protections. The puzzle is why we would observe the combination. The property rights section of the 1996 South African constitution contains competing imperatives, and is balanced by a broad set of socio-economic rights in other sections. What might explain this pattern?

In the ordinary context of constitutional negotiations, judicial review was modelled as an insurance policy to minimise future losses in the event of political defeat. All parties that see themselves as potential losers in the electoral realm will want to ensure that they have access to a court to challenge future policies that violate their rights or liberties. As has been recognised, the availability of this insurance lowers the stakes associated with political defeat, and hence may make some constitutional bargains possible that would not otherwise be so.³⁰

For left-wing parties, however, there is also the danger that agreeing to certain forms of basic rights-based insurance – particularly in the form of rights to property or contract – can prove extremely costly, greatly undermining the future ability to adopt progressive legislation. If read sufficiently broadly, rights to property or contract have the capacity to cast doubt on the validity of almost any form of redistributive or progressive legislation. All that is required for this to occur, in the context of a right to property, for example, is that a court adopt a broad view of what is (in US language) a ‘regulatory taking’, or in the language of the 1993 South African Constitution, a ‘deprivation’ as opposed to ‘expropriation’ of property. Given such an approach, almost any law imposing a tax, or regulating the use of property, may be invalidated by a court for inconsistency with the right to property. Where a constitution is negotiated between left- and right-leaning parties, rather than unilaterally adopted by a dictator or right-leaning party, rights to property can therefore emerge as a significant source of disagreement in constitutional negotiations.

Three basic responses emerge in the face of this kind of conflict. One option will be non-inclusion of a right to property, perhaps in

²⁹ On the signaling function of socio-economic rights provisions more generally, see DA Farber ‘Rights as signals’ (2002) 31 *The Journal of Legal Studies* 83.

³⁰ Ginsburg (n 21 above).

return for concessions on other issues.³¹ A second option will be for the parties to include the guarantees sought by both parties, but to negotiate language limiting the scope of the relevant political insurance by appropriately clear 'carve-outs', so as to avoid any obvious conflict between such rights and potential future progressive/redistributive legislation favoured by a left-wing party to constitutional negotiations.³² And a third option will be for the parties to adopt both a right to property and a set of *offsetting socio-economic rights* (or directive principles) that can help shield, or immunise, progressive legislation or policies against the potential for future constitutional attack.³³

A good example of how socio-economic rights guarantees can play this role – as constitutional 'shields' – is the decision of the SACC in *Minister of Public Works v Kyalami Ridge Environmental Association*,³⁴ a case involving the right to housing as a mere shield, and the better known case of *Government of South Africa v Grootboom*,³⁵ in which the applicants asserted a positive obligation on the state to provide them with access to housing. The applicants in *Kyalami Ridge* were property-owners who sought to restrain the construction of temporary housing by the government near their homes (for approximately 300 hundred people rendered homeless by a flood in Alexandra), on the basis that the decision to commence construction was unlawful. The government, however, defended the legality of its actions by relying on a combination of its inherent right as a property owner and its obligations under section 26(1) of the Constitution.

Certain rights, such as the right of access to housing, or land, mineral resources or collective bargaining, will have a particularly strong capacity to play this role, because of their quite direct, physical connection to the enjoyment of rights to real property. However, almost any socio-economic right will have the capacity to play such a role, given a sufficiently expansive approach by a court to the right to property. (Take, for example, the role a right of access to health-care, such as section 27(1), could play in helping support the

³¹ This, for example, is what happened in Canada in the context of conflict over the inclusion of a right to property in the Canadian Charter of Rights and Freedoms. The federal sponsors of the *Charter* (Prime Minister Pierre Trudeau and the Liberal Party) agreed to drop their demand that such a clause be included, in return for support from provinces such as Saskatchewan for the *Charter* package as a whole: see eg Alvaro (n 22 above).

³² See eg Constitution of Zambia 1996 art 16. For this idea of constitutional 'carve-outs', see Dixon (n 23 above).

³³ The more freestanding such rights guarantees are, however, the more likely it is that they will in fact be interpreted as having this kind of immunising effect.

³⁴ *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 7 BCLR 652 (CC).

³⁵ *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

validity of a change in zoning law allowing the building of a nursing home, or group-care facility, in a wealthy neighbourhood.)³⁶

For left-wing parties to constitutional negotiations, therefore, the constitutionalisation of a broad range of socio-economic guarantees can be seen as providing a form of *insurance* against the risk that a particular concession (in relation to the right to property) will lead to a very large cost in terms of the scope for adopting progressive legislation. Because the demand for such insurance is linked to the grant of reciprocal insurance to right-wing parties to constitutional negotiations, such insurance can also be seen as contributing to a form of constitutional ‘insurance swap’ arrangement.

In an economic context, a swap is a contract for an exchange of future cashflows. Parties engage in them to reduce risk in markets such as those for currency, commodities, and interest rates. For example, a risk-averse party might want to exchange the obligation to pay a floating rate of interest for the obligation to pay a fixed rate. Another example is a credit default swap, in which one party transfers the risk of a credit default to another party that is (presumably) in a better position to accept the risk.³⁷

Both parties under such an arrangement hold mutual cross-collateralised promises that hedge their risk to a certain degree, but leave to it downstream or ‘market’ agents (here, a court) to determine the precise value of the hedge for both sides. Both parties also pay some form of ‘premium’ for the insurance they obtain; a premium is a small but certain cost today, in order to avoid a larger and more uncertain loss tomorrow.³⁸

Why might parties decide to adopt a ‘swap arrangement’ of this kind? The reasons are clearly multiple, but the key explanation, we suggest, lies in the presence of both high bargaining costs for parties in attempting to negotiate a complete and fully articulated balancing of the competing constitutional demands, and strong preferences for one or other party over a particular constitutional domain.

³⁶ For the conflict between property owners and such facilities, compare eg *City of Cleburne v Cleburne Living Center, Inc.* 473 US 432 (1985).

³⁷ RM Stulz ‘Credit default swaps and the credit crisis’ (2010) 24 *Journal of Economic Perspectives* 73 - 92. There is, unsurprisingly, a large literature on the costs and benefits of credit default swaps in the wake of the 2008 financial crisis, in which swaps on subprime mortgage-backed securities played a major role. Some argue that the presence of swaps improves the speed of transmission of market information and makes markets more efficient. Others have argued that the ability to offload risk reduces incentives for monitoring. Stulz 76.

³⁸ The basic idea of insurance is that involves paying some definite cost (i.e. premium) in order to avoid a potential uncertain liability in the future.

If bargaining costs are low, the parties will simply negotiate all the details of a particular constitutional arrangement. Bargaining costs, however, may be high for a number of reasons. One factor will be asymmetric information among parties to a constitutional negotiation process, which can lead to a failure to reveal the basis for a bargain. Another problem is that constitutional bargaining sometimes has the character of a bilateral monopoly, in which two groups are thrown together by historical circumstance into a nation and they have no possibility of divorce. This can lead to efforts to 'hold-out' for a better agreement, making it difficult to conclude a bargain. Another source of trouble, is the existence of constitutional 'passions',³⁹ which may lead parties to reject pareto-improving trades or agreements. If bargaining costs are high, parties will also often respond by 'deciding not to decide' all relevant constitutional details,⁴⁰ and instead adopting broad constitutional standards, or vague constitutional language, requiring key issues be decided by future legislators or courts.⁴¹

Parties, however, may also have a strong interest in providing – or at least being seen to provide – *some* general guidelines for downstream decision-makers in certain areas. They may have strong historical reasons for wishing downstream decision-makers to be constrained in particular ways. Alternatively, parties may have publicly committed themselves to certain constitutional positions in a way that means that they will demand a form of reputational premium from the other side, before being willing to drop their demand for particular constitutional language.

Preferences of this kind will mean that the parties to constitutional negotiations are willing to pay a real political price in order to obtain protection for their agenda (or policies) from a court, in the event of a bad political outcome. The form this price takes will generally be quite similar for both right- and left-wing parties, namely, acceptance of downstream judicial power to impose certain limits on their own freedom of action, when in government, in return for certainty that their agenda (or policies) will receive at least partial protection from the court in the event of a bad political outcome. The only difference between the two contexts is that, in the case of left-wing parties, the left may have greater freedom to choose between more and less expensive (and thus comprehensive) forms of insurance, via the choice between justiciable socio-economic rights

³⁹ J Elster 'Forces and mechanisms in the constitution-making process' 45 *Duke Law Journal* 364 (1995).

⁴⁰ See T Ginsburg & R Dixon 'Deciding not to decide: Deferral in constitutional design' *I-Con: the International Journal of Constitutional Law* (2011).

⁴¹ As above.

guarantees and mere ‘directive principles’ of state policy.⁴² That is, the left can calibrate the strength of demanded rights guarantees.

One bit of evidence for the plausibility of such constitutional insurance swap arrangements, we suggest, is the co-occurrence of socio-economic and property rights in national constitutions. To evaluate this relationship, we used a summary index of socio-economic rights generated by Ben-Bassat and Dahan.⁴³ They examine different levels of constitutional protection for five sets of rights (social security, health, education, housing, and workers’ rights) for 67 nations. Using data from the Comparative Constitutions Project, we generated a variable to capture strong protection of private property, which was coded 1 if a country’s constitution explicitly provides for ‘full’ ‘adequate’ or ‘just’ compensation for takings. The socio-economic rights index and the property rights variables are positively correlated, and strong property rights are a significant predictor of a higher socio-economic rights index in numerous multivariate specifications, controlling for wealth, democracy, the year the constitution was adopted, and whether the country has ratified the International Covenant on Social and Economic Rights.⁴⁴ Strong protection for property thus seems to go along with bundles of socio-economic rights.

In the South African context, we argue, sections 25-27 of the Constitution also ultimately reflected exactly this kind of swap arrangement when it came to the protection of the right to property and other socio-economic rights.

⁴² This assumes, of course, that both sets of guarantees give courts some textual basis for imposing affirmative limits on government action, as is evidenced, for example, by the approach of the Supreme Court to India to the directive principles contained in the Indian Constitution. See eg *Olga Tellis & Ors v Bombay Municipal Council* [1985] 2 Supp SCR 51. It also assumes, however, that courts are more likely to impose affirmative limits on governments where the constitution explicitly authorises this, than where it does not. See eg G Hogan ‘Directive principles, socio-economic rights and the Constitution’ *Irish Jurist*, xxxvi (2001). Right-wing parties, of course, also have the option of choosing more or less comprehensive forms of insurance, via the selection of ‘strong’ versus ‘weak’ models of judicial review. Doubts have been raised, however, about the stability of such a choice: see Tushnet (n 23 above); M Tushnet ‘The rise of weak-form review’ in T Ginsburg & R Dixon (eds) (2011) *Comparative Constitutional Law* 321 - 333.

⁴³ A Ben-Bassat & M Dahan ‘Socio-economic rights in the constitution and in practice’ (2008) 36 *Journal of Comparative Economics* 103.

⁴⁴ In some specifications, the significance was only at the 85% confidence level. Data is available from authors.

3 The South African constitution and insurance swaps

The 1996 Constitution was, of course, the product of a unique two-stage process of constitutional drafting.⁴⁵ The first stage involved the negotiation, between the National Party (NP), African National Congress (ANC) and other key players, of an interim constitution to govern during a two-year period of transitional government; and the second, the election of a Constituent Assembly to draft a final democratic constitution. The two stages were also linked in a crucial and novel way, by a form of constitutional 'certification' requirement, according to which a newly created constitutional court was required to certify that the final Constitution was consistent with 32 fundamental constitutional principles set out in a schedule to the interim Constitution.

The negotiation of the interim Constitution itself also took place over many stages. The first formal multi-party talks began in 1991 at the first Congress for a Democratic South Africa (CODESA I); and then resumed, in 1992, at CODESA II. These negotiations, however, broke down completely in June 1992, following a massacre of 49 black South Africans at Boipatong. It took many more rounds of bilateral negotiations between the NP and ANC, and a third round of formal multi-party talks called the Multi-party Negotiating Process (MPNP) at the World Trade Centre in Johannesburg in 1993, to finally come to agreement on the constitutional transition process. A key decision was to adopt an Interim Constitution that would include a bill of rights, and to allow the judiciary to certify the final Constitution for conformity with certain constitutional principles.

The constitutional protection of property was from the outset of these constitutional negotiations one of the areas of sharp disagreement between the parties.⁴⁶ The ANC, for example, expressed concerns from the outset of negotiations at CODESA I about the effect of including *any* right to property in a South African constitution. The concern was that such a right could make it impossible – or at least prohibitively expensive – for a future democratic government to restore land wrongfully taken under apartheid, or even to redistribute land and resources with a view to

⁴⁵ For an excellent summary of this process, from which we borrow in our summary below, see H Ebrahim *The soul of a nation: Constitution-making in South Africa* (1998).

⁴⁶ Chaskalson (n 28 above)

addressing homelessness.⁴⁷ A number of leading ANC thinkers therefore argued that that ‘the only way to achieve a true balance between the rights of property-holders and [the] property-less [was] to weaken existing property rights, as a matter of deliberate policy’.⁴⁸ In the early stages of work by the Technical Committee on Fundamental Rights, at Kempton Park in 1992, the ANC argued against the inclusion of any form of constitutional protection for the right to property.⁴⁹

It soon became clear, however, that this position was politically untenable. It went directly against the expansive approach toward the drafting of a bill of rights taken by the ANC-appointed members of the Technical Committee, and, also, the importance of the right to property to the National Party, as a form of political insurance (or at least *perceived* insurance).⁵⁰

The National Party (NP) was, as Mathew Chaskalson has noted, intent from the outset of constitutional negotiations ‘on ensuring that the property of existing white owners would be safe from the depredations of a future democratic government’.⁵¹ In 1993, it therefore argued for the inclusion of an extremely strong form of constitutional protection for the right to property, which required both that any taking (or expropriation) of property had to be for a ‘public purpose’ and at full market value,⁵² and that sought to prevent the imposition of any form of tax imposing ‘unreasonable inroads upon the enjoyment, use or value of such property’.⁵³

The ANC thus quickly responded by adopting an alternative strategy, which sought to limit the scope of such a property guarantee in at least three key ways: first, by making the content of the right to property a matter to be ‘determined by law’; second, by preventing the exercise of such rights in a manner contrary to the ‘public interest’; and third, by making the compensation for any taking of property an amount that achieved an ‘equitable balance’ between the public interest and the interests of the property owner.

⁴⁷ See eg G Budlender ‘The right to equitable access to land’ (1992) 8 *South African Journal on Human Rights* 295-304; AJ van der Walt ‘Development that may change the institution of private ownership so as to meet the needs of a non-racial society in South Africa’ (1990) 1 *Stellenbosch Law Review* 26. (suggesting that ‘the inclusion of the right to private property [in a democratic constitution could] serve to reinforce [an] abstract and absolute concept of ownership’, in a way which would then stand in the way of the emergence of a non-racial society).

⁴⁸ Budlender (n 47 above) 304.

⁴⁹ Chaskalson (n 28 above) 229.

⁵⁰ On the latter, see Chaskalson (n 28 above) 226 - 228.

⁵¹ Chaskalson (n 28 above).

⁵² Republic of South Africa ‘Government’s proposal on a Charter of Fundamental Rights’ (2 February 1993) 11. See also discussion in Chaskalson (n 28 above) 224.

⁵³ Government’s Proposal (n 52 above).

The property clause adopted in section 28 of the 1993 Constitution was also ultimately a true compromise between the divergent positions of the Government and ANC (and its allies) on these issues.⁵⁴

On the issue of the restitution of land, for example, section 28 was silent in a way that reflected an important victory for the Government on the issue of property rights. At the same time, by linking the level of compensation payable for any expropriation of land to the 'history of its acquisition', the clause also gave an important victory to the ANC. In fact, on the issue of compensation for the taking (or expropriation) of property more generally, section 28(3) established a near perfect compromise between the standards advocated by the Government and the ANC. By requiring, for example, that any such compensation be 'just and equitable', taking into account both the market value of particular property and a range of other relevant factors, section 28(3) clearly rejected the Government's preference for full market value to be the sole determinant of the relevant constitutional standard.⁵⁵ At the same time, by directing attention to factors such as 'the use to which property [was] being put, the value of the investments in it by those affected and the interests of those affected', the clause also adopted an approach to questions of justice and equity that largely rejected the approach of the ANC, which wanted to require courts to focus on (and thus impose on individual property owners the cost of supporting) the social benefit of a particular expropriation. The consideration of investment value obviously weighed in favor of the NP, whose constituents were much more likely to have sunk investments in property.

On the issue of regulatory takings (i.e. the regulation rather than taking) of property, section 28(2) struck a compromise between the positions of the Government and the ANC. It rejected, for example, the ANC approach of making property rights subject to legislative definition and an overriding public interest test; but also allowed the regulation of property rights, subject to certain procedural requirements (i.e. an 'in accordance with law' test).⁵⁶

In 1995, however, the ANC effectively had the opportunity to renegotiate the terms of this compromise, without the same degree of danger of holdout from the NP. As a legal matter, the ANC majority had broad freedom under the final Constitution to redefine the right

⁵⁴ Chaskalson (n 28 above) 226.

⁵⁵ The provisions require that consideration be given to 'all relevant factors, including the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.' Constitution of the Republic of South Africa, sec 28(3).

⁵⁶ Constitution, sec 28(2).

to property.⁵⁷ National constitutions, as the Constitutional Court noted in the First Certification Case, define the right to property in wide variety of different ways: some constitutions give very broad protection to such rights, while others provide no express protection whatsoever.⁵⁸ The right to property also finds limited protection in international human rights law, given the absence of such a right in both the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵⁹ There is no clear minimum content to the right to property as a form of ‘universally accepted fundamental righ[t]’, which the final constitution was bound to respect by virtue of Schedule 3 to the Interim Constitution.

Politically, the ANC also had far greater bargaining power than in 1992-93, by virtue of its strength in the Constitutional Assembly (CA). In South Africa’s first democratic elections, in 1994, to elect the CA, the ANC won approximately 60% of the vote, compared to the NP and DP’s combined total of roughly 25%. To adopt a constitution, by 2/3 majority, the ANC therefore needed the support of only a small number of additional members of the Assembly, which it could achieve without obtaining the support of any of the other major black or white political parties.⁶⁰

This left the ANC with a clear and important choice: either it could attempt to redraft the language of the property clause, so as to closer conform to its preferred position in 1993, or demand additional concessions from the NP and DP in the form of cross-collateralised constitutional guarantees or insurance – i.e. socio-economic rights. To a large extent, the ANC executive also chose to pursue the second of these options.

In the context of the property clause, the ANC ultimately sought only quite limited changes to the existing text of the Interim

⁵⁷ Compare A Sachs <http://www.nelsonmandela.org/omalley/index.php/site/q/03lv00017/04lv00344/05lv01183/06lv01235.htm> (accessed 8 August 2011) (suggesting that the two stage process of constitution-making in fact gave ‘gave [the ANC] a chance to come back in and have lots of different things acknowledged and accepted’ in this context, that they were not able to achieve in 1993).

⁵⁸ *Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC) paras 72 - 73.

⁵⁹ As above.

⁶⁰ See eg S Daley ‘A new charter wins adoption in South Africa’ *New York Time* 09 May 1996 <http://www.nytimes.com/1996/05/09/world/a-new-charter-wins-adoption-in-south-africa.html?src=p> (accessed 8 August 2011).

Constitution.⁶¹ It argued, for example, in its submission to the CA that 'measures aimed at bringing about land reform for the benefit of people previously disadvantaged by unfair discrimination' should be expressly excluded from the scope of the clause. And it sought to reassert the idea that the public interest should be considered in determining compensation for the expropriation of property, alongside those factors set out in the interim Constitution.⁶² Otherwise, however, it rejected arguments from other members of the governing 'tripartite alliance' (i.e. the Congress of South African Trade Unions (COSATU) and the South African Communist Party (or SACP)) that the property clause should be wholly excluded, or radically redrafted.⁶³

This ultimately meant that the core compromise made in 1993 regarding property remained largely intact in 1996. The 'fair and equitable' standard adopted in 1993, for example, was retained in 1996.⁶⁴ Section 25(1) of the 1996 Constitution also clearly continues to apply even in the context of efforts at land restitution and redistribution, in a way strongly opposed by the ANC in 1993.⁶⁵

⁶¹ It argued, for example, that 'measures aimed at bringing about land reform for the benefit of people previously disadvantaged by unfair discrimination' should be expressly excluded from the scope of the clause. It also sought to reassert the idea that the public interest should be considered in determining compensation for the expropriation of property, alongside those factors set out in the Interim Constitution. See ANC 'African National Congress (ANC) preliminary submission on land rights' sec 3.1.2 (arguing that compensation should 'establish an equitable balance between the public interest and the interests of those affected').

⁶² See ANC Land Rights (n 61 above) sec 3.1.2(a) (arguing that compensation should 'establish an equitable balance between the public interest and the interests of those affected').

⁶³ The final draft did also add an extensive set of sub-articles which addressed demands for land reform in greater detail than had the 1993 text

⁶⁴ Constitution sec 26(3). 'The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including: (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.'

⁶⁵ Sec 25 of the Constitution reads in part '(4) For the purposes of this section: (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

Compared to 1993, however, the ANC in 1995 also placed far greater emphasis on the constitutionalisation of various socio-economic rights, as a means of checking an overly expansive reading of the right to property.⁶⁶

In 1993, the ANC argued for the recognition of a range of socio-economic rights under the interim Constitution, including the 'right to enjoy basic social, educational and welfare rights' for all men, women and children; a land rights clause, which recognised 'access to land' as the 'birthright of all South Africans'; and a negative right to shelter, in the form of a right not to be removed from one's home, except by court order, and after consideration by the court of the existence of potential reasonable alternative accommodation.⁶⁷

This reflected the increasing belief among key ANC thinkers that constitutional protections for socio-economic rights were 'indivisible' from and 'interdependent' with the recognition of civil and political rights,⁶⁸ and, in addition, the arguments by leading constitutional thinkers, such as Etienne Mureinik and Nicholas Haysom, that if the constitution were seen 'to institutionalise and guarantee only political/civil rights and ignore the real survival needs of the people', it would 'find no lasting resonance among' the majority citizens, as 'the true guardians' of the constitution.⁶⁹ Or that, as Etienne Mureinik put it, if a bill of rights contained only first-generation rights, it would be 'perceived to be elevating luxuries over necessities' and thus as simply a 'charter of luxuries',⁷⁰ that would find limited support from the majority of black citizens who were not only deprived of civil and political rights under apartheid, but also subject to severe forms of economic deprivation at the hands of the apartheid state.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

⁶⁶ (9) Parliament must enact the legislation referred to in subsection (6). In this context the ANC reasserted its previous argument that the constitution should contain 'a positive right to land', a right not to be 'unlawfully evicted from accommodation occupied by him/her without the legal process having been invoked and a court order obtained'; and an obligation on the state 'within the limits of its available resources, to provide adequate shelter for all'. See ANC 'Preliminary ANC submission Theme Committee 4 – Further socio-economic rights' sec 1.A.

⁶⁷ [AB to insert].

⁶⁸ This, of course, is the international law understanding. For discussion of this, and the divide in the ANC over acceptance of the idea, see eg N Haysom 'Constitutionalism, majoritarian democracy and socioeconomic rights' 8 (1992) *South African Journal on Human Rights* 451.

⁶⁹ Haysom (n 68 above) 454.

⁷⁰ E Mureinik 'Beyond a charter of luxuries: Economic rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464 465.

The ANC's emphasis, however, was still largely on the recognition of such rights as abstract goals or directive principles,⁷¹ to be realised by a future democratic legislature under a series of 'by law' clauses,⁷² rather than on a role for courts in enforcing such rights as a *constraint* on future democratic legislatures.

In 1995, by contrast, the ANC moved clearly toward support for the constitutionalisation of socio-economic rights *qua* positive, justiciable guarantees, arguing that '[t]he new Bill of Rights [should not] shy away from including within the scope of its protection, fundamental rights, which while posing difficulties in enforcement reflect important principles in the promotion of a society based on justice and equality, a society which seeks to redress the imbalances of the past'.⁷³ It also gave specific support, in its submission to the Constituent Assembly, to the constitutionalisation of judicially enforceable rights to shelter, health care, food, water and social assistance.

The NP and DP, during this same period, also shifted markedly in their position toward the constitutionalisation of such rights. In 1993, the DP in particular argued strongly against the constitutionalisation of such rights in 1993, especially rights such as the right 'not to be evicted from one's lawful home', as a 'fundamental invasion of the right to private property'.⁷⁴ The DP was also instrumental, at the Ad Hoc Committee stage, in ensuring that such a right was omitted from the text of the 1993 Constitution.⁷⁵ In 1995, however, both the NP and DP dropped their opposition to the constitutionalisation of all relevant

⁷¹ For contemporaneous arguments in favour of a directive principles-based approach, see eg DM Davis 'The case against the inclusion of socio-economic demands in a bill of rights except as directive principles' (1992) 8 *South African Journal on Human Rights* 475.

⁷² Art 11(2) of the draft bill of rights, for example, provided that 'legislation shall ensure the creation of a progressively expanding floor of minimum rights in the social, educational and welfare spheres for all in the country'. Art 11(8) likewise provided that, in the context of the right to health, that 'a comprehensive national health service shall be established linking health workers, community organisations, state institutions, private medical schemes and individual medical practitioners so as to provide hygiene education, preventative medicine and health care delivery to all'. On the function of such by law clauses generally, see Dixon & Ginsburg (n 40 above).

⁷³ See eg ANC Theme 4 (n 66 above) ('it is our firm belief that rights to social assistance, food and water be included within the Bill of Rights').

⁷⁴ See DP submission 1993 327 - 328 (arguing that it would also jeopardise the erection of new housing stock and deter financial institutions from granting bonds prospective homeowners in the lower income category').

⁷⁵ R Spitz & M Chaskalson, *The Politics of transition: A hidden history of South Africa's negotiated settlement* (2000) 328.

socio-economic rights, including the right not to be arbitrarily evicted from one's home.⁷⁶

The inclusion of various socio-economic rights guarantees in sections 26-29 of the Constitution, we suggest, also ultimately seems to have had exactly the kind of effect an insurance swap-based theory would predict, namely: to have promoted agreement between the parties in an area that had involved significant decision costs in the negotiation of the interim Constitution.

Further, for some within the ANC, at least, the inclusion of such rights in the Constitution involved exactly the kind of political cost, or constraint, implicit in an insurance-based theory. In 1993, such a constraint would have appeared less salient (or costly) to key players within the ANC, because the party as a whole was committed to the economic approach embodied in the 1994 Reconstruction and Development Program (RDP), which included a commitment to meeting citizens' 'basic needs' in much the same way contemplated by socio-economic rights guarantees such as sections 26-29 of the Constitution.⁷⁷ By 1995, however, leading figures within the more

⁷⁶ NP 'National Party submission item 14: Socio-economic rights' (1995), DP 'Democratic Party submission on: Socio-economic rights' (1995). For the initial opposition of these parties to such clauses, see eg S Liebenberg 'Socio-economic rights' in M Chaskalson *et al* (eds) *Constitutional law of South Africa* (1999).

⁷⁷ The only 'basic needs' recognised under by the RDP, but not by the Constitution, are needs relating to transport and telecommunications. 'Land reform', for example, is one of the 'basic needs' listed in Chapter 2 of the 1994 RDP White Paper; and sec 25(5) of the Constitution recognises a right on the part of citizens 'to gain access to land on an equitable basis', while sec 25(8) makes clear that land reform is contemplated. The RDP recognises 'housing and services [and] water and sanitation' as basic needs, while sec 26 of the Constitution recognises a right of access to adequate housing, which some argue includes not only a right of access to housing, but also related services such as sanitation, energy and electrification. (This argument was in fact made in the 2010 Term itself, in *Leon Joseph v. City of Johannesburg*, See para 32 in the context of a decision by Johannesburg power to terminate the supply of electricity to the petitioners, without direct notice to them as tenants (rather than to their landlord)). Similarly, The RDP recognises 'the environment, nutrition, health care, social security and social welfare' as core 'basic' priorities for the government; and sec 27(1) of the Constitution recognises a right of access to 'health care services, including reproductive health care; sufficient food and water; and social security, including... appropriate social assistance', while sec 24 recognises a right 'to an environment that is not harmful to their health or well-being'.

In areas in which the two overlap, the Constitution is also clearly informed by the guidelines set out in various parts of Chapter 2 of the RDP. For example, in endorsing 'housing [as] a human right' that government was ultimately responsible for ensuring universal access to, the RDP acknowledged that meeting this obligation would involve some delay, and the government's approach to housing must 'take account of funding and resource constraints.' See Restructure and Development Program 1996 secs 2.5.5 - 2.5.6. The language in secs 26(2) and 27(2) of the Constitution requiring the state to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of various rights also directly parallels this understanding.

centrist or 'pragmatic' faction of the ANC,⁷⁸ such as Thabo Mbeki (as then Deputy-President) and (soon to be Minister for Finance) Trevor Manuel, had already begun work on the pre-cursor to 'GEAR', the 'Growth, Employment and Redistribution' (GEAR) policy, as an overlay to the government's earlier Reconstruction and Development Program (RDP).⁷⁹ While the aim of GEAR was to stimulate both economic growth and job-creation (and thus said to be fully consistent with the aims of the RDP),⁸⁰ it included a number of 'pro-market' policies aimed at reducing government borrowing, and increasing private investment, that potentially conflicted with the vision of the state as playing a 'lea[d] role in building an economy which offers to all South Africans the opportunity to contribute productively' – endorsed under both the RDP and sections 26-29 of the Constitution.⁸¹

For this centrist faction in particular, therefore, there likely was a potential for conflict between a decision to entrench socio-economic rights *qua* positive rights in the Constitution, and the freedom to pursue its preferred approach to economic management. The fact that the party as a whole nonetheless took this step provides suggestive evidence of the importance, for others within the ANC, of preserving scope to pursue certain kinds of progressive/redistributive economic measures – without fear of challenge under the property clause.⁸²

⁷⁸ For this characterisation of the relevant factional politics, see eg T Roux *The politics of principle: The first South African Constitutional Court, 1995 - 2005* (forthcoming, Cambridge UP 2013).

⁷⁹ This was admittedly in part due to increasing pressure on the currency, and appointment of Trevor Manuel to the ministry of finance in 1996. See T Lodge *Politics in South Africa: From Mandela to Mbeki* (2002) 26. However, the latter development in particular was likely quite foreseeable to key COSATU and SACP figures at an earlier stage. See eg T Lodge 'The ANC and the development of party politics in modern South Africa' (2004) 42 *Journal of Modern African Studies* 189-219; DT McKinley 'Democracy, power and patronage: Debate and opposition within the African National Congress and the Tripartite Alliance since 1994' (2001) 8 *Democratization* 183 - 206. For a discussion of subsequent shifts rightward within the ANC see also Roux (n 78 above) ch 8; D Davis 'Socio-economic rights in South Africa: The record of the Constitutional Court after ten years' (2004) 5 *ESR Review: Economic and Social Rights in South Africa* 3.

⁸⁰ See eg T Manuel 'Economic policy and South Africa's growth strategy' *Ministry of Finance* 19 March 2007 http://www.treasury.gov.za/comm_media/speeches/2007/2007031901.pdf (accessed 8 August 2011).

⁸¹ Reconstruction and Development Plan 1994 para 2.3.1 <http://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02120/06lv02126.htm> (accessed 8 August 2011).

⁸² On the nature of this as a priority for many within the ANC, see eg G Budlender 'The right to equitable access to land' (1992) 8 *South African Journal on Human Rights* 295 304; Chaskalson (n 28 above) 229.

4 Insurance swaps and judicial review

Given its potential relevance in South Africa in 1995, an insurance swap-based theory of judicial review has potential normative relevance for 'originalist' or backward-looking forms of interpretation by a court such as the Constitutional Court.

Originalism, obviously, is a contested interpretive stance, and it does not follow automatically from an insurance-based theory that courts should pay attention to the founding bargain between parties when interpreting a constitution. Parties must certainly *believe* that courts will show some fidelity to the text and/or history behind relevant constitutional guarantees, in order for an insurance-based theory to operate. But this does not mean that courts must always vindicate this belief, *ex post*, in order to facilitate efficient constitutional bargaining. On the contrary, from a purely pragmatic perspective, courts will often be free to depart from the terms of the original political bargain, without undermining constitutional efficiency. The only exception to this will be where constitutional bargaining remains ongoing, by virtue, for example, of transitional arrangements such as under the 1993 interim constitution in South Africa, or a credible threat by a key constitutional player to 'exit' an entire constitutional system, by resort to (say) violence, or the large-scale withdrawal of capital.⁸³

Courts, however, often *choose* to look to the historical context behind various rights, either out of a sense of legal obligation, or as a matter of interpretive preference. Indeed, the SACC has itself quite clearly endorsed the relevance of attention to historical understandings and context in the interpretation of sections 25-29. In the context of section 26, for example, the Court has consistently suggested that attention must be given to both the relevant 'social and historical context' for the adoption of a right to housing.⁸⁴ In the context of the right to health, and specifically section 27(2), the Court suggested, in *Soobramoney*, that provisions such as section 27 must be considered in their full context, 'which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of [the bill of rights] of which [they are] part'.⁸⁵ And in the context of the right to water, in *Mazibuko*, the Court suggested that the first (and most important?) background fact to consider in interpreting section 27(2) was again the legacy of apartheid and its effect on the living

⁸³ *Machele* (n 15 above); *Joe Slovo II* (n 17 above).

⁸⁴ See eg *Grootboom* (n 35 above) para 25; *Joe Slovo I* (n 12 above) 191.

⁸⁵ *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 12 BCLR 1696 para 16.

conditions of black South Africans in areas such as Phiri in Soweto.⁸⁶

An insurance swap-based theory, therefore, also has potential relevance in providing guidance to the Constitutional Court as to the *direction* of relevant historical understandings.

4.1 A pro-balancing approach

In cases of direct conflict between property and other socio-economic rights, an insurance swap-based theory suggests that, even from an originalist perspective, South African courts have in fact been charged with the task of creating, rather than giving effect to some pre-existing, balance between rights.⁸⁷ This is a consequence of the existence of high bargaining costs between the ANC and NP and DP over the issue of the constitutional protection of property, and the consequent decision by both sides to 'decide not to decide' the controversial details in this area. This assignment of balancing power, as Justice Sachs has noted, also implies an important degree of judicial freedom, and responsibility, in interpreting provisions such as sections 25-29.⁸⁸

At the same time, an insurance swap-based perspective suggests that, from the drafters' perspective, it is also centrally important that courts should in fact attempt to maintain such a balance: this, after all, was the key reason that both parties preferred an insurance swap to an approach that involved a greater loss for one party, in return for reciprocal concessions from the other party in another area. To achieve this balance, we suggest, it will also be essential for a court to adopt at least two basic strategies: first, to invalidate any statutory or common law presumption in favour of one set of rights at the expense of the other; and second, to ensure that, in its own reasoning about these rights, it adopts as careful, context-sensitive approach as possible.

Over time, almost any legal presumption will tend to give priority to one set of rights over another. This will be true even for quite weak presumptions, which are merely procedural in nature: with enough litigation, the law of large numbers will inevitably mean that, without some equally strong counter-pressure, there is a tilt in the law toward results that reflect such a presumption. Thus, if a court allows

⁸⁶ *Mazibuko* (n 10 above) para 10.

⁸⁷ *Port Elizabeth Municipality v. Various Occupiers* 2004 12 BCLR 1268 (CC) paras 22 - 23 (noting that 'the way in which the courts are to manage the process [of balancing competing rights] has ... been left as wide open as constitutional language could achieve, by design and not by accident, by deliberate purpose and not by omission').

⁸⁸ *Port Elizabeth Municipality* (n 87 above).

presumptions to operate, it will have little chance of maintaining a true balance between competing rights, across the constitutional system as a whole.

Similarly, broad forms of reasoning by a court about the scope or priority of particular rights will have the potential to undermine the balance between the relevant rights, across the constitutional system as a whole. Courts cannot, of course, wholly avoid deciding in favor of a particular right or rights claimant in a system of concrete review. They can, however, seek to limit the system-wide consequences of such decisions, by either avoiding particular constitutional questions, or resolving particular constitutional controversies in as narrow, context-specific a way as possible.⁸⁹

This kind of commitment to context-sensitive balancing in cases of direct rights conflict will also have important implications in cases in which just one side of the relevant rights equation is involved. Otherwise, courts may find that where a case of actual conflict does arise, they are pre-committed to preferring a quite abstract, rule-like resolution of the particular conflict. It will therefore be important for courts, in all cases, to avoid broad statements in favor of either a wholly non-deferential *or* deferential – or strong or weak – approach to the enforcement of socio-economic rights.

In the South African context in particular, this is consistent with the rejection of *both* the idea of a ‘minimum core’ or ‘minimum content’ to various socio-economic rights *and* the suggestion that courts should consistently defer to legislative or executive judgments about reasonableness when it comes to the realisation of these rights. By definition, the idea of there being a ‘minimum core’ to various rights, under sections 26(2) and 27(2) of the Constitution, involves a relatively broad statement by the Court, about the (presumptively) non-derogable scope of such rights in a particular case. It also, however, inevitably involves the Court making even broader, more abstract statements about the kinds of values that will inform the interpretation of such rights, in future cases, because of the relationship between how one defines such a core and the priority given to other constitutional values, such as rights to life, dignity and equality.⁹⁰

On the other hand, suggestions by the Court that the government has *unlimited* freedom to make judgments about reasonableness

⁸⁹ As Frank Michelman has noted, such an approach allows for the resolution of a particular case ‘without predetermining so many others that one “side” experiences large-scale victory or defeat’, see F Michelman ‘Foreword: Traces of Self-Government’ (1986) 100 *Harvard Law Review* 4 34.

⁹⁰ Dixon (n 23 above).

under sections 26(2) and 27(2), will be equally detrimental to a context-sensitive, pro-balancing type approach – by undermining any claim a government has to be acting pursuant to predefined legal obligation, rather than making a pure policy judgment, in cases where its actions are challenged on constitutional property rights grounds.

4.2 The Court's record thus far

The approach of the Constitutional Court, we suggest, has in fact shown a quite striking degree of consistency to date with all these various aspects of 'pro-balancing' approach.⁹¹

In cases involving statutory presumptions in favour of a right to property, the Court has consistently voted to invalidate such presumptions, in favor of a more case-by-case, contextual approach to balancing. This is equally true for recent cases, such as *Abahlali Basemjondolo Movement of South Africa v Premier of KwaZulu-Natal*⁹² and *Gundwana v Steko Development*,⁹³ as for earlier such as *Jaftha v Schoeman*.⁹⁴

In *Abahlali*, the provincial legislation under challenge (i.e. the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007) purported to *require*, in certain circumstances, both private property owners and municipalities to invoke the procedures for eviction provided for by section 6 of the PIE, the security of tenure law.⁹⁵ It thus increased the likelihood that eviction proceedings would be commenced without any engagement with unlawful occupiers, or consideration of other alternatives. At the same time, the Act could also be seen as aimed at protecting a right to private property in at least two ways: first, by requiring municipalities to expend the resources – and political capital – necessary to protect property owners against unlawful occupation in areas deemed to be a 'slum';⁹⁶ and second, by creating procedures to protect the value of property in neighboring areas. It thus sought to create a form of procedural presumption in favour of the right to property over existing rights of access to housing.

⁹¹ We do not mean to suggest that, in doing so, the Court has necessarily been influenced by an insurance-swap understanding, but merely, that it has acted consistently with such an understanding.

⁹² *Abahlali* (n 14 above).

⁹³ *Gundwana* (n 16 above).

⁹⁴ *Jaftha v Schoeman* 2005 2 SA 140 (CC).

⁹⁵ KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007, secs 9 - 13.

⁹⁶ It should be noted that, in the view of the majority, the legislation may well have applied more broadly, to areas that were simply informal settlements, but even if confined in this way, as Yacoob J. dissenting favored, the majority found that it was still invalids: see *Abahlali* (n 14 above) 107.

The majority of the Court, however, held that under section 26(2) of the Constitution, such a procedural presumption was unconstitutional. The ‘compulsory nature’ of the relevant provisions, the Court held, ‘disturb[ed] [the] carefully established legal framework’ for evictions established by both section 26(2) and the PIE and national Housing Act.⁹⁷ Under this framework, the Court further held, property rights could legitimately be protected by eviction procedures, but only providing that housing rights were simultaneously protected by the giving of proper notice to unlawful occupiers, and by insisting that decision-makers consider all other possible alternatives.⁹⁸

Even more recently, in *Gundwana*, the Court adopted the same kind of approach to High Court Rules permitting a registrar to declare mortgaged property specially executable, as part of granting default judgment.⁹⁹ By allowing for cheaper, and more expeditious, execution proceedings in cases of default by a borrower, these rules clearly sought to enhance the property rights of existing mortgagees.¹⁰⁰ They also did so in a way that gave clear procedural priority to these rights over the rights of South Africans in economic distress to retain access to existing housing. High Court procedures, for example, clearly allow a borrower to apply to the court to have a default judgment set aside. Borrowers, however, as Froneman J noted, can often be unaware of such procedures, or ‘too poor to make proper use of them’, so that an initial – more or less routine – order for execution by a registrar effectively becomes final in many cases.¹⁰¹

The Court’s response was, once again, to insist on the inconsistency between this kind of procedural presumption in favor of a right to property and the insurance (swap) created by sections 26(1) and (3). The presence of sections 26(1) and (3) in the Constitution, the Court held, implies that any order for execution in respect of immovable property must be a ‘proportionate means’ of protecting the right to property of mortgagees.¹⁰² For this to be the case, the Court further held, any application for such an order must also be subject to a careful ‘evaluation’ by a judge, rather than automatically granted.¹⁰³ Without such an evaluation, the Court suggested, it would be impossible to determine whether there were other reasonable means of satisfying a judgment debt, and thus whether the burden of

⁹⁷ *Abahlali* (n 14 above) para 122.

⁹⁸ As above.

⁹⁹ For the relevant effect of the rules in this respect, see *Gundwana* (n 16 above) para 35 - 36.

¹⁰⁰ *Gundwana* (n 16 above) para 37.

¹⁰¹ *Gundwana* (n 16 above) para 50.

¹⁰² *Gundwana* (n 16 above) para 54.

¹⁰³ *Gundwana* (n 16 above) para 50.

such an order on those 'who are poor and at risk of losing their homes' was in fact justifiable in the particular circumstances.¹⁰⁴

This also directly paralleled the approach of the Court in *Jaftha*, where the legislation under challenge was part of a broader scheme dealing with the satisfaction of judgment debts that not only allowed but actually required a clerk of the High Court to issue a warrant for the execution of immovable property where they were satisfied that there was insufficient moveable property to satisfy a judgment debt (including a judgment entered by default).¹⁰⁵ In striking down the relevant law as an unjustifiable infringement of the right to housing under section 26(1) of the 1996 Constitution, Justice Mokgoro placed strong emphasis on the degree to which such a requirement created a constitutionally impermissible presumption in favor of the rights of creditors (or property), as opposed to homeowners. Instead, the justifiability of ordering the execution of a home depended on a range of contextual factors, such as the economic position of the parties, the hardship or prejudice to the homeowner of ordering execution, and the degree to which the parties were acting in an informed and good faith way in the relevant context.¹⁰⁶

In other cases involving a potential direct conflict between property and other socio-economic rights, the Court has consistently and quite explicitly insisted on the need for a context-sensitive, 'all things considered' approach to balancing competing rights. This comports with the insurance-swap rationale.

In the first case in this category, *Port Elizabeth Municipality*,¹⁰⁷ for example, in overturning an order for eviction under the PIE, the Court noted both the degree to which the statute was designed to give effect to constitutional imperatives; and the degree to which those imperatives themselves called for 'concrete and case-specific solutions' to the problem of balancing on the part of the Court.¹⁰⁸ Thus, under provisions such as sections 25 and 26(1) and (3), Justice Sachs suggested, the judicial function was distinctly '*not* to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa' but 'rather ... to balance out and reconcile the opposed claims in as just

¹⁰⁴ *Gundwana* (n 16 above) para 53.

¹⁰⁵ See Magistrates' Courts Act 32 of 1944 sec 67, and discussion of its effect at *Jaftha* (n 94 above) paras 14 - 16.

¹⁰⁶ *Jaftha* (n 94 above) para 43 (noting that the section is 'sufficiently broad to allow sales in execution to proceed in circumstances where it would not be justifiable for them to be permitted'), paras 40 - 42 (setting out the range of potentially relevant considerations).

¹⁰⁷ *Port Elizabeth Municipality* (n 87 above).

¹⁰⁸ *Port Elizabeth Municipality* (n 87 above) para 22.

a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case’.

In the 2010 Term, in *Juma Musjid Trust v MEC*,¹⁰⁹ the Court took a similar approach to balancing competing rights to private property and education under sections 25 and 29 of the Constitution. The issue facing the Court in *Musjid* was whether a private trust was entitled to evict from its property a public school that it had helped establish, but which the state had taken over, only to default on the rental payments. The issue, the Court held, involved a direct conflict between the property rights of the trust and the rights of students (or ‘learners’) to have ‘access to basic education’ under section 29, given that the Trust itself was under a clear horizontal duty to respect such rights. The test for the resolving this conflict, the Court suggested, was inherently case-specific, involving an all-things-considered judgment about reasonableness – or whether the ‘Trustees acted reasonably in seeking an order for eviction’.¹¹⁰ In applying this test, the Court also looked to a range of context-specific factors, such as the degree to which the trust had sought to resolve the matter by other means, given notice to the MEC of its intention to proceed with the order, and also been willing to delay the effect of any such eviction.¹¹¹

The Court has also taken a similarly narrow, context-sensitive approach even in cases involving no such immediate conflict of rights, and in doing so, rejected calls for it to endorse both a more absolutist ‘minimum core’ or ‘minimum content’-based and more deferential approach. In *Government of South Africa v Grootboom*,¹¹² for example, in deciding whether the government’s failure to provide basic shelter to the applicants (who were rendered homeless by a prior eviction order) was in breach of section 26(2), the Court was urged to endorse the idea of a ‘minimum core’ to the right to shelter. The Court, however, rejected this approach, instead insisting on the need for a more case-by-case approach to determining the contours of reasonableness under section 26(2), designed to take account of the actual resources available to the state, the diverse needs of different groups in relation to access to housing, and the full range of information available to the Court about the state of housing needs and development.¹¹³ At the same time, it also rejected the suggestion that it should give complete *deference* to the political branches, under sections 26(2)-27(2), by holding that no housing policy could be reasonable unless it constituted ‘a coherent public housing

¹⁰⁹ *Musjid* (n 4 above).

¹¹⁰ *Musjid* (n 4 above) para 62.

¹¹¹ *Musjid* (n 4 above) paras 62 - 65.

¹¹² *Grootboom* (n 35 above).

¹¹³ *Grootboom* (n 35 above) paras 32 - 33.

programme directed towards the progressive realisation of the right of access to adequate housing', was 'capable of facilitating the realisation of the right', was reasonable in design and implementation, and provided some form of relief state must provide for relief for 'those in desperate need'.¹¹⁴

Similarly, in *Minister for Health v Treatment Action Campaign (No 2)*,¹¹⁵ in the context of the right of access to health-care under section 27(2), the Court rejected the idea of a minimum core in favour of an incremental, context-sensitive approach to reasonableness, suggesting that the Court itself was ill-equipped 'to make the wide-ranging factual and political enquiries necessary for determining ... minimum-core standards'.¹¹⁶ But in doing so it also affirmed that, to be reasonable, a policy must not ignore 'those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril', and take account of the special vulnerability of particular groups, such as the poor in rural areas.¹¹⁷

More recently, in *Mazibuko v City of Johannesburg*,¹¹⁸ the Court affirmed both aspects of this approach, this time in the context of the right of access to water. It thus both rejected arguments that section 27(1) required the Court to quantify the amount of water sufficient for dignified life,¹¹⁹ and insisted that the idea of reasonableness, under section 27(2), had four basic minimum components: the requirement that the government take some affirmative steps to realise relevant rights; that these steps be reasonable; not unreasonably fail to make provision for those most desperately in need; or involve unreasonable limitations or exclusions; and be subject to 'continua[l] ... review ... to ensure that the achievement of the right is progressively realised'.¹²⁰ It also explicitly rejected the idea that notions of 'democratic deference' required complete deference by the Court to the government, or governing faction(s) of the ANC, about notions of reasonableness, rather than a more participatory democratic process in which the Court itself played a much more central role in promoting democratic accountability.¹²¹

¹¹⁴ *Grootboom* (n 35 above) paras 40 - 41, 66.

¹¹⁵ *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 10 BCLR 1033.

¹¹⁶ n 116 above, paras 32 - 39.

¹¹⁷ *Minister of Health* (n 116 above) paras 68 - 70.

¹¹⁸ *Mazibuko* (n 10 above).

¹¹⁹ *Mazibuko* (n 10 above) para 59 (suggesting that what sec 27(2) requires 'will vary over time and context'). For the similarities between this argument and the minimum core argument in *Grootboom* and *TAC*, see *Mazibuko* (n 10 above) paras 51 - 52.

¹²⁰ *Mazibuko* (n 10 above) para 67.

¹²¹ *Mazibuko* (n 10 above) para 81. This also accords with what Etienne Mureink argued in 1994 was a key benefit of including socio-economic rights in the 1994 Constitution, namely, their capacity to promote a culture of justification or greater accountability, within the government. See Mureinik (n 70 above).

5 Conclusion

Constitutions often involve inter-temporal insurance guarantees, whereby parties (and factions within parties) seek to reduce the risk of downstream policy drift. We have argued that the complex bargain among property and socio-economic rights in South Africa's 1996 Constitution can be understood using the metaphor of insurance swaps, in which two opposing factions agree to accept each others' downstream guarantees, even if the two are in some tension with each other. This effectively delegates the precise tradeoffs to downstream constitutional courts. So long as the courts can be trusted to act as good faith interpreters, they will facilitate constitutional bargains that might otherwise be unachievable. In South Africa, the apparent tensions between progressive redistribution and security of property were highly salient, but the Constitution was nevertheless adopted, in part because of the insurance swap mechanism in our view.

This view also has potential normative implications for constitutional adjudication. While originalism is a contested interpretive stance, the Court in South Africa has indicated a willingness to consider historical understandings and context in the interpretation of sections 25-29; and an insurance-based theory provides quite clear guidance to the Court as to the *direction* in which these kind of historical understandings point. It suggests, for example, that where an insurance swap arrangement has applied, courts should consider context and tradeoffs, and avoid deciding claims in ways that systematically abnegates one or the other part of the swap arrangement. It thus counsels an approach to constitutional adjudication that is plainly evident in various Constitutional Court decisions in the 2009, 2010 and 2011 Terms, namely: an attention to the context and tradeoffs, rather than more absolutist notions of the scope of socio-economic rights, or their 'minimum core'. At the same time, it also lends support to the Court's claim to actively enforce such rights, in appropriate cases, rather than simply defer to the government in respect of all matters of social and economic policy.

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