Political and Constitutional Futures for Land Reform in South Africa

Kevin Russell, Yale University

Abstract

How does the normative debate about land reform affect rule of law from a positivist perspective? Are some solutions to the land reform question more likely to have the externality of strengthening or weakening rule of law than others? How, in turn, has the strength (and weakness) of rule of law in South Africa affected the evolution of policy and outcomes on land reform? This paper argues that South Africa has, for the most part, transitioned from a period of revolutionary upheaval that marks periods of "higher lawmaking" (Ackerman 1991) to a period where organized interests and private citizens have relatively fixed expectations about how the government will behave and planned their lives accordingly. Regularized government behavior has not necessarily meant strict adherence to constitutional limits on power – moderate transgressions have perhaps incrementally increased the longer the ANC has dominated the political branches – but so too have major shifts in how power is used become less likely. Land reform represents an anomaly in this trend, remarkable both for the legalized nature of attempted solutions and for their unsatisfactory outcomes. This gap in higher lawmaking leftover from the transition is exacerbated by the *mechanism* of higher lawmaking in South Africa, which was – despite significant efforts not to be – a process of elite driven deal-making establishing little precedent for popular sovereignty to address constitutional failures in the future. As a result, South Africa faces the choice of addressing the land issue through politics as usual with incremental shifts in policy and bureaucratic authority, or a re-opening of constitutional interpretation that embraces a degree of popular sovereignty so far absent.

I. Introduction

The liberation struggle to end apartheid succeeded in a legal sense with the transition to a constitution that protected individual rights and democracy. However, rules are not settled when they are written on paper; rather they are defined and recognized as law only through the course of events after the transition. No one disputes that the U.S. Supreme Court has the authority to review laws for constitutionality now, but until *Marbury v. Madison* and the accepted practice of judicial review afterward, this was not necessarily the case. Authorities associated with branches and offices of government become solidified only when they are used to deal with substantive issues that matter to the population. If, alternatively, they are not up to the task, as American institutions of law making and adjudication were not in the case of slavery, substantive policy debates can unravel these procedures and lead to upheaval and even civil war.

South Africa was able to deal with many of the substantive issues that threatened to unravel the institutional plan of the constitution by aligning law with points of overlap in the interests of the two main negotiating parties. This alignment is a critical feature of successful constitutional transitions from a positivist perspective, as powerful groups will

have an incentive to use the new institutions and make them authoritative over time. While law is meant to constrain power, it can't stray too far from organized interests or those groups will opt to use extrajudicial means to achieve their goals (Maravall and Przeworski 2003). Despite some unrest, related mainly to the place of group autonomy in the new South Africa, the final Constitution was acceptable to the major organized interests in South Africa. It also reflected the progressive elements of human rights norms under strong international influence (Klug 2000), holding out the promise that not only the powerful would benefit from the hard won freedom.

Perhaps the most important point of agreement between the National Party (NP) and African National Congress (ANC) was on property rights and the role of the state in the economy. This agreement was negotiated in part by business and labor directly, prior to the final political negotiations (Wood 2000). Other legal mechanisms such as Black Economic Empowerment, however uneven its record, helped to diffuse the stakes of politics and keep the constitutional plan on track. The persistence of poverty, inequality, and unemployment puts pressure on the ANC to take more aggressive steps toward redistribution, but despite their rhetoric, the party has so far chosen less radical policy options – incremental moves toward a broader welfare state – to address these problems. Allusions to a more socialist future are generally vague and teleological rather than a call to immediate action (Butler 2012). Because law aligned with power on many issues, the Constitutional Court of South Africa (CCSA) has largely been able to retain its independence and ability to rule based on legal legitimacy, furthering its independence when it does (Roux 2009).[1] Few issues that have reached the CCSA carry the weight of control of the state itself as occurs in other transitional democracies with more tenuous prospects for rule of law.[2]

If there is an exception to the idea that core power and wealth-sharing issues were settled in the constitutional negotiations, reducing the likelihood of overburdening the new institutions, it is land reform. As Hall has stated, land reform raises issues about "the very nature, and purpose, of political transition" (2004, p. 214). In other words, it brings back questions that a constitution and not just politics as usual is supposed to answer.

There are several reasons for the exceptional nature of land reform in South Africa, including constitutional objections. However, this point raises a curious question: the Constitution and CCSA rulings clearly recognize the mandate for state action that goes

[1] As Roux discusses, the CCSA is best positioned to rule independently and provide legally legitimate reasons for its opinions when it has political support from either the public or the ruling party. Hence it was able to make unpopular decisions with no threat to its institutional independence, in part because it had support from ANC elites, for example on the death penalty. Roux's analysis demonstrates the endogenous point that independent, legally legitimate rulings strengthen the CCSA, but are more likely on issues that are not politically one-sided.

[2] For example, in Iraq the Supreme Court was asked, following the 2010 election, to rule on whether the largest vote getting party list or, alternatively, post-election coalition had the right to form a government, with the office of the Prime Minister at stake. This type of overburdening of the courts dissipates somewhat over time. When the Supreme Court in the U.S. was given a similar task, the stakes were not perceived to be as high for institutional and economic reasons (Przeworski 2004), and had ambiguous effects on the legal system (Waldron 2002).

beyond Willing Buyer, Willing Seller, for example. Why then, would constitutional objection be an effective counter to more aggressive action? Will constitutional politics be an inhibitor or facilitator of increased restitution and redistribution of land in the future? And what impact will this issue have on constitutional authority and rule of law more generally?

This paper seeks to answer these questions at a level general enough to connect the South African case to other cases where constitutional transition leaves some issues unresolved (as every transition does to a greater or lesser extent). Its focus is on the political logic of transitions from constitutional to normal politics, rather than on the normative considerations of land policy that takes an internal point of view with respect to the law, that is, a point of view that assumes the law should be followed and will be enforced. Indeed, whether and how the law is enforced is considered as endogenous to the power and interests of the parties involved. The approach of the paper is to first describe an idealized account of the institutional equilibrium in South Africa by outlining two broad trends that the ANC considers in deciding when and how to use institutions of the state. In South Africa these forces have taken a particular form due to the ANC's electoral dominance and its nature as a broad based ("big tent"), but centralized party. Second, the paper places land reform within the broader forces shaping rule of law in South Africa and identifies why it is of particular interest as an anomaly to the broader trends. Finally, the paper identifies the possibilities for constitutional politics that emerge from the paper's analysis of land reform as an anomaly to South Africa's transition. Section five concludes by drawing lessons for other countries.

II. A Theory of Rule of Law Equilibrium

Before turning to the intersection of constitutional and normal politics on the land issue, this section proposes a set of political forces that have shaped constitutional authority since the 1994 transition more generally. While this is a necessarily reductive account, the benefit is a more general theory that identifies possibilities that arise in many post-transition contexts.

Constitutional Compliance

This paper defines constitutional compliance as adherence to the limits on power specified by the constitution, and transgression as violation of those limits. From a positivist perspective adherence to limits is a somewhat tautological definition of compliance, since nothing other than recognition of how constitutional powers are used will determine what it means to be constitutional. However, even at the time of constitutional transition – for example, as a result of the negotiation – citizens, judges, and politicians recognize legal limits on power that can therefore be transgressed. In other words, stated rules have some initial shared meaning for all stakeholders. A fully positivist position would hold that there is a procedural rule to answer every legal question. One can continue to question where the authority for a procedural rule comes from until one reaches "legal bedrock" (Shapiro 2011) in the form of the rule of recognition that everyone agrees is the supreme criterion of law (Greenawalt 1986); a

social practice "among relevant officials" (Coleman 1991) holds the legal system together. A transgression, as defined above, therefore ultimately implies a violation of the rule of recognition.

Compliance is defined as adherence to power conferring rules of a constitution (also known as "secondary rules" (Hart 1957), "procedural regulation" (Colvin 1978), and a "plan for planning" (Shapiro 2011)) because such rules are the site of political contestation: they are the means by which officials can *use the power of the state* for the public good – by managing primary rules efficiently and for the benefit of all – or for a narrower interest. The constitution's power conferring rules are there to limit opportunities to usurp the state for narrower interests by assigning only limited authorities. A constitution may also separate powers so that ambition can check ambition, but when one party dominates all branches, secondary rules are likely to be strained.

It is precisely the tension between the ANC's dominance and constitutions limits on power that is analyzed here with the aim of understanding the special role of land reform in South Africa. It is useful to separate a measure of compliance that a party in power chooses in any one event or issue (indicated as "*C*" below) from a background level of rule of law in which a party in power operates (indicated as "*R*" below). *C* and *R* are endogenous since *R* reflects past compliance (past choices of *C*), and choices of *C* will depend on incentives determined by *R*. The following analysis describes this endogenous process in South Africa at a general level and then shows how and why the issue of land reform disrupts the main trends in South African politics.

Two Trends

The logic of the theory presented here rests on two main assumptions or trends that are observable in post-transition politics. They are extremely general and draw mainly on the canonical political theory texts from Thucydides to Machiavelli to Rousseau. However, when applied to the particular arrangement of power and norms in South Africa they can reveal the role of some structural features in constitutional politics that are often overlooked and help frame the possibilities for land reform in the future. While these trends can be integrated into a formal model, that is not included here to avoid unnecessary technical language.

First, a party with a strong majority under a credible democratic constitution will face external incentives to respond to citizen preferences (electoral power), organized special interests (often economic power), and the rewards of direct access to state resources and power. The former two might be grouped as "public incentives" and the latter called "private incentives" that include any source of wealth or power that benefits the party outside of the public eye. Constitutional compliance, if recognized by the population, will likely be rewarded by public honor and votes, while constitutional transgression – the abuse of office – can be rewarded with money and influence behind the scenes. Some parties may have internal norms and power dynamics that encourage more or less compliance, but that is assumed to be a black box here since the population does not

observe it. Indeed, every party or individual in power has an incentive to play a double game to accrue both public and private rewards.

A party in power has a variety of political tools to play this double game. These include: public assertions that transgressions are the work of "a few bad apples" who are punished; public moral arguments that centralization and expansion of power beyond constitutional limits is necessary to achieve some greater moral purpose, whether religious, nationalistic, or historical – as in the case of liberation movements; and delivery of goods, services, or special treatment to special groups or individuals who can, in turn, provide honor, power, or material reward to the party. In this task of using public argument and selective benefits, parties in power benefit from an inherent alienation among the population. Citizens generally don't want to be constantly engaged in public life, and modern representative government and legal systems are designed to order and guide a complicated and differentiated society without such engagement. While this is a necessary aspect of an efficient government, it creates opportunities for a government to operate without widespread public scrutiny, even in countries with the most vigorous and free press. That a party will use these tools to maximize public and private rewards, I refer to as the "legitimacy trend."

A crucial feature of the legitimacy trend is that some political tools appeal to citizens as citizens while others appeal to citizens in their capacity as some narrower identity or interest. To the extent that a constitution at least aims for political equality and possibly socio-economic equality, the latter set of tools will generally strain the constitutional limits on offices. (Exceptions to this will be when differential treatment is explicitly a matter of law, either creating or rectifying a historical injustice.) Politicians have an incentive to transgress in this way if the net increase in support from those favored is greater than the loss of support from those who are disadvantaged. However, if constitutional limits are stretched too far, then even the most diehard partisans in a population will likely feel the effects of dysfunctional government. As a result, at a general level, the legitimacy trend gives a strong incentive to a party in power to moderately transgress, but to punish particularly visible transgressions and prevent the appearance of favoring faction too much.

The second trend I refer to as the "positivist trend." Most simply the positivist trend is that events during and in the uncertain period after a constitutional transition tend to lock in the expectations and thus the plans of organized interests and citizens. If the government signals a strong commitment to formal rules and independent adjudication, then society will use those rules and thus make it even harder (more costly to the sources of support for the party) to stop using them. Alternatively, if a party immediately sends the signal that there are no forces in society or government able to restrain them, then organized interests and citizens will set their expectations and plans accordingly, either relying on informal regularities in government behavior, or not relying on the legal system at all. In each case the government and organized interests and citizens reach a strategic equilibrium around the social practices of government that are disruptive and costly to change. The positivist trend therefore means that the authorities and expected behavior of officials will become less variable over time, no matter what the level of

compliance at the equilibrium. In short, constitutional politics is replaced by normal politics.

In South Africa, the procedural lawfulness of the transition (Meierhenrich 2008), the two-step process of negotiation that aligned the constitution with powerful interests and offered the promise of equality, and the fact that Nelson Mandela and the ANC were committed to the success of the nation-building project meant that a dramatic transgression usurping the new constitutional rules was unlikely. However, precisely these features paradoxically created a level of legitimacy that is dangerous if there are limited institutional checks on a governing power. Furthermore, the underside of the dual state that the new government inherited and the nature of an underground political and military organization taking power meant that there was opportunity and will to use the state for narrower private interests. Perhaps the earliest manifestation of these forces at a large-scale was the Arms Deal and the series of cover-ups and political fights that it spurred, continuing even today with deleterious effects on the oversight capacity of parliament and the Chapter Nine institutions and the politicization of the security and intelligence services (Holden and Plaut 2012). More sensational instances are complemented by incremental expansion of ANC control through cadre deployment, discipline, and loyalty to the party, which together inevitably can come into conflict with loyalty to the authorized limits on official behavior. And finally, the increased entanglement between ANC elites and business community offers further temptations to govern outside of limits designed to ensure the public good.[3] In all cases, these developments were largely out of the public eye. In short, at the time of the Arms Deal in 1999, expectations regarding government compliance were higher than the incentives the ANC, or elements within it, faced to actually comply. In the terminology introduced above, *C* in many instances was low relative to *R*, which endogenously decreased both.

And yet at the same time the courts have kept a relatively strong independence and organized interests and citizens can largely plan their lives around the idea that the government will uphold their most basic constitutional commitments. For example, throughout the period of Afrobarometer[4] polling since 2002, citizens of all races have believed that court decisions are binding (roughly 70% "agree" or "strongly agree"). When the ANC made political statements regarding the CCSA's commitment to transformation in late 2011, they were forced to back down. Against the background of incremental transgressions and weakening of institutional checks on the ANC, citizens seem to believe the government won't cross certain red lines, including the usurpation of courts. This does not necessarily mean that norms of justice have triumphed. Rather, instrumental interest in power and wealth are likely more reliable explanations.

In general this double game of moderately transgressing constitutional limits on power has not damaged ANC support. South Africans across all races consistently believe that creating jobs is the most important issue – not the more esoteric problems of

[3] The Institute for Security Studies reported that by August 2011 three-fourths of the cabinet and 59% of MPs had financial interests outside of their main occupation (*Business Report*, 5 August 2011 as cited in Plaut and Holden 2012, pp. 38-39).
[4] http://www.afrobarometer.org/ accessed March 21, 2013.

transgressing secondary rules of a legal system. The public also believes that the ANC has done a poor job on the most important issue, and yet trust in the party is at an all time high in the last round of polling, especially among whites (though just under a one in three trust the ANC "somewhat" or "a lot," which is still low). Overall, 61% of South Africans trust the ruling party (dominated by black support), which roughly aligns with their success at the polls.

In terms of the legitimacy and positivist trends, we can thus conclude that the ANC:

1) Has had increased opportunity to benefit from transgression due to cadre deployment, centralization of power, and connections to organized special interests without significant damage to their legitimacy as the most credible vehicle for transformation.
2) Has maintained a sense among the population and key powerful interests that core institutional constraints remain in place, which are strengthened each time they are exercised.

A useful way of integrating these insights is to consider how each affects a choice of constitutional compliance, *C*, for a given general level of rule of law, *R*. While a formal model is beyond the scope of this paper the positivist trend says that *C* must approach *R* over time, while the legitimacy trend implies that there are increasing marginal returns to compliance as rule of law increases (because at high rule of law, political tools are less useful for playing the double game of politics). Graphically this implies that a party in power will reach an equilibrium at the intersection of two curves as depicted in figure one.

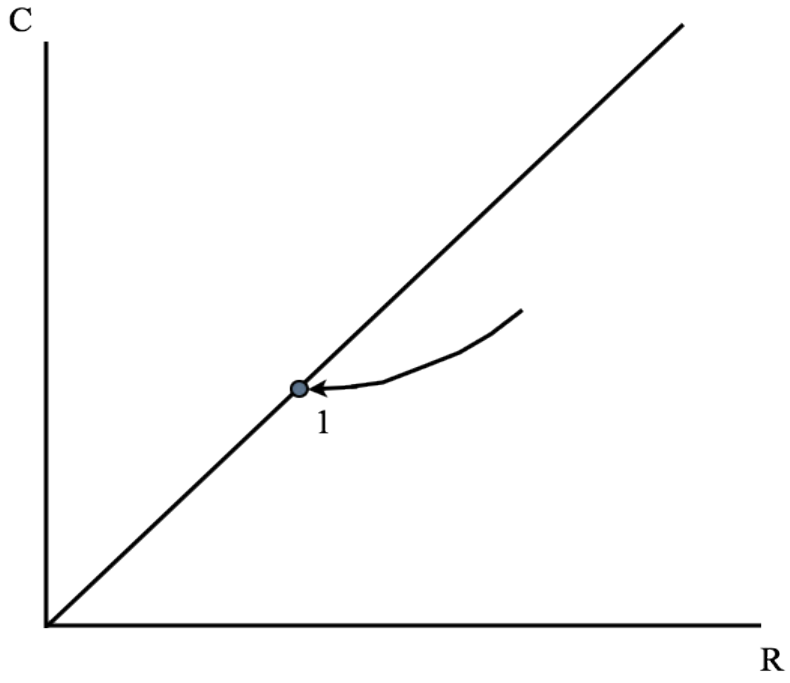

Figure one.

Point one is a stable equilibrium where the ANC maximizes its legitimacy within the constraints that positive law allows. As with most new democracies, *R* initially exceeds *C*, which implies a general downward trend in rule of law until an equilibrium is reached.

The model outlined informally here is obviously a gross simplification, but matches the pattern seen daily in South African newspapers of abuses of power alongside authoritative court rulings and ANC efforts to maintain legitimacy by responding to accusations and drawing attention to policy successes. However, land reform does not fit this trend of South African law and politics. Rather, land reform is anomalous because it has not been the subject of incrementally greater transgression and yet neither has the procedural machinery of government been able to resolve the issue – that is, to demonstrate to all stakeholders that a legal solution is necessarily preferable to all alternatives. The following section examines why land reform is an outlier, while the final section considers the different ways in which such a tension between a constitutional equilibrium and an anomalous issue can be resolved.

III. Land Reform: Unfinished Constitutional Business

The expectations around land reform in South Africa in 1994 were high. The Constitution and early CCSA ruling in *Transvaal Agricultural Union vs. Minister of Land Affairs* provided a mandate to the government to achieve substantive change in restitution, redistribution, and tenure reform. Chief Justice Chaskalson, writing in that case, concluded that the rights of a landowner must be balanced with constitutional injunctions addressing historical injustice and giving parliament the role of deciding how this balance takes place. Overall, new legislation for post apartheid land reform has shifted emphasis from a common law absolute right of property to constitutionally guided reallocation policies (Miller and Pope 2000). These constitutional provisions appeared to mitigate the tension between the conservatism of law and mandate for revolutionary change that would otherwise naturally arise.

However, the goal of 30% of land transferred to black ownership by 1999, needless to say, proved overly ambitious. Unlike on issues such as nationalization of industries and macro-economic policy, the legal mandate did not provide a ready political answer. Indeed, rather than straining legal limits for political gain as on other issues, the ANC has largely tried to find technical legal and policy solutions for an inherently political problem. In 1999, recognizing the need for a change in approach the government passed the "Land Restitution and Reform Laws Amendment Act 18 of 1999." These policy changes pushed more of the burden back from the Land Claims Court to the executive branch (Miller and Pope 2000), but did not solve the political problem.

The initial political difficulty on land reform was in part due to the political success[5] in the negotiated agreements on macro-economic policy, including the government's early commitment to the Growth, Employment, and Redistribution (GEAR) strategy (Hall

[5] I mean political success only in terms of the transition of constitutional to normal politics without any judgments about the justice of the economic policy.

2000). The resources and staff that could have made the land reform process less of a zero sum game were not made available. This was in part because GEAR focused on economic liberalization right when black "emerging" commercial farmers would have benefitted from the subsidies and soft loans that had supported white farmers previously. Hall's conclusion in 2000 was that the political economy and not constitutional commitments on land reform were constraining land reform. Indeed, the power arrangement that made the constitution a credible commitment in other areas of law may have perpetuated a capital intensive and large-scale agrarian sector, inhibiting the entry of the poor as productive landowners as one would have to happen to reach high levels of redistribution quickly.

If one considers only ANC ideology, the tendency toward commercialization in land reform would be somewhat of a surprise. Indeed, even in the ANC's 2012 *Strategy and Tactics* document, land reform is raised in the context of a broader push to undo the economic power relations of colonialism, centered around capital accumulation of the white upper class. It states, "Such a society will place a high premium on redistribution of land in both urban and rural areas for the benefit of those who were denied access under colonialism. Such access must be provided for a variety of purposes including agriculture, housing, environmental preservation, mining and other economic activity, public utilities and spaces, entertainment and other uses. In order to ensure effective and sustainable land and agrarian reform, effective measures will be put in place to assist 'emergent' and small-scale farmers and co-operatives" (*ANC* 2012, p. 26). And yet, the land policies face the same dilemma that they always have, as expressed in the *ANC's Land Reform Policy Discussion Document* of June 2012: "Land reform must represent a radical and rapid break from the past without significantly disrupting agricultural production and food security" (*ANC* 2012a p. 2). The main administrative solution introduced is the advent of a Land Valuer General with some authority to go beyond WBWS and accelerate redistribution (*ANC* 2012a p. 7) along with a Land Management Commission and Land Rights Management Board "to ensure better support for land reform and rural development" (p. 2), which the ANC acknowledges has been restricted by "inadequate state support" (p. 15). These proposals represent increased administrative authority to fulfill the constitutional mandate for redistribution, but will they address the political problem?

The answer undoubtedly remains to be seen, but some insight can be gained from considering the political barriers to land reform so far. The ANC was founded in 1912 in part in response to proposed land bills that led to 1913 Land Acts, a commitment still visible in the Freedom Charter of 1955. However, the ANC largely failed to develop a strategy of rural resistance and organization. When politics came into the open in 1990, the ANC's priority was a top down centralization of control necessary for negotiation rather than a grass roots movement in rural areas for major land reform (Levin and Weiner 1996). In addition, the international financial institutions provided incentives for South Africa to take a market based approach generally during this period of neo-liberal ascendancy, and on the land issue this meant a policy of willing buyer, willing seller. Third, opponents to a more aggressive land redistribution policy have been able to organize effectively against it.

The ANC's approach to land reform is therefore somewhat anomalous to its strategy on other issues for two related reasons. First, the vague promise of a future transition to a more equitable society or socialist economy is not satisfactory to a broad base of the ANC constituency that sees the land issue as not only one of economic injustice but of dignity. The land issue is too immediately understood in rural communities for it to go away without visible change. Second, and as a result, the ANC is in a lose-lose situation because it can only drive such change – if at all – by unsettling commitments that are beneficial to the party's hold on power in other areas. In other words, the ANC's continued strength draws on a balance between macro-economic liberalism and a commitment to wealth redistribution that has been achievable (if not always just) in most industrial sectors; but the interests of white agriculture and black rural masses are less easy to reconcile (Levin and Weiner 1996, p. 117). Together these political considerations fit Holmes describes as the type of issue that the powerful seek to avoid, "namely those that are liable to excite lasting hatred and resentment. To exercise power is to create winners and losers… It is dangerous to wield power because the powerful are eye-catching targets for the vengeance of those whom they have really or supposedly harmed." (2003, p. 26). Following Machiavelli's logic, issues that are more likely to bring dissatisfaction among losers than satisfaction among winners offer little honor even when solutions are just and should appeal to a broad constituency, while losers will "almost certainly be aggreived." In these circumstances it is preferable to distance the party from the issue and provide bureaucratic or judicial solutions. This may explain the ANC's fervent desire to find bureaucratic and judicial solutions, but the political imperative of faster change has not allowed them to find a path out of the political vise. The question is whether the ANC will continue oscillate between various bureaucratic and judicial solutions or turn to a process that renegotiates land reform at a constitutional level.

IV. Resolving the Land Question: Normal Politics or Higher Law-Making?

This paper has so far posited that an equilibrium level of rule of law has taken root in South Africa that is not perfect or even high, but is acceptable to major organized interests and, most importantly, the ANC; and, second, that the issue of land reform is not easily resolved within these political parameters. Rather, land reform is remarkable for its strong legal procedure and yet unsatisfactory outcomes. The ANC has oscillated among various judicial and bureaucratic solutions but has not changed the fundamental nature of the interests involved. This section considers how such an anomalous issue might be resolved.

Writing about scientific revolution, Thomas Kuhn famously said that normal science is the process of better measurement that not only tests existing theories, but reveals anomalies in the data that don't fit those theories. Resolving such revealed tensions can require a paradigm shift to a new theory in which such anomalies are predicted as part of a coherent whole. A somewhat analogous theory in law is Ackerman's theory of dualist democracy. He assumes that citizens in the United States generally prefer liberal politics of limited government conducted by elected representatives. However, on issues that are

too important to be resolved by politicians, citizens shift to a republican mode of highly engaged attention and debate. It then becomes clear that a national election is primarily about the issue itself rather than the representatives who will conduct business as usual. If there is a clear outcome, then "We the People" have spoken and Supreme Court justices need to incorporate the new "higher law" into a coherent view of constitutional law as a whole. The Founding, the Civil War amendments, and the New Deal each fit such a description, according to Ackerman.

The main question considered here is whether the land question – due to its status as an anomalous issue – can and should enter a process of higher lawmaking and what that means in South Africa. In general, higher lawmaking is when a law-making body has the authority to revisit constitutional commitments. Ackerman's description of the American case refers to a specific notion of popular sovereignty that he says, largely following Arendt, has developed in the United States. In South Africa, democratic constitutionalism does not have the same deep roots in popular sovereignty. Rather, the elite deal making of the constitution determined the commitments that could not be changed by normal politics. Human rights rather than communal engagement are the source of ultimate authority. With this in mind, how might higher law making occur on the land question?

One possibility is to revisit the process that created the Constitution in the first place, through a negotiated process among the main organized interests. The problem is that there is no reason to think that any different outcome would come from such an elite-driven process, and those most affected by land reform aren't organized politically in the way that the ANC and NP were at the time of the transition. Protections for citizens are thus likely – again – to be formulated as rights, but to the extent that these are justiciable, they still put the burden on the political branches for resolution, which is precisely the problem that has persisted to this point. A more promising alternative, therefore, is political engagement of the type that Ackerman describes, where a movement for rural change is not centered on rights to specific claims on land but as rights to make law. A crucial aspect of the Ackerman view is that citizens engage in deliberation in a manner that tends to erode partisan bias because people take views of their fellow citizens seriously. This is a somewhat utopian view, but given South Africa's strong national identity and civil society potential, it is not unreasonable to think that political organization is inhibiting rather than promoting this kind of debate. The risk is that there is little precedent for this type of national engagement – Arendt says the Americans had hundreds of years of practice since the Mayflower Pact and still failed utterly to address the issues of slavery, and race even after the Civil War. Perhaps the ANC's greatest achievement has been to avoid such divisiveness during and after the constitutional transition, precisely by centralizing control and keeping various factions in the big tent. If the population mobilizes and it takes on the character of racial retribution, the process will fail and much of the ANC achievement would be lost. However, the complexity of the issue and South Africa's progress in political engagement – visible in nascent political parties as well as civil society – suggests that the time might be right for a strong mode of popular sovereignty on a limited issue. Indeed, disagreements among black and white farmers as well as between them on issues of commercialization, communal ownership, and tenure reform, in addition to restitution and redistribution, means that

there may be enough cross cutting constituencies to maintain a coherent and inclusive debate. The crucial question would be if leadership from within or from outside the ANC exists to recognize and facilitate such a process in the name of South African democracy rather than in a way that discards the progress made so far.

If these risks are overcome, the main benefit of a new mode of popular sovereignty in higher lawmaking would be that if it were to succeed it would have positive externalities on other areas of rule of law. Specifically, it would address the sense of impunity that is not special to the ANC but rather exists in any state where one party dominates the political branches. It would bring into effect what Weingast refers to as the coordinating role of a constitution (Weingast 1997) that can provide a vertical check on political rulers. Such a check is only possible if there is a process through which citizens can coordinate and act politically, not just as bearers of rights in court, but as enforcers of the laws they have had a role in creating.

Alternatively, the land question will likely continue on its present course of incremental change driven by ANC bureaucratic solutions. This is perhaps the more likely option as the positivist trend has entrenched the interests of the party and other major interests in patterns of planning and networks of support that are costly to change. However, by creating the Land Valuer General, the ANC has gone even further in the direction that Machiavelli would have warned them not to. By taking the responsibility for not only valuing land, but actually owning land in many cases under the new four-tiered system, the ANC has perhaps owned the issue most likely to create "hatred and resentment" more than it ever has before. One can only hope that this process is successful because the most drastic alternative would be mobilization without the kind of leadership that would steer the process toward engaged debate and away from more parochial modes of politics.

The risk of this approach is not only that the land question continues to fester, unresolved. Rather, if there is a substantive injustice that is perpetuated by the rule of law – which is likely the case if the ANC pursues a bureaucratic and juridical tract – then the instrumental rationality of an efficient constitutional plan may not be worth the cost of the injustice. If, as Holmes (2003) asserts is always the case, some elements of society are better positioned to use the instrument of law for their interests than others, then the rule of law is likely to produce precisely such a situation where the solidification of social practices on which the legal system rests will marginalize weaker organized interests *even when the constitution nominally promotes equality before the law*. In such circumstances it becomes difficult to rectify injustices without unraveling the rest of the constitutional plan and threatening the interests on which it rests. As Waldron notes, Hart recognized this feature of his positivism, and the implication that one cannot say *a priori* whether rule of law will be worth it in every instance (Waldron 1999). Such is the positivist's dilemma.

Conclusion

Such possibilities for normal or higher lawmaking apply to many issues. Every country must deal with them differently, since higher lawmaking relies on principles of legitimate

authority that are unique to the history and structure of every state. If it is true that the land question is appropriate for a new mode of political engagement in South Africa, it doesn't have to take the pattern of popular sovereignty that Ackerman outlines in the American case, but it does have to be a *constitutional* process for dealing with *constitutional* issues. South Africa's progressive bill of rights in the constitution and impressive interpretation and enforcement of such rights through the CCSA may not be sufficient in the case of the land question. Rather, South Africa faces an opportunity and a risk to mobilize around land reform, not as a zero sum game with the ANC as referee, but as a country that says the issue is too important to hand over to officials. There is little precedent, legal or political, for this approach, but so too is there little precedent for success on the land question. If South Africa can succeed in creating such a mode, it will be an example for any country that successfully establishes an authoritative constitution, but needs to adjust it as politics under the constitution reveal its defects. Only with such flexibility, rooted in some degree of popular sovereignty can a democratic transition be deemed successful.

References

Ackerman, Bruce. 1991. *We The People Vol. 1: Foundations*. Cambridge, MA: Harvard University Press.

Strategy and Tactics of the ANC, December 2012. ANC 2012. www.anc.org.za.

Land Reform Policy Discussion Document. ANC 2012a. www.anc.org.za.

Butler, Anthony. 2012. *The Idea of the ANC*. Johannesburg, SA: Jacana.

Coleman, Jules. 1991. "Rules and Social Facts." *Harvard Journal of Law and Public Policy*, 14:3.

Colvin, Eric. 1978. "The Sociology of Secondary Rules." *The University of Toronto Law Journal* 28:2.

Greenawalt, Kent. 1986-1987. "The Rule of Recognition and the Constitution" *Michigan Law Review* 85.

Hall, Ruth. 2004. "A Political Economy of Land Reform in South Africa" *Review of African Political Economy*, (31:100) pp. 213-227.

Holmes, Stephen. 2003. "Lineages of the Rule of Law" in *Democracy and the Rule of Law* eds. Jose Maria Maravall and Adam Przeworski. New York: Cambridge University Press.

Levin, Richard and Daniel Weiner. 1996. "The Politics of Land Reform in South Africa after Apartheid: Perspectives, Problems, Prospects," *The Journal of Peasant Studies*, 23:2-3, 93-119.

Maravall, and Adam Przeworski. 2003. "Introduction" in *Democracy and the Rule of Law* eds. Jose Maria Maravall and Adam Przeworski. New York: Cambridge University Press.

Meierhenrich, Jens. 2008. *The Legacies of Law: Long-run Consequences of Legal Development in South Africa, 1652-2000*. New York: Cambridge University Press.

Miller, D. L. Carey and Anne Pope. 2000. "South African Land Reform." *Journal of African Law*, (44:2), pp. 167-194.

Plaut, Martin and Paul Holden. 2012. *Who Rules South Africa? Pulling the Strings in The Battle for Power*. Johannesburg, SA: Jonathan Ball Publishers.

Roux, Theunis. 2009. "Principle and Pragmatism on the Constitutional Court of South Africa." *International Journal of Constitutional Law*, (7:1) pp. 106-138.

Shapiro, Scott. 2011. *Legality*. Cambridge, MA: Belknap Press at Harvard University Press.

Waldron, Jeremy. 2002. "Is the Rule of Law an Essentially Contested Concept (In Florida)? *Law and Philosophy* (21:2) pp. 137-164.

Waldron, Jeremy. 1999. "All We Like Sheep" *Can. J. L. and Jurisprudence*, 12.

Weingast, Barry. 1997. "The Political Foundations of Democracy and Rule of Law." *American Political Science Review*, (91:2), pp. 245-263.

Wood, Elisabeth J. 2000. *Forging Democracy from Below*. Cambridge, UK: Cambridge University Press.