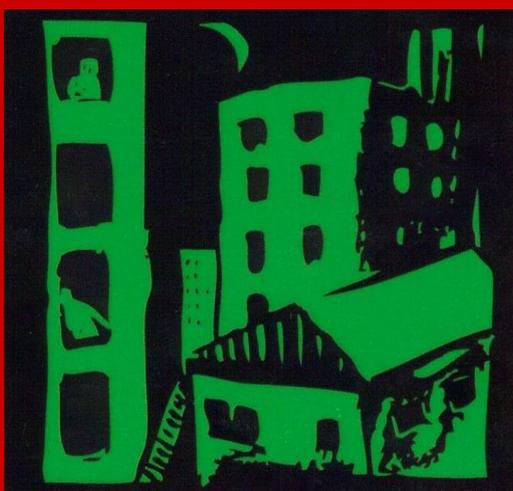


# LAW DEMOCRACY & DEVELOPMENT



VOLUME 27 (2023)

DOI: <http://dx.doi.org/10.17159/2077-4907/2023/idd.v27.21>

ISSN: 2077-4907  
CC-BY 4.0

## **A question of underlying interests: Economic justice, constitutional history and the capture of the South African state by white economic interests\***

SANELE SIBANDA

*Senior Lecturer, Department of Jurisprudence, University of Pretoria, South Africa*

<https://orcid.org/0000-0001-7518-3030>

NGWAKO RABOSHAKGA

*Senior Lecturer, Faculty of Law, North-West University, Potchefstroom, South Africa*

<https://orcid.org/0000-0002-8200-0623>

### **ABSTRACT**

*Understanding the South African constitutional state beyond the banal framings of liberal or transformative thinking requires a reconsideration of the prevailing approach to questions of constitutional identity or character. Rather than fixating on the ideological*

---

\* Earlier versions of this paper were presented at the following: the Conquest, Constitutionalism and Democratic Contestations Conference, Wits School of Law; the International Conference on the Making, Unmaking and Remaking of Africa's Independence and Post-Independence Constitutions, University of the Free State; and the seminar series of the Department of Jurisprudence, University of Pretoria. We wish to thank the following for their comments on this article: Ndumiso Dladla, Elme Ravenscroft, and both anonymous reviewers. We also thank Joey Kok and Felix Dube for their editorial inputs. Any mistakes or omissions remain our own.

*underpinnings that mark the identity of the South African Constitution, we suggest that more may be learnt about its nature by examining the material relations that it recognises between its various subjects and the institutions it establishes. To understand why and how South African society came to be so constituted, it is imperative to interrogate how the Constitution deals with the question of material distribution. In this respect, we focus on how white economic interests impacted on South Africa's constitution-making processes at two distinct points in history, namely the making of the 1910 and post-1994 constitutions. In doing so, we seek to disturb the often uncritical, linear narratives of South Africa's constitutional history that focus on the prevailing politics and the identity of the main political actors and their political agendas. We draw attention to white economic interests, which were preeminent in the (re)constituting of South Africa. Historical events suggest that these discrete interests were key drivers in determining the nature of South African constitutionalism, which established a political and economic environment for the benefit of white interests. We contend that these interests determined the construction of the constitutional scheme by establishing the state as a key site for enabling the accumulation and preservation of white economic interests at the expense of the broader black population.*

**Keywords:** constitutional history; constitutionalism; (re)distributive justice; economic interests; law and political-economy; material constitution; racial capitalism

## 1 INTRODUCTION

In order to properly comprehend and characterise the nature of the South African constitutional state beyond the banal framings of liberal or transformative thinking, it is imperative that we reconsider our approach to questions of its identity or character. Rather than fixating on the constitution's ideological or theoretical underpinning as marking its identity, in this article we suggest that we may learn more about the nature of the South African Constitution<sup>1</sup> by critically examining the economic or material relations it recognises, establishes or anticipates between its various subjects and the institutions it establishes or recognises. We argue that if we want to understand why and how our society came to be constituted as it is, there is potentially more expository value in scrutinising how the Constitution deals with the question of material distribution and the underlying logics informing such distribution in the past, present and future. It is axiomatic that, to make sense of the present, which in turn informs how we imagine the future, we have to study the past with care and attention. In this respect, the focus of our article will be on white economic interests and how they impacted on South Africa's constitution-making processes at two distinct points in history, namely the making of the 1910 and 1994 constitutions.<sup>2</sup>

<sup>1</sup> Constitution of the Republic of South Africa, 1996 (the Constitution).

<sup>2</sup> In this article, we will use the term "white" rather than "European" as a contemporary way to refer to the multitudes of descendants of South Africa's European settler population who arrived during the colonial-apartheid era and who are the inheritors of the wealth, status and opportunities that were the preserve of persons designated white. The preference for "white" over "European" is, further, informed by the fact that, strictly speaking, to benefit from the opportunities and protections in South Africa that excluded the black population (understood here to include the indigenous as well as descendants of the

## THE QUESTION OF UNDERLYING INTERESTS: ECONOMIC JUSTICE, CONSTITUTIONAL HISTORY AND THE CAPTURE OF THE SOUTH AFRICAN STATE

In making a case for revisiting this history, our intention is to disturb the often uncritical, linear narratives of South Africa's constitutional history that focus on the prevailing politics, the identity of the main political actors and their respective political agendas, which are widely presented as being the predominant factors in the ensuing constitutional arrangements. Instead, our article seeks to draw attention to an often ignored, yet critical, issue that was arguably a preeminent factor in the decisions to (re)constitute South Africa: white economic interests.

Before proceeding further, it is worth mentioning that we readily accept that what exactly falls within the purview of the term "white economic interests" could be the subject of protracted debate, and that the term itself is neither a term of art nor entirely elegant or precise. In spite of this, we submit that if we look past the potential (non)-debate on nomenclature, it is fairly uncontroversial to suggest that under colonial-apartheid rule, the legal, political and economic environment established to benefit big white businesses and capital or commercial interests more broadly existed to the benefit of the white population, irrespective of the ability or inability of individual whites to capitalise on the colonial-apartheid bounty.<sup>3</sup> Colonisation was undeniably and substantially a commercial enterprise. Samaradiwakera-Wijesundara has characterised the relationship between the company as an instrument and the colonial state as a "symbiosis".<sup>4</sup> She argues the admittedly more provocative, yet more perceptive point, that "the company is an instrument of coloniality made in the image of the sovereign as a representative of God on earth, later replaced by Enlightenment man".<sup>5</sup> So conceived, the company emerged as a fictional juristic personality. one of whose primary features was its ability to accumulate property in its own name, although in reality it was known to all that the benefits of such ownership accrued to actual, identifiable, raced humans in whose interests the colonial project of conquest was pursued.<sup>6</sup>

We will argue that there are identifiable economic interests that have significantly influenced, if not determined, the construction of the constitutional scheme and provisions adopted in the respective constitutions. We advance the argument that the 1910 Constitution established an extractive colonial state that closely identified with

---

enslaved), being identifiable as phenotypically white (on the basis of skin colour and hair texture, for example) was of greater importance than one's place of actual or factual origin.

<sup>3</sup> This is, of course, not to lose sight of the fact that what we are referring to here as "white interests", tethered as they are to an overarching project of white supremacy, extend beyond the economic and include cultural and psychic elements. See Modiri JM "Conquest and constitutionalism: First thoughts on an alternative jurisprudence" (2018) 34(3) *South African Journal on Human Rights* 300 at 304.

<sup>4</sup> Samaradiwakera-Wijesundara C "Reframing corporate subjectivity: Systemic inequality and the company at the intersection of race, gender and poverty" (2022) 7(1) *Business and Human Rights Journal* 100 at 100-16.

<sup>5</sup> Samaradiwakera-Wijesundara (2022) at 102.

<sup>6</sup> Samaradiwakera-Wijesundara (2022) at 109; in particular, reference is made to the author's discussion of *Dadoo Ltd and Others Appellants v Krugersdorp Municipal Council Respondents* AD 530 (1920).

the underlying interests of a narrow white capitalist class that was largely representative of and aligned to British imperial interests, at the expense of a conquered and subjugated black population. Applying a mode of analysis that entails identifying and foregrounding these dominant economic interests, we will argue that there are important insights to be drawn from examining the democratic constitution-making processes of the 1990s in this fashion. While a plethora of historical accounts deal with this period in legal scholarship, few delve into the question of the relationship or interplay between constitutionally securing the prevailing racially skewed economic interests and the founding of modern South African constitutionalism. We will submit that the economic is treated as a backdrop in the “main” historiographies of the making of the “post”-apartheid constitutions, the consequence of which is that this leaves largely unexamined the roots, nature and content of the Constitution’s implicit and explicit material distributive commitments, arrangements and consequences.

Ultimately, our aim is to argue that reading these historical moments in such a way as to foreground the economic interests that informed them, will unearth novel insights into the nature of the constitutional states established in 1910 and 1994. In particular, we seek to demonstrate that one of the preeminent underlying rationales was that of establishing the state as a key site both for the accumulation and the preservation of white economic interests at the expense of black people, invariably a project pursued with accompanying violence and dispossession. This article is divided into three sections and culminates in some concluding thoughts. In the next section, we will establish the theoretical framework for this article by suggesting that the nature of a constitution is possibly best discerned by viewing its substance relative to the distribution and arrangement of economic relations and interests that it will govern. In the second section, we examine the implications of this framework when applied to the formation of the 1910 Constitution. In the third section, we turn our attention to the making of the post-apartheid constitutions, where we examine the role played by white economic interests in shaping the contemporary constitutional scheme, and suggest instances where the prevalence of white economic interests was an important factor in shaping some of the provisions of the Constitution. In the final section, we offer some concluding remarks wherein we invite other scholars to engage with the line of inquiry posited in this article.

## **2 THE CONSTITUTION AS/AND THE EMBODIMENT OF ECONOMIC INTERESTS**

As suggested above, it is no exaggeration to say that there is a dearth of research on questions of materiality and the adoption of the Constitution that advances a distributive explanation. To put it differently, there is little scholarship that examines the nature of the material distributive consequences of the Constitution’s founding moments and which foregrounds who participated and how they sought to influence the outcome in line with the interests they were associated with or represented. In other words, there is little work that focuses on delineating or accounting for the nature of economic or material relationships as established, protected, promoted, recognised or even imagined under the Constitution.

## THE QUESTION OF UNDERLYING INTERESTS: ECONOMIC JUSTICE, CONSTITUTIONAL HISTORY AND THE CAPTURE OF THE SOUTH AFRICAN STATE

While recognising that there is much research and analysis on the effects of the Constitution on the economy, particularly on the political economy, and even on the implications of its redistributive commitments, we suggest that little of it scrutinises the prevailing basis or nature of distributions under the Constitution, or the implicit assumptions about their naturalness or inevitability. Of course, this is not notwithstanding the post-apartheid constitutions' stated redistributive commitments based on rights and values, as well as the historical bases upon which such commitments came into being. We are not concerned with these here; rather, our focus is on how those material relations are imagined and framed in the Constitution and which group or class is able to assert or secure its own priority. Therefore, we are interested here in what these underlying economic interests can tell us about ensuing material or economic relations that are concurrently constituted (or erased) with the founding of the "new" state.<sup>7</sup>

We suggest that it is uncontroversial to argue that it is in the very nature of constitutions that they answer distributive questions both explicitly and implicitly. It is these stated and unstated distributive consequences and how they are arrived at that we suggest demand more attention from researchers if we are to make sense of how the hope of the so-called "rainbow nation" has turned to despair for so many South Africans.<sup>8</sup> By so doing, we seek to provoke researchers into reflecting critically upon the adequacy of an analytical approach to the Constitution's possibilities or limits conceived of primarily in legal and political terms whilst overlooking and completely failing to contemplate the question of what or whose economic interests or vision it centres and how.

### 2.1 Charles Beard on the relationship between economic interests and the act of constitution

A useful point of entry will be to draw upon a pioneering work of the early 1900s by Charles Beard, *An Economic Interpretation of the United States Constitution*. Although Beard's book has come to be regarded as a seminal text, at the time of its publication it

---

<sup>7</sup> The argument we make here must not be understood to occlude the many critical works that anticipate the narrower question we examine here that relates to identifying what we suggest were the predominant interests during the period of negotiating post-apartheid constitutions. In this respect, we build on works such as Mutua M "Hope and despair for a new South Africa: The limits of rights discourse" (1997) 10 *Harvard Human Rights Journal* 63; Sibanda S "Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty" (2011) 22(3) *Stellenbosch Law Review* 482; Madlingozi T "Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution" (2016) 28(1) *Stellenbosch Law Review* 123; and Sibanda S "When do you call time on a compromise? South Africa's discourse on transformation and the future of transformative constitutionalism" (2020) 24(1) *Law Democracy and Development* 384.

<sup>8</sup> Kenyon K & Madlingozi T "'Rainbow is not the new black': #FeesMustFall and the demythification of South Africa's liberation narrative" (2022) 43(2) *Third World Quarterly* 494.

was received by many as controversial for its provocative line of argument. In brief, Beard argued that to truly understand the founding determinative logics of the United States (US) Constitution, one must consider the economic interests of its founding fathers and their class positioning within a broader colonial-settler paradigm.<sup>9</sup> The core of his argument is that the historical records of the material interests (property) of the founding fathers reveal the interests of the white, propertied colonial-settler class to which many of them belonged and that these interests find expression in the text of, and arrangements under, the US Constitution.<sup>10</sup>

Beard, dissatisfied with standard structural, institutional, democratic and rights-based accounts as to what informed the adoption of the US Constitution, looked behind these and, to his surprise, “found that many of the Fathers of the Republic regarded the conflict over the Constitution as springing essentially out of conflicts of economic interests”.<sup>11</sup> Beard’s thesis is that the drafters of the US Constitution were not altruistic politicians who sought to do what was best for “the whole people”.<sup>12</sup> Rather, many were men of substantial property interests or whose class positioning provided them with access to the levers of power, such that, as they acted in the name of founding the new nation, their own self-interest was never distant from their considerations of what was believed to be good for the nation.

One clear insight to be drawn from Beard is that, in seeking to understand the true nature of a constitution by reference to the history of its making, it is never enough to study the political or social history alone without also examining the economic roots or foundations informing what and whose material interests attain primacy. Beard cautions sagely that “whoever leaves economic pressures out of history or out of the discussion of public questions is in mortal peril of substituting mythology for reality and confusing issues instead of clarifying them”.<sup>13</sup>

According to Beard, what gives rise to this need is a simple fact: that rather than primarily providing an abstract set of rules and principles, law has material consequences, as it is predominantly concerned with property relations. This, in turn, suggests that property is the fundamental problem of constitutional law.<sup>14</sup> Beard can be understood as saying that, examined closely, a constitution is demonstrably in the service of the interests of the dominant economic group; under the influence of this economic group, a constitution is instrumentalised to serve those interests. Beard’s historical reading of the foundations of the US Constitution is premised on what he

---

<sup>9</sup> Beard C *An economic interpretation of the Constitution of the United States* (1936) at 16.

<sup>10</sup> Beard (1936) at 16–17.

<sup>11</sup> Beard (1936) at xliii.

<sup>12</sup> Beard (1936) at 17.

<sup>13</sup> Beard (1936) at liii.

<sup>14</sup> Beard (1936) at 12–13. See also Murungi J *An introduction to African legal philosophy* (2013) at 39ff, who makes a similar point.

## THE QUESTION OF UNDERLYING INTERESTS: ECONOMIC JUSTICE, CONSTITUTIONAL HISTORY AND THE CAPTURE OF THE SOUTH AFRICAN STATE

terms a theory of “economic determinism”. In brief, the operational premise of this theory is that:

[d]ifferent degrees and kinds of property inevitably exist in modern society; party doctrines and “principles” originate in the sentiments and views which the possession of various kinds of property creates in the minds of the possessors; class and group divisions based on property lie at the basis of modern government; and politics and constitutional law are inevitably a reflex of these contending interests ...<sup>15</sup>

Beard demonstrates that promoting and securing property interests is a primordial question dominated by particular class interests and that such interests were top of mind as the drafters of the US Constitution deliberated.<sup>16</sup>

Methodologically, Beard, a masterful historian, sets out the property interests of the founding fathers and the class interests which they represented.<sup>17</sup> Beard’s focus is on the men at the constitutional convention not only as individuals but also as representatives of the collective interests of the exclusively white section of the colonialist or settler population. This was made up of landowners and owners of capital, including bankers and industrialists. Beard’s underlying thesis is that by examining documentary evidence relating to the property-acquisition, ownership, transfer and retention patterns and practices of those wielding economic power at the time, one can demonstrate the correlation between those economic interests and their resultant constitutional protection. According to Beard, the true nature and horizons of the US Constitution are better understood not as a product of that political abstraction usually framed as “we, the people” exercising constituent power, but rather as the result of the work of the established and expectant economic interests to which what James Tully terms “economic constituent power” has been delegated in the broader constitutional scheme.<sup>18</sup>

### 2.2 Economic constituent power as a distinct element of constitution

As regards the nature of constituent power, Tully argues that, contrary to its common characterisation as relating solely to the political (concerns with self-government), constituent power should be understood historically to also include economic (labour or productive) and military (self-defence and police) powers.<sup>19</sup> Similar to Beard, Tully

---

<sup>15</sup> Beard (1936) at 15–6.

<sup>16</sup> In this respect, Beard, through detailed archival research, shows how constitutional positions expressed by Madison in *Federalist No. X* aligned with his own substantial property interests and those of his class of wealthy white colonial settlers, as well as working more generally to promote something of a racial capitalism. See Beard (1936) at 14–15; 125–6.

<sup>17</sup> In particular, see Beard (1936) Chapter 5.

<sup>18</sup> Tully J “Modern constitutional democracy and imperialism” (2008) 46(3) *Osgoode Hall Law Journal* 461 at 472.

<sup>19</sup> See Tully (2008) at 472–3.

makes an analogous argument on the operational or determinative underlying logics of empire with respect to the study of constitutionalism by decrying the near-exclusive focus on political constitutional power and dynamics. Tully's insights on constituent power, we suggest, are quite profound in illustrating the naturalness with which constituent power is, and always has been, concerned with economic questions, as "the people" have an arguably unassailable interest in their labour and its product. Tully makes his point trenchantly:

The second type of constituent power, labour power, is exercised by selling it for a wage on the market to competing national or multinational corporations that manage its exercise and extract a profit. These capitalist forms of constituent labour power and private property in the means of production and contractual relations are stipulated by the constitutional forms of state and international legal regimes and enforced by the corresponding sovereigns. This form of organization of productive power is distinctive to modern constitutionalism. Humans have been dispossessed of their access to the land and independent means of production: first, with the enclosures within Europe and then, with the dispossession of the non-European peoples of their indigenous legal and political control over their resources and labour during the spread of western imperialism and its legal orders ... Just as one can think of political powers being either delegated or alienated to the representative institutions, so too can one think of economic powers being either delegated or alienated to the capitalist corporations.<sup>20</sup>

Here, Tully highlights that if we accept that constituent powers are foundational to the state and determine the matters falling within its purview, it requires no stretch of the imagination to apprehend these powers as extending beyond the political to encompass the economic (including labour, ownership and production) as well. This idea prompts us to recall that economic questions – not insulated from politics as a practical matter – are indeed matters in which "the people" have a legitimate and continuing interest. This, we suggest, finds much resonance with Beard's admonition that when studying the constitution we exclude a historical examination of economic interests at our peril.<sup>21</sup>

An important insight to be drawn from Tully is that, despite the apparent reticence of modern constitutional scholarship to engage directly with the political economy of constitutionalism, constitutional questions impact on and are impacted upon by economic matters, for example in structuring relationships to property between the state, its populace and citizens *inter se*. Therefore, Tully rightly suggests that to think of constitutionalism as attending only to political and legal questions in a narrow institutional governance, rule-of-law and individual rights frame is fallacious. The current dearth of constitutional scholarship on the exact nature of the relationship between the historical development of South African constitutionalism and economic or material matters should thus give much cause for pause. This is especially the case at the current South African moment, in which the land/property debate demands

---

<sup>20</sup>Tully (2008) at 473 (emphasis added, footnotes omitted).

<sup>21</sup>Beard (1936) at liii.

## THE QUESTION OF UNDERLYING INTERESTS: ECONOMIC JUSTICE, CONSTITUTIONAL HISTORY AND THE CAPTURE OF THE SOUTH AFRICAN STATE

answer(s) to the question of economic distributive justice. We return to the issue of the land/property debate in section four below.

### 3 ECONOMIC INTERESTS AND THE FOUNDING OF THE EARLY SOUTH AFRICAN STATE

Economic or material historical analysis is, of course, well established in South African historical scholarship, where there is a strong tradition of Marxist historiography in which structural and materialist analysis is the norm. However, there is little that focuses squarely on constitutions and the nature of the material or proprietary relations they sustain or establish in a manner that connects to the history of the conception of particular constitutional structures, provisions or doctrines. There are, to be sure, historians who do connect economic interests to the formation and nature of the state, but few connect these directly to the overarching constitutional scheme, let alone the drafting of the text.

One exception is the distinguished South African historian, Shula Marks, who makes this connection while decrying the tendency within South African historiography to focus on the role and intentions of individuals as authors search for “immediate causes”.<sup>22</sup> The problem with such an approach, which essentially produces character-driven, causal accounts of history, according to Marks, is that it fails to adequately take into account the broader “structural context” and the dominant interests in economic and social terms. Marks notes that this structural context in South Africa must be read against a broader canvas of European imperial ambition and domination that was, in turn, underpinned by racist notions of white supremacy that were mobilised to justify the so-called right of conquest.<sup>23</sup> Marks further notes that at the time of writing, there was little examination or questioning of the naturalness with which imperial interests or “British supremacy” were assumed to be legitimate ones around which to orient the nascent South African state. In so doing, Marks enjoins us to consider more closely the relationship established between the state and capital in order to ensure that predominant economic interests are accounted for in understanding the formation of the South African state.<sup>24</sup>

By examining the prevailing economic interests, we are forced to consider the resultant constitutional, political-economic and social structures in terms of class, race, gender, ideology and power. We must necessarily consider the composition of these interests,

---

<sup>22</sup> Marks S & Trapido S “Lord Milner and the South African state” (1979) 18(1) *History Workshop Journal* 50 at 54.

<sup>23</sup> See generally Ramose MB “In memoriam: Sovereignty and the ‘new’ South Africa” (2007) 16(2) *Griffith Law Review* 310 at 316.

<sup>24</sup> See Marks & Trapido (1979) at 59. See also Samaradiwakera-Wijesundara C “The fiction of the juristic person: Reassessing the ‘personhood’ of juristic persons in relation to ‘other people’” in Steyn M & Mpofo W (eds) *Decolonising the human: Reflections from Africa on difference and oppression* (2021).

what identifiable role they played in the processes of establishing a new order – and what those behind them stood to benefit under the incoming constitutional order.

### 3.1 The 1910 Constitution: Economic interests as “a matter of life and death”

In this section, we turn our attention briefly to the formation of the South African state and suggest what a reading of its formative history in terms of the underlying economic interests might look like if we were to focus on establishing the precise nature of those interests. The 1910 Constitution was preceded by the Convention of 1908, where representatives of the four colonies sat down in secret to negotiate the unification of South Africa. It is worthwhile to spend a few moments considering the events leading to the convention, as they shed some light as to (i) how economic competition and tensions between the colonies underpinned the impetus to establish a political union, and (ii) how the so-called “native problem” (discussed below) provided an economic impetus for unification and, eventually, the constitutional structuring and distribution of power. The aim of considering the events preceding the convention is to perform at least a summary application of Beard’s thesis, while noting that many accounts of South Africa’s constitutional history fail to address these issues adequately, if at all, in relation to the institutional make-up and operational scheme of the 1910 Constitution. The subsections that follow are necessarily brief, as they serve as illustrative examples in a prelude to a more detailed exposition of the making of the post-apartheid constitutions.

#### 3.1.1 *The failed Customs and Railways Conference*

It is generally not well documented in South African constitutional scholarship that the birth of South Africa as a nation-state can be significantly attributed to ongoing “friction” between the two predominantly Dutch (Afrikaner) colonies, the Orange Free State and Transvaal, and the two mainly English colonies, the Cape of Good Hope and Natal. The apparent source of this friction concerned membership of the customs union and associated railway tariffs.<sup>25</sup> According to May, so central to the success of the four colonies and the securing of a lasting peace among the white settlers were these two matters that in:

1908 it was announced that the Customs and Railways Conference then in session had failed; but it succeeded in passing resolutions requesting the colonial legislatures to appoint delegates to a national convention to draft a constitution for a union of the colonies.<sup>26</sup>

Pivotal to the viability of the four colonies was establishing a common economic framework such as a union.<sup>27</sup> Brand, a delegate at the convention, in motivating for the urgent resolution of the economic question, stated as follows:

---

<sup>25</sup> May H *The South African constitution* (1970) at 3.

<sup>26</sup> May (1970) at 4.

<sup>27</sup> “Union” in this respect refers to the formal unification of the four colonies to establish a unitary state.

## THE QUESTION OF UNDERLYING INTERESTS: ECONOMIC JUSTICE, CONSTITUTIONAL HISTORY AND THE CAPTURE OF THE SOUTH AFRICAN STATE

In a community whose main object is to develop resources hitherto untouched, and where the government's main work is to foster such development, freedom to adjust customs dues and railway rates to the rapidly changing needs of the community is a matter of life and death. It is therefore, no cause for surprise that politics should focus themselves around such questions.<sup>28</sup>

It is beyond the scope of this study to detail the nature of the then underlying tensions. Suffice it to say that, as Magubane argues, the foundations of the Union were strongly underpinned by economic imperatives and enjoyed the support of Britain as the imperial power.<sup>29</sup>

### 3.1.2 *The native question*

Prior to the union of the four colonies, Lord Alfred Milner, in his capacity as High Commissioner, established the Langden Commission (also known as the South African Native Affairs Commission) “to gather accurate information as to native affairs so as to arrive at a common understanding on questions of native policy”.<sup>30</sup> May remarks that “[l]ong before the union was brought about men had recognised that the colour question transcended all others in importance”.<sup>31</sup> Unequivocal about what he perceived as a failure on the part of the Union to act on the native question, Brand warned that:

[a]part, too, from economic questions which have been more immediately in the public eye, thoughtful men have long seen in the native question also a peril which menaces the future ... No other nation is faced with a future so perilous.<sup>32</sup>

As with the economic question, Brand viewed the continuing state of disunion and the “handling of the native problem [as] *a matter of life and death*”.<sup>33</sup>

Complicating the native question for the colonists was the clearly recognised fact that the future of the Union's economy was dependent on the exploitation of black labour. Capturing well the apparent dilemma presented by the native question in this regard, Maloka points out that while they were a “problem” that needed to be “subdued, controlled and administered”, the natives were nevertheless “a desperately needed

---

<sup>28</sup> Brand R *The Union of South Africa* (1909) (emphasis added).

<sup>29</sup> Magubane B *The making of a racist state: British imperialism and the Union of South Africa, 1875–1910* (1996) at 276. Magubane tells us that “in the constitutional settlement the economic interests of the English minority would be paramount, and any changes in the political relations between English and Afrikaners, it was made sure, would not threaten imperial economic stakes”. More broadly, Magubane, in painstaking detail, demonstrates the extent of British involvement in determining the direction of South Africa post the South African War of 1899–1902, including the fact that the South Africa Act of 1909 was adopted and passed by the Westminster Parliament.

<sup>30</sup> South African Native Affairs Commission 1903–1905 *Report with annexures no. 1 to 9* (1905).

<sup>31</sup> May (1970) at 5.

<sup>32</sup> Brand (1909) at 27.

<sup>33</sup> Brand (1909) at 101 (emphasis added).

source of cheap labour without whose sweat and blood the colonial economy could not run".<sup>34</sup> Magubane puts it emphatically as follows:

What was at stake in 1909, at the South African Constitutional Convention and the debate at the House of Commons in London, was not whether Africans were fit to exercise the franchise or not. What was at stake at the turn of the century was how white capital should incorporate black labour in a way that would not pose a danger to itself.<sup>35</sup>

### 3.2 Constituting South Africa as an extractive colony

A perusal of the Preamble of the 1910 Constitution belies any suggestion of its being a people-driven one. Couched in the language of expediency, the birth of South Africa as a nation-state was very much a contrivance of the British as they sought to consolidate their imperial gains pursuant to the South African War of 1899–1902. Stark in its absence was any proclamation purporting to designate this moment as an act of popular sovereignty in the name of the people at what is historically and factually the foundational moment of the modern state of South Africa. The 1910 Constitution contained no bill of rights, and the drafters made no allusion to the protection or promotion of the rights of the inhabitants of the territory.<sup>36</sup> In fact, considered in its entirety, the 1910 Constitution, beyond establishing the structures of government, can be read as having a discernible transactional motif running through it, in terms of which the *raison d'être* of the Union was intimately aligned with the financial interests of the Crown of Great Britain and Ireland and, of course, the well-being of the colonial settlers. For example, so crucial was the establishment of infrastructure to enable the exploitation of the colony, purportedly in pursuance of the "welfare and future progress of South Africa",<sup>37</sup> that the Constitution made detailed provision for the financing of the railways, ports and harbours that would be integral to the transportation of raw materials and other goods.<sup>38</sup> Notably, while tacitly committing to the subsidisation of "agricultural and industrial development within the Union and promotion, by means of cheap transport, of the settlement of an agricultural and industrial population in the inland portions of all provinces of the Union", the 1910 Constitution determined that the railways, ports and harbours were to be run on business principles. In fact, a contextual reading of the financial provisions betrays a preoccupation with establishing a regulated extractive economy, with the Governor-General-in-Council wielding extensive

---

<sup>34</sup> Maloka E *Friends of the natives: The inconvenient past of South African liberalism* (2014) at 20–21.

<sup>35</sup> Magubane (1996) at 293.

<sup>36</sup> This is despite the fact that the notion of rights protection had featured in the constitutionalism of pre-Union South Africa, with the Orange Free State having provided for such rights in its 1905 Constitution. Of course, these rights were the exclusive preserve of white people, and men in particular. See Dugard J *Human rights and the South African legal order* (1978).

<sup>37</sup> Preamble to the Union of South Africa Act, 1909.

<sup>38</sup> Sections 117 of the 1910 Constitution provides for the establishment of the Railway and Harbour Fund to receive monies raised from these facilities and provide for their administration.

## THE QUESTION OF UNDERLYING INTERESTS: ECONOMIC JUSTICE, CONSTITUTIONAL HISTORY AND THE CAPTURE OF THE SOUTH AFRICAN STATE

powers over the appointment of financial commissions and state boards.<sup>39</sup> While not establishing a mixed economy, what seems transparent is the role, envisaged by the drafters, that the colonial state would play as an enabler of extraction and accumulation, specifically by the white settler minority and more broadly by the British Empire.

Beyond being revisited by scholars for its historical significance as marking the union of Afrikaner and English interests, the 1910 South African Constitution as a constitutive document remains largely uninvestigated.<sup>40</sup> Significantly, the distributive consequences of this mode of colonial constitutionalism remain unexplored, meaning that the naturalisation of white economic interests underpinning its adoption continue unexamined. If, as we suggest, this line of inquiry is critical for understanding the constituting of an extractive colonial(-apartheid) political economy, then we suggest that it is equally important that a research agenda subjecting South Africa's post-1994 constitutionalism to scrutiny be embarked upon. This is especially so as it has by now become self-evident that South Africa's post-1994 constitutions' distributive consequences have hardly shifted the racialised patterns of enrichment/impoverishment established under the 1910 Constitution and preceding colonial arrangements.<sup>41</sup>

#### **4 WHITE ECONOMIC INTERESTS AND THE PRELUDE TO NEGOTIATING THE 1994 CONSTITUTION**

We extend our thinking by asking what it would mean to seek to understand South Africa's constitutional history of the 1990s while foregrounding the then prevailing economic interests – namely those of an economically dominant white population group led from behind the scenes by capitalist bosses. Despite the relationship between the outcome of the constitutional negotiations and the then prevailing economic interests being understudied, there are numerous narrative accounts of some of the significant events of that time. In this section, by invoking several of those accounts we intend to demonstrate that a great deal of time and effort was invested in advocating for securing the long-term future of white business interests in particular, and white economic domination and ideological hegemony more generally, despite the impending shift towards a non-racial constitutional democracy.

Understanding the emergence of the economic interests as they coalesced in the 1990s demands looking beyond the formal period of constitutional negotiations in the early 1990s. Significant on this score on a global scale was the fact that formal decolonisation had taken effect across numerous former colonies while, at the same time, US-led

---

<sup>39</sup> See ss 117 and 131 of the 1910 Constitution.

<sup>40</sup> A notable exception on this score is Magubane (1996), although it must be pointed out that its focus is on the question of the franchise and its implications for the large-scale exclusion of blacks.

<sup>41</sup> See generally Statistics South Africa "Inequality trends in South Africa: A multidimensional diagnostic of inequality" (2019) available at <https://www.statssa.gov.za/publications/Report-03-10-19/Report-03-10-192017.pdf> (accessed 6 June 2022).

neoliberal globalism was taking root with reverberating effects which did not leave white economic interests – represented most cohesively by white capital – unaffected, thus forcing them to adapt in order to survive.<sup>42</sup> While this happened, the black-led struggle for liberation continued both internally and externally, with many exiled political groupings applying pressure through international anti-apartheid campaigns.<sup>43</sup> In the 1970s, it became undeniable that government actions, policies and laws were having a negative impact on white capital. Policies such as that of the “homelands” or “self-governing territories” and influx control, the overarching scheme of grand apartheid, began to threaten white business interests by reducing access to cheap labour. This had the effect of fuelling demands for higher wages and better working conditions, which in turn affected profits negatively. Therefore, to sustain and guarantee profitability, white capital was willing to seek concessions from the government ostensibly on behalf of black people, even at the risk of alienating apartheid hardliners.<sup>44</sup> In the 1980s, white business is known to have supported some reform such as limited relaxation of influx control, the toleration of some union activity, and improvements in the living conditions and tenure for black people in urban areas. Support for reforms led to the eventual involvement of the corporate sector in the putative reform project of then Prime Minister PW Botha, whose high-water mark was the enactment of the discredited Tricameral Constitution of 1983.<sup>45</sup>

---

<sup>42</sup> Our use of the shorthand term “white capital” throughout the following sections speaks to what has perhaps best been elucidated by Bond, who refers to “white, sub-imperial ‘settler capital’ whose accumulation in the past century and a quarter was based on the (often artificial) availability of cheap black labour, the extraction of minerals and generation of cheap electricity, and the production of protected luxury goods”. See Bond P *Elite transition: From apartheid to neoliberalism in South Africa* (2014) at 4. While we accept that this group is not cohesive or representative in the true sense of the word, we would defend the use of the term in this context as reflective of the leadership role of white capital in perpetuating an irrefutable white political, economic and cultural hegemony whose primary beneficiaries were then, and now continue to be, persons historically, and currently, designated as white.

<sup>43</sup> Resolutions condemning apartheid, the adoption of the UNGA *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973), the suspension of South Africa from the UN in 1974, as well as the World Conference on Sanctions against Racist South Africa in 1986, intensified the international anti-apartheid campaign. An oil embargo was encouraged by a resolution of the General Assembly in 1963, and in 1968 the General Assembly called on member states to suspend cultural, educational, sporting and other exchanges with the apartheid regime and organisations or institutions related to it. States and international bodies embraced this call, and South Africa faced cultural and sports boycotts until the early 1990s.

<sup>44</sup> According to Bond, by the mid-1980s, recession, intensifying sanctions, growing worker militancy, international competition and a declining rate of corporate profit and reinvestment led South African capitalists to realise that if a transition to a kind of democracy did not take place, the country would go into economic free-fall and there would be political anarchy. However, the transition was seen as acceptable, as it was in exchange for “the lifting of sanctions and *pliant post-apartheid economic policy-making*” – Bond (2014) at 23–24.

<sup>45</sup> See Klug H “Decolonisation, compensation and constitutionalism: Land, wealth and the sustainability of constitutionalism in post-apartheid South Africa” (2018) 34(3) *South African Journal on Human Rights* 469 at 472–3.

## THE QUESTION OF UNDERLYING INTERESTS: ECONOMIC JUSTICE, CONSTITUTIONAL HISTORY AND THE CAPTURE OF THE SOUTH AFRICAN STATE

The political and economic turmoil of the 1980s in South Africa presented very difficult operating conditions for white capital. In response to this reality, it developed formations to safeguard and promote its interests. These included the South Africa Foundation,<sup>46</sup> the Free Market Foundation,<sup>47</sup> the Urban Foundation and the Consultative Business Movement.<sup>48</sup> In particular, the Urban Foundation and the Free Market Foundation became involved in the apartheid reform agenda, culminating in what were claimed as improvements in certain living conditions of urban Africans. White capital's interest in these supposed reforms was to increase the influx of cheap black labour from the "homelands" or "self-governing territories" to "white South Africa" and to ensure a sustained supply of cheap labour. The greater the demand for jobs, the cheaper the supply.<sup>49</sup> According to Kane-Berman, the then executive director of the South African Institute of Race Relations, the Urban Foundation's campaign to change the influx control policy was "probably the most successful business achievement in the dismantling of apartheid that South Africa has yet seen".<sup>50</sup>

Internationally, the anti-apartheid campaign – spearheaded by exiled liberation movements – put pressure on the international community, and Western governments in particular, to institute sanctions against South Africa. Western transnational corporations doing business in South Africa were compelled to disinvest from the country, and there was a drive to boycott goods from South African corporations and state-owned entities. Institutions such as those serving the higher education sector

---

<sup>46</sup> The South Africa Foundation was a corporate association, with its membership comprising about 50 of the largest firms in South Africa, including large banks, extractive industries, investment and insurance houses, oil companies and export-oriented firms. See Koelble T "Economic policy in the post-colony: South Africa between Keynesian remedies and neoliberal pain" (2004) 9(1) *New Political Economy* 57 at 63; Handley A "Business, government and economic policymaking in the New South Africa, 1990–2000" (2005) 43(2) *Journal of Modern African Studies* 211 at 215.

<sup>47</sup> The South African Free Market Foundation was founded by various white business figures with the main aim of encouraging the free market economy in South Africa. Free Market Foundation (date unknown) available at <https://www.freemarketfoundation.com/about-us-history%20accessed%2028%20March%202022> (accessed 28 March 2022).

<sup>48</sup> The Consultative Business Movement was another corporate organisation formally constituted in 1988, and was home to some of the big corporations of the time, including PG Bison, Premier, Southern Life, Upjohn and Shell. The organisation vigorously pursued influence over not only the African National Congress (ANC) but De Klerk's National Party regime. A formal meeting between the Consultative Business Movement and a 40-person delegation headed by Nelson Mandela in 1990, after Mandela was released from prison, set the scene for more engagements. See Handley (2005) at 217; Bond (2014) at 54.

<sup>49</sup> See generally Terreblanche S *A history of inequality in South Africa* (2002) at 76. See also Bundy C *Short-changed? South Africa since apartheid* (2014) at 16.

<sup>50</sup> Kane-Berman J *South Africa's silent revolution* Halfway House: Southern Book Publishers (1990) at 28.

were pushed to disinvest from corporations doing business in South Africa.<sup>51</sup> Calls for sanctions resulted in the passing of the Comprehensive Anti-Apartheid Act of 1986 in the US, and by 1990 more than 200 US corporations had cut business ties in South Africa. The value of the South African currency plummeted, and inflation reached all-time highs.

#### 4.1 White capital negotiating with the leadership core of the African National Congress

The conditions described above were catalytic, as they had a significant influence on the decision by a section of white capital to commence informal talks with some members of the African National Congress (ANC) leadership in the 1980s.<sup>52</sup> One of these early meetings took place in 1984. It was organised by Zambian President Kenneth Kaunda at the request of some South African industry leaders and newspaper editors, and was led by Gavin Relly, the then chairman of Anglo American, one of the largest conglomerates in South Africa.<sup>53</sup> The ANC delegation was led by president-in-exile, Oliver Tambo. At the core were white capital's concerns with the ANC's economic commitments as expressed in the Freedom Charter, and particularly the commitment to nationalisation of "the mineral wealth beneath the soil, the banks and monopoly industry".<sup>54</sup> In a message to American investors, Relly called for negotiations with the ANC. Here he described the role of business in negotiating a new era as advising "on economic structures and, in their long-term commitment to free enterprise and to the idea of wealth creation ... to encourage political organizations to take a similar long-term view".<sup>55</sup>

In 1986, captains of British industry with interests in South Africa met with Oliver Tambo and Thabo Mbeki. This led to a series of "clandestine" talks arranged and moderated by Michael Young, then head of communications and corporate affairs at a British mining corporation, Consolidated Goldfields, which itself had a major subsidiary in South Africa.<sup>56</sup> Between 1987 and 1990, meetings were held in England with Mbeki,

<sup>51</sup> See Knight R "Documenting the US solidarity movement – with reflections on the sanctions and divestment campaigns" (Conference on celebrating a decade of freedom: International anti-apartheid movements in South Africa's freedom struggles – lessons for today 10–13 October 2004).

<sup>52</sup> The term "ANC core leadership" is used by Sampie Terreblanche in the context of the party's relationship with big business to emphasise the point that, for several years prior to democracy, big business was largely not in conversation with "the ANC" but with particular clique or cliques of elite ANC leaders: those who wielded the strongest influence on the party.

<sup>53</sup> Such was the market dominance of Anglo American at the time that it was reputed to own or control about 70% of the companies listed on the Johannesburg Stock Exchange. See Harden B "S. African businessmen meet with exiled guerrilla leaders" (1985) *Washington Post* 14 September 1985 available at <https://www.washingtonpost.com/archive/politics/1985/09/14/s-african-businessmen-meet-with-exiled-guerrilla-leaders/331c11d6-1ef2-4e58-9d75-aeabe053674e/> (accessed 28 March 2022)

<sup>54</sup> Harden (1985).

<sup>55</sup> Relly G "The costs of disinvestment" (1986) 63 *Foreign Policy* 131 at 138.

<sup>56</sup> Sparks A *Tomorrow is another country: The inside story of South Africa's road to change* (1994) at 77.

## THE QUESTION OF UNDERLYING INTERESTS: ECONOMIC JUSTICE, CONSTITUTIONAL HISTORY AND THE CAPTURE OF THE SOUTH AFRICAN STATE

Aziz Pahad and Jacob Zuma, representing the ANC, and with Afrikaner intellectuals, academics, business leaders and church leaders largely representing “white South Africa”. Topics discussed included “political developments in South Africa, the rise of international pressures, sanctions, the state of the economy, the possibility and implications of releasing Nelson Mandela, and what both sides believed could be done about the deepening racial conflict”.<sup>57</sup>

In subsequent meetings with ANC leaders, organised business aimed to persuade the liberation movement’s representatives to adopt pro-market policies so as to prioritise and safeguard their primary corporate agenda of extracting profits.<sup>58</sup> ANC leaders, on the other hand, prioritised securing post-1994 economic stability and foreign investment.<sup>59</sup> Following his release, Nelson Mandela “cultivated close relationships with top local businessmen”, among them mining moguls Harry Oppenheimer of the Anglo American Corporation, Clive Menell of Anglovaal Ltd, and insurance and financial services mogul Douw Steyn of Budget Insurance Company. Mandela maintained regular meetings with “a group of 15 leading businessmen in what became known as the ‘Brenthurst Group’” at Oppenheimer’s Brenthurst mansion.<sup>60</sup> The economic historian Sampie Terreblanche suggests that ANC leaders were ill prepared for discussions of economic policy and perhaps susceptible to undue influence by captains of industry and foreign experts. He submits that, until 1990, the ANC had paid little attention to what form post-apartheid economic policy should take.<sup>61</sup>

While courting the ANC leadership in preparation for what must have already seemed an inevitable post-apartheid future, white capital also worked to consolidate its relations with those individuals and formations favouring a democratic transition within the National Party and other minority white parties such as the Democratic Party. One example is the Consultative Business Movement’s attendance at, and participation in, the then South African president FW de Klerk’s peace conference, which later culminated in the National Peace Accord.<sup>62</sup> Terreblanche notes that the South African corporate sector and the National Party government “were perhaps at their closest in the 1980s and early 1990s, when the apartheid regime experienced a serious legitimacy crisis, and the corporate sector its most serious accumulation

---

<sup>57</sup> Sparks (1994) at 82–83.

<sup>58</sup> See Seekings J & Natrass N “State-business relations and pro-poor growth in South Africa” (2011) 23(3) *Journal of International Development* 338 at 339.

<sup>59</sup> Sparks A *Beyond the miracle: Inside the new South Africa* (2003) at 180.

<sup>60</sup> Seekings & Natrass (2011) at 347.

<sup>61</sup> Terreblanche (2002) at 84–5.

<sup>62</sup> See Camay P & Gordon A “The National Peace Accord and its structures” (date unknown) available at <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv03275/05lv03294/06lv03321.htm> (accessed 28 March 2022).

crisis”.<sup>63</sup> De Klerk was a free-market proponent and brought business people into his cabinet and inner circle.<sup>64</sup> Esterhuysen notes that the National Party’s economic policy under De Klerk came to align with much of what white capital was putting forward at the time.<sup>65</sup>

In search of popular support from his constituency, De Klerk called a whites-only referendum in 1992. This asked whether the white electorate supported the continuation of reforms aimed at negotiating a new constitution for South Africa. Annette Strauss, writing on the referendum, refers to an advertisement placed by the leadership of the Private Sector Referendum Fund. This had been established to support De Klerk’s “Yes” vote campaign. The Fund pleaded its case in the following terms, asserting:

that a “No” vote would mean the certainty of disaster. This is what we have achieved since 1990: we have already been accepted back into the international fold; sanctions have been lifted, trade is starting to prosper; investment capital is pouring in, creating new jobs, new opportunities. This is what a “No” vote will destroy overnight.<sup>66</sup>

Support for the “Yes” vote was further encouraged on the basis that it would ensure that there would be “efficient protection of ownership of private property and land ... for foreign investments, loans, and capital; for international trade and the end of the oil embargo; and for access to the I.M.F.”.<sup>67</sup> To further illustrate the level of corporate investment in the “Yes” campaign, Strauss points out that “21 Big companies such as Anglo-American, Barlow Rand, B.P., Caltex, First National Bank, Murray and Roberts, Shell, and Standard Bank [appealed] directly to their employees to vote ‘Yes’”.<sup>68</sup>

Formal negotiations for a transition to democracy began in 1991, and were formalised under the banner of the Convention for a Democratic South Africa (CODESA) and later by its successor, the Multiparty Negotiating Forum. The negotiations were politician-led and formally constituted of 19 political formations. These were made up of white political parties, Indian and coloured representatives from the tricameral parliament, anti-apartheid liberation movements, and leaders of “homelands” and “self-governing territories”.<sup>69</sup> Business leaders or formations were not officially represented in the formal negotiations, though there was one exception: the Consultative Business Movement. This was involved in the National Peace Accord process that propelled the

---

<sup>63</sup> Terreblanche (2002) at 265.

<sup>64</sup> Esterhuysen W *Endgame: Secret talks and the end of apartheid* (2012) at 257.

<sup>65</sup> Esterhuysen (2012) at 281.

<sup>66</sup> Strauss A “The 1992 Referendum in South Africa” (1993) 31(2) *The Journal of Modern African Studies* 339 at 342.

<sup>67</sup> Strauss (1993) at 349.

<sup>68</sup> Strauss (1993) at 343.

<sup>69</sup> See South African History Online “The Convention for a Democratic South Africa (CODESA): CODESA 1” (date unknown) available at <https://www.sahistory.org.za/article/convention-democratic-south-africa-codesa-codesa-1#endnote-102> (accessed 28 March 2022).

## THE QUESTION OF UNDERLYING INTERESTS: ECONOMIC JUSTICE, CONSTITUTIONAL HISTORY AND THE CAPTURE OF THE SOUTH AFRICAN STATE

negotiations, and several Consultative Business Movement members became part of the administrative staff of CODESA.<sup>70</sup>

The position taken by white capital at the advent of constitutional negotiations was neither coincidental nor a matter of chance. According to MacDonald, from early on in the 1980s, white capital began “contemplating the advantages of democratic capitalism as an alternative to social revolution”.<sup>71</sup> During the negotiations, business would intensify its efforts to gain support for a capital-friendly post-transition constitutional order. With political leaders preoccupied with formal transitional negotiations, business formations were organising and funding inputs into the conceptualisation of future economic policy. Terreblanche refers to the white corporate sector’s efforts at the time as a “strategy of co-option”.<sup>72</sup> In 1990, the newly-established South African Chamber of Business published a scenario-planning document called *Economic Options for South Africa* and promoted this among political role-players.<sup>73</sup> Nedcor and Old Mutual also developed and sponsored a team (which became known as the Professional Economists Panel) to develop post-1990 scenarios for South Africa.<sup>74</sup> Bond points out that

the scenario-planning game was not meant to challenge the norms and practices of South Africa’s elites, as much as it was to deradicalise further the politicians and technocrats of the democratic movement, precisely in order to prepare them to join the elite.<sup>75</sup>

Bundy submits that the scenario-planning exercises were “disproportionately effective in shaping economic planning”.<sup>76</sup> He reports that, in that period, as many as 250 business forums and coalitions courted the ANC elite.<sup>77</sup> A key feature of white capital’s agenda was to insist on a “high economic growth rate, and that all other objectives [including uplifting Black majority socially and economically] should be subordinated to this”. According to Terreblanche, white capital was thus leading the charge in favour of what was, in essence, a neoliberal economic agenda and free-market system.<sup>78</sup>

There are stark similarities between the scenarios developed as blueprints by white capital in the early 1990s and what later became official economic policy. One of the policy debates in the early 1990s related to where income and wealth redistribution in favour of the black majority should sit in the order of economic priorities in the soon-to-

---

<sup>70</sup> South African History Online.

<sup>71</sup> MacDonald M *Why race matters in South Africa* (2006) at 72.

<sup>72</sup> Terreblanche (2002) at 80.

<sup>73</sup> Terreblanche (2002) at 80.

<sup>74</sup> Terreblanche (2002) at 80.

<sup>75</sup> Bond (2014) at 58.

<sup>76</sup> Bundy (2014) at 39.

<sup>77</sup> Bundy (2014) at 39.

<sup>78</sup> Terreblanche (2002) at 96.

be-constituted democratic South Africa. Here white capital led the charge, arguing that primacy should be given to economic growth, with the necessary legal and policy protections put in place to assure growth. It was argued that redistribution would follow naturally from growth, and that only a free-market economy would make this possible.<sup>79</sup> Against this, the Congress of South African Trade Unions (COSATU) argued that wealth and income redistribution would lead to economic growth with better economic outcomes for the country as a whole.

According to Terreblanche, the ANC leadership either remained on the fence or were slowly turned in favour of the position advanced by white capital, having been warned against “the grave dangers of the comprehensive redistribution or poverty alleviation programme”.<sup>80</sup> Further, the corporate sector criticised the “growth through redistribution” approach, saying it would dampen economic growth. The International Monetary Fund (IMF) also warned against additional taxation and increased government expenditure.<sup>81</sup> Fundamental too for white capital was the notion of an independent reserve bank the independence of which would be enshrined in the Constitution. According to Bond, the Professional Economists Panel supported the recommendation for an independent reserve bank, seeking to immunise it against democratic inputs and any pressures to increase government spending.<sup>82</sup>

Increased interactions with the corporate captains (and others who shared their approach) would eventually convince those at the helm of the ANC of the merits of their approach. In May 1992, the ANC published its *Ready to Govern* document.<sup>83</sup> This effectively dispensed with the “growth through redistribution” approach, holding instead to the idea that the inequality and injustice of colonial-apartheid could not be overcome in a “swift progressive and principled way”.<sup>84</sup> The rhetoric of nationalisation was also dropped by the ANC leadership on the grounds that its costs would be too great.<sup>85</sup> Even Joe Slovo, then secretary-general of the South African Communist Party and an ANC negotiator at CODESA, conceded that national liberation had to be achieved in an evolutionary way and that the socialist reconstruction of the economy (as embodied in the Freedom Charter) could be delayed for reasons of political expediency.<sup>86</sup> Strauss points out that Nelson Mandela, in efforts to allay white fears at

---

<sup>79</sup> This is the so-called trickle-down effect. See Odhiambo N “Growth, employment and poverty in South Africa: In search of a trickle-down effect” (2011) 20 *Journal of Income Distribution* 49 at 49–62. Interestingly, Odhiambo finds no empirical evidence to support the efficacy of the trickle-down effect in reducing poverty.

<sup>80</sup> Terreblanche (2002) at 114–6 and Esterhuyse (2012) at 265.

<sup>81</sup> Terreblanche (2002) at 81.

<sup>82</sup> Bond (2014) at 57, 228.

<sup>83</sup> African National Congress “ANC policy guidelines for a democratic South Africa” (1992) available at <https://www.anc1912.org.za/policy-documents-1992-ready-to-govern-anc-policy-guidelines-for-a-democratic-south-africa> (accessed 10 February 2022).

<sup>84</sup> Terreblanche (2002) at 87.

<sup>85</sup> See Terreblanche (2002) at 86.

<sup>86</sup> Terreblanche (2002) at 86.

## THE QUESTION OF UNDERLYING INTERESTS: ECONOMIC JUSTICE, CONSTITUTIONAL HISTORY AND THE CAPTURE OF THE SOUTH AFRICAN STATE

the time, claimed “that President Robert Mugabe’s plans to nationalise farm land in Zimbabwe had no bearing on the situation in South Africa [and that the] whole policy of nationalisation was under review”.<sup>87</sup> Bundy summarises the outcome of the contestation around the direction to be taken in the post-1994 economy by positing that while the ANC won the political game, that there was also “another game”, this one “with chips priced in dollars, and with croupiers who were urbane and persuasive bankers and businessmen”.<sup>88</sup>

A significant part of the story of securing white economic interests at the time of transition is the role played by the IMF and the World Bank. The Bretton Woods institutions (as these are collectively known) added impetus to the “democratic capitalism” project which, as was previously mentioned, the one favoured by white capital.<sup>89</sup> This meant that the democratic government’s economic policy would be a “liberal-capitalist version of democratic capitalism [i]n which the balance of power would be on the ‘capitalist’ rather than ‘democratic’ side”.<sup>90</sup> In 1993, the leadership of the Transitional Executive Council, a multiparty forum charged with making core governmental decisions ahead of the first democratic elections, approached the IMF to borrow funds to run the elections. It is recorded that a loan of \$850 million was advanced by the IMF, seemingly in exchange for the signing of a secret protocol named the “Statement on economic policies”. This contained a promise that the economic approach of the new democratic government would be based on the primacy of economic growth over a redistributive agenda.<sup>91</sup> Terreblanche argues that this effectively sealed the deal for a post-democratic neoliberal economic agenda in the so-called ‘new South Africa’.<sup>92</sup> Bundy argues that “[n]estling up to the IMF, the ANC ‘agreed to leave the structures of production, ownership and income substantially intact’ – effectively achieving ‘broad continuity in the economic sphere’”.<sup>93</sup>

The discussion above strongly suggests that at the heart of the agenda of white capital’s involvement with key role-players in the democratisation process, and particularly the leadership of the ANC, was securing its own economic interests and, concomitantly,

---

<sup>87</sup> Strauss (1993) at 347.

<sup>88</sup> Bundy (2014) at 41. He further opines that the ANC was won to the goals of macroeconomic stability, the opening of the economy to international trade and finance, and an export-oriented growth path, in return securing “a commitment from big business to accelerate the entry of Black shareholders into boardrooms and directorates”; Bundy (2014) at 40.

<sup>89</sup> Terreblanche (2002) at 37 describes democratic capitalism as relevant to South Africa as “[t]he legal system that protects both democracy and capitalism ... based on the principle of equality before the law but maintains inequalities in the distribution of property rights and opportunities for the capitalist system”.

<sup>90</sup> Terreblanche (2002) at 98.

<sup>91</sup> Terreblanche (2002) at 6.

<sup>92</sup> Terreblanche (2002) at 6.

<sup>93</sup> Terreblanche (2002) at 41.

those aligned to it. For white capital, this was to be encapsulated in the very nature of post-apartheid statehood. Putting it plainly, Terreblanche boldly suggests: “[T]he ANC got its first prize – political control of SA – while the corporate sector got its first prize – continued control of the SA economy – to an even greater extent than before.”<sup>94</sup> In his 2012 book, *Lost in Transformation*, Terreblanche characterises South Africa’s transition as essentially “an elite compromise” in terms of which there would be no comprehensive redistribution, fiscal austerity would be maintained, deficit-reduction would be achieved, and taxation and expenditure would be fixed as proportions of gross domestic product.<sup>95</sup> The elite compromise:

exonerated white corporations and white citizens for the part they played in the exploitation and deprivation of blacks, and it also enabled whites to transfer almost all their accumulated wealth, their social and physical wealth – and also the part that was accumulated undeservedly – almost intact to the new South Africa ... [It enabled whites] to perpetuate their white elitism almost intact.<sup>96</sup>

The elite compromise entailed South Africa’s becoming a constitutional democracy rather than a parliamentary one; a constitutional guarantee of independence for the South African Reserve Bank, guaranteed by the Constitution itself; and that property rights could be rescinded only by a special majority vote in the National Assembly.<sup>97</sup>

The position above is affirmed by MacDonald. He argues that, from an early stage, the ANC’s “negotiationist” leaders, together with white capital and the Nationalist Party government, “agreed on a capitalist democracy as a framework of a new order”, one built on constitutionally guaranteed property rights, a constitutional government (as opposed to a majoritarian democracy), and the primacy of the bourgeoisie.<sup>98</sup> In turn, the white corporate sector would provide, through black economic empowerment schemes, opportunities for black elites to join white elites.<sup>99</sup> On the protection of private enterprise and property, Shivambu instructively observes:

The Constitution protects private enterprise [...] making it almost impossible to change the capitalist foundation of the Constitution due to the two-thirds provision required to do so. It is true that the Constitutionalisation of private property rights in South Africa primarily preserved the unequal property relations that defined the racial capitalism, and therefore bequeathed to the post 1994 system, almost the same challenges of inequalities, poverty and unemployment of the majority that defined South Africa under apartheid. The economic policies adopted by the post 1994 government are a reflection of the ideological conquest and reign of fractions [sic] of

---

<sup>94</sup> Terreblanche (2002) at 102.

<sup>95</sup> Terreblanche (2002) at 66, 127.

<sup>96</sup> Terreblanche *S Lost in transformation* (2012) at 109.

<sup>97</sup> Terreblanche (2002) at 99. See also section 74(2) of the Constitution in respect of requirements for its amendment.

<sup>98</sup> MacDonald (2006) at 88–9.

<sup>99</sup> Terreblanche (2012) at 69. See also Michie J & Padayachee V “South Africa’s transition: The policy agenda” in Michie J & Padayachee V (eds) *The political economy of South Africa’s transition* (1997).

## THE QUESTION OF UNDERLYING INTERESTS: ECONOMIC JUSTICE, CONSTITUTIONAL HISTORY AND THE CAPTURE OF THE SOUTH AFRICAN STATE

capital that defined the transition period. The social and economic conditions that characterise the post 1994 South Africa are also a consequence of the transition.<sup>100</sup>

Whether or not an explicit secret deal was in fact reached is not something we seek to confirm in this article, nor is it necessary to do so. Rather, the argument we advance here is that white capital laboured hard to secure its position and that the structure of the economy and society post-1994 strongly suggests that, at the very least, a large portion of its “wish list” was secured. A key indicator to measure the impact of white capital’s influence over post-1994 South Africa from a material perspective is the extent to which its objectives in fact found favour and are encapsulated in the text of the Constitution.

### 4.2 The presence of white economic interests in the negotiated democratic constitutions

It is beyond the scope of this article to set out a detailed analysis of the many provisions of the “post”-apartheid constitutions that can be read in terms of the interests embodied in them. However, to further substantiate our argument, it is useful to refer to at least some relevant provisions with regard to what the constitutional vision of economic justice seems to be.

The Preamble and section 1 of the Constitution set out and establish its values, which are aspirational and promising. “We the people”, the Preamble opens, “recognise the injustices of our past” before continuing to commit “the people” to “[healing] the divisions of the past” and “[improving] the quality of life of all citizens and free[ing] the potential of each person”.<sup>101</sup> In line with these preambular commitments, the values in the Constitution include “the achievement of equality”, along with human dignity, advancement of human rights and freedoms, non-racialism, non-sexism, supremacy of the Constitution, transparency, and the rule of law. However, it is trite that the Preamble and the founding values are generally not directly enforceable, particularly when there is another provision in the Constitution specifically dealing with that issue.<sup>102</sup>

The much-vaunted section 9 demands equality before the law and equal protection and benefit of the law.<sup>103</sup> The effect of this is that any differentiation that may lead to

---

<sup>100</sup> Shivambu N *South Africa's negotiated transition from apartheid to an inclusive political system: What capital interests reigned supreme?* (MA thesis, University of the Witwatersrand, 2015) at 115.

<sup>101</sup> The Preamble of the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution) was even less inspirational on economic justice. It referred only to the need to create a democratic constitutional state in which there is equality between men and women and people of all races.

<sup>102</sup> See Fowkes J “Founding provisions” in Woolman S & Bishop M (eds) *Constitutional law of South Africa* (2014).

<sup>103</sup> Sections 9(1) of the Constitution and 8(1) of the Interim Constitution.

discrimination must meet the standard of rationality.<sup>104</sup> The equality clause also protects against unfair discrimination on grounds including race, sex, ethnic or social origin, belief, and culture.<sup>105</sup> Closer to the idea of economic justice, section 9(2) provides for “the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination”.<sup>106</sup> This affirmative action provision is, arguably, the closest approximation to a commitment to actively pursue economic or restorative justice in the Constitution. Read in the broader context of the section, one cannot help but note the immediate limitations that make it subject to legislative intervention, and thus entirely dependent on political will and dynamics at any given moment. The “achievement of equality” is thus less an obligation imposed on the state (or on anyone for that matter) than it is a discretionary authority conferred upon the legislative and executive arms of government. In practice, however, this provision has been interpreted to mean that any affirmative measures to advance the interests of previously subjugated black people should not “impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened”.<sup>107</sup> The question of when an affirmative action measure is considered to impose “substantial and undue harm remains a matter of interpretation”.

In the period leading up to the transition, affirmative action is likely a policy which white capital reconciled itself to as long as it was manageable and not deemed to be incompatible with democratic capitalism and free markets. Anglo American chairman Rely’s statement in 1986 suggests as much: “What is clear is that the complexion of South African business will in many respects be transformed, though the fundamental principles of private ownership of property will perforce have to remain.”<sup>108</sup>

This statement suggests that Rely was of the view that constitutional provisions, such as a bill of rights that enshrines the protection of private property and “the classic Western democratic concept of the rule of law”, would function as countermeasures that would stave off any potentially adverse effects affirmative action might have on white capital interests.<sup>109</sup> Terreblanche notes that the affirmative action policies that came to be implemented by the democratic government are largely indifferent to the plight of poor black people and instead feed on the black elite’s “careerism” and “quest for material enrichment”.<sup>110</sup>

<sup>104</sup> See *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) and *Harksen v Lane NO* 1998 (1) SA 300 (CC).

<sup>105</sup> Sections 9(3) of the Constitution and 8(2) of the Interim Constitution.

<sup>106</sup> The Interim Constitution provides for a similar measure in section 8(3)(a).

<sup>107</sup> *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 44.

<sup>108</sup> Rely (1986) at 141.

<sup>109</sup> Rely (1986) at 141, 143.

<sup>110</sup> Terreblanche (2002) at 136. Adam H, van Zyl SF & Moodley K *Comrades in business: Post-liberation politics in South Africa* (1997) at 174 write that post-apartheid affirmative measures mostly favour the black middle class, “independent entrepreneurs, a managerial aristocracy in high demand and a political bourgeoisie eager to join in the consumerism of the former oppressors”. They lament that “[m]ost ANC

## THE QUESTION OF UNDERLYING INTERESTS: ECONOMIC JUSTICE, CONSTITUTIONAL HISTORY AND THE CAPTURE OF THE SOUTH AFRICAN STATE

The enshrining of socio-economic rights in the Constitution was considered by many to be a radical – yet welcome – development. Housing, education, health care, and social security, as well as sufficient food and water, are included in the Bill of Rights as justiciable rights. However, some onerous internal qualifiers or limitations are attached to these rights. The government bears the sole responsibility for “progressively” realising the provision of these goods through the taking of “reasonable and legislative measures” to the extent that it is within its available resources to do so.<sup>111</sup> Therefore, the enshrinement of socio-economic rights was not intended to deliver an immediately realisable redistribution of resources to meet the basic needs of those previously dispossessed and impoverished under colonial-apartheid policies. The content and implementation of socio-economic rights as a balancing mechanism thus dovetails well with the economic policy and ideological approach promoted in the early 1990s that is based the primacy of economic growth and free markets.

As previously intimated, in as far as democratisation was concerned, the protection of private property was a deal-breaker for white South Africa, including the business sector. For a clearer sense of the extent to which this is true, we need to turn more pointedly to the history of the inclusion of the right to property, including its nature and content. Klug provides us with a useful and detailed account of South Africa’s property debate from the late 1980s and up to and including the constitutional negotiations.<sup>112</sup> Crucial for our purposes is the effort and energy that then “existing economic interests” put into framing the debates and delimiting future distributive possibilities while the ANC grappled to find an internal position reflective of its ideologically diverse or “broad church” membership.<sup>113</sup>

A close reading of Klug’s account reveals how the existence and influence of “existing economic interests” in the property debate culminated in a crucial bifurcation that separates the general protection of property from the specific protection of land in both the Interim Constitution and the 1996 Constitution. The implications of this bifurcation, we suggest, are far-reaching, but they are beyond the scope of this current article. Suffice it to say (and as suggested by Klug below), this bifurcation allowed for a workable compromise around property rights – broadly conceived – to be reached. This compromise allowed the National Party and the ANC to hold their respective lines with

---

officials [have come to] measure equality by comparison with the affluence of the predecessors [and that] American habits and ostentatious consumption have become yardsticks of South African progress”.

<sup>111</sup> See ss 26(2), 27(2) and 29(1)(b) of the Constitution. The right to basic education is enshrined without the said limitations, but the state still bears sole responsibility for it unless one can afford and opts for private basic education.

<sup>112</sup> Klug (2018). Klug’s article centres on the ANC’s internal grappling with whether to include property rights at all or to limit them only to personal property, but it is nevertheless an important contribution in as far as it captures the competing narratives that informed what ultimately went into the constitutional provisions.

<sup>113</sup> Klug (2018) at 479.

their primary constituencies on the importance of safeguarding existing property rights (on the one hand) and the importance of providing a constitutional foundation for land reform (on the other). Describing the deliberations of a sub-committee of the Constitutional Assembly, Klug states:

Focusing on the land issue, this meeting once again brought together those committed to the cause of land redistribution and raised the problem of protecting property rights in the Constitution. While some participants again raised questions about the very inclusion of a clause protecting property, in a change from the period in which the Interim Constitution was negotiated, participants in this workshop, even those representing long-established interests such as the National Party and the South African Agricultural Union, agreed on the need 'to rectify past wrongs' and to undertake land reform. Disagreement here was over the means. The South African Agricultural Union, for example, continued to assert that, "[I]t should be done in a way without jeopardising the protection of private ownership," while the National Party now embraced the World Bank's proposals, arguing that land reform should "be accomplished within the parameters of the market and should be demand-driven."<sup>114</sup>

On the surface, the base constitutional protections of property captured by the Interim Constitution and the 1996 Constitution can be read differently. The former is framed positively as the right to own, while the latter is framed negatively to protect owners' rights from interference without due legal process. Yet their net legal effect is, arguably, the same. It is, we suggest, the same in the sense that both, in their default positions, recognise the property rights existing at the time of negotiations as legitimate and protect them, irrespective of the history of their acquisition.<sup>115</sup> As far as redistributive commitments relating to property go, both constitutions rehearse the property-land bifurcation born of compromise identified above. Specifically, constitutional redistributive commitments are limited only to the category of property designated as land.<sup>116</sup> Less precisely, if not cryptically, the general right to property provides that the state must "take reasonable legislative and other measures, within its available

---

<sup>114</sup> Klug (2018) at 486 (emphases added).

<sup>115</sup> For example, s 28 of the Interim Constitution protects "the right to acquire and hold rights in property". The term "rights in property" here refers to rights in terms of prevailing law that was, effectively, the same law that permitted white accumulation through dispossession and profiteering at the expense of subjugated black people. In a similar vein, s 25 of the Constitution provides that "[n]o one may be deprived of property". Again, the term "property" refers to rights in property in terms of any persisting law. Thus, the private ownership of property that Rely said will "*perforce have to remain*" was achieved in s 25(1) of the present Constitution; Rely (1986) at 141.

<sup>116</sup> No specific redistributive commitments are made with respect to property more generally. This is not to suggest that this would be impossible under the Constitution, save that should such a policy be adopted, it would be achievable only by way of law of general application and subject to the s 36 limitation clause, as well as further subject to the s 25(1) prohibition against the "arbitrary deprivation of property".

## THE QUESTION OF UNDERLYING INTERESTS: ECONOMIC JUSTICE, CONSTITUTIONAL HISTORY AND THE CAPTURE OF THE SOUTH AFRICAN STATE

resources, to foster conditions which enable citizens to gain access to land on an equitable basis".<sup>117</sup>

The silence on the possibility of redistribution of other categories of property is palpable. While Klug (alongside several other commentators) notes the ANC government's failures to deliver adequately on land reforms as required by the Constitution, his contribution (significantly for present purposes) also lays bare how it is that white economic interests as encapsulated through the ownership of a myriad property rights beyond land were hard-wired into post-apartheid constitutionalism. It is arguably a consequence of this constitutionalisation of the right to property that prompted Adam, Van Zyl Slabbert and Moodley to ask rhetorically, yet prophetically: "[D]oes a constitutional protection of all property relations not freeze unjust acquisition?"<sup>118</sup>

### 5 IN LIEU OF A CONCLUSION

Strictly speaking, it is difficult to speak properly of a conclusion when the aim of this article is decidedly to seek to make an opening. It is with this thought in mind that we must acknowledge that our article only manages to scrape the surface of the issues raised. Rather than offer answers, it seeks to spark questions for further contemplation and research in line with a growing body of scholarship that is reviving interest in constitutionalism and political-economy, or what Goldoni and Wilkinson have dubbed "the material constitution".<sup>119</sup> In this article, by applying our attention to constitution-making processes of the early 1900s and the 1990s, and highlighting how the prevailing economic interests sought to influence, if not frame, the agenda, we have sought to demonstrate that material relations that have permeated the making of South African statehood are neither coincidental nor the natural consequences of political, social, or cultural forces.

Drawing upon writings that have sought to examine the relationship between economic interests and the constituting of the state, we have argued that to properly understand the foundations and nature of South African constitutionalism in material rather than theoretical terms, we must, through a historical lens, closely examine the underlying white economic interests as represented by a dominant white capitalist class. It is these interests, we argue, that have been instrumental, if not determinative, in directing and shaping the politics and material distributive priorities of state-making at both these constitutive moments. Both moments reveal the ability and resolve of the white

---

<sup>117</sup> Subsection 25(5) (emphasis added). Again, note the ring-fencing of land in contradistinction to other forms of property. This is a significant move in a modern economy, where land ownership is, arguably, no longer the primary means of production and/or marker of wealth.

<sup>118</sup> Adam, van Zyl & Moodley (1997) at 56 (emphasis added).

<sup>119</sup> Goldoni M & Wilkinson M A "The material constitution" (2018) 81(4) *The Modern Law Review* 567. See also Britton-Purdy J, Grewal D S, Kapczynski A, & Rahman, K S "Building a law-and-political-economy framework: Beyond the twentieth-century synthesis" (2019) 129(6) *Yale Law Journal* 1784.

capitalist class as representative of broader white economic interests to navigate and even direct politics to achieve both their survival and continuity to accumulate and profiteer further even when threatened by the prevailing environment. It is our hope that following this article, constitutional scholars will seriously heed the warning sounded by Beard when he says, “[W]hoever leaves economic pressures out of history or out of the discussion of public questions is in mortal peril of substituting mythology for reality and confusing issues instead of clarifying them.”<sup>120</sup>

#### **AUTHORS' CONTRIBUTIONS**

The first author contributed to the development of the theoretical framework for the South African context and its implications when applied to the formation of the 1910 Constitution. The second author contributed the framework's implications on the making of the post-apartheid constitutions and in particular the prevalent role played by white economic interests in shaping these constitutions. The authors, together, reflected on providing concluding remarks.

---

<sup>120</sup> Beard (1936) at liii.

# THE QUESTION OF UNDERLYING INTERESTS: ECONOMIC JUSTICE, CONSTITUTIONAL HISTORY AND THE CAPTURE OF THE SOUTH AFRICAN STATE

## **BIBLIOGRAPHY**

### **Books**

Adam H, van Zyl SF & Moodley K *Comrades in business: Post-liberation politics in South Africa* Cape Town: Tafelberg (1997)

Beard C *An economic interpretation of the constitution of the United States* New York: Macmillan (1936)

Bond P *Elite transition: From apartheid to neoliberalism in South Africa* London: Pluto (2014)

Brand R *The Union of South Africa* Oxford: Clarendon Press (1909)

Bundy C *Short-changed? South Africa since apartheid* Athens: Ohio University Press (2014)

Dugard J *Human rights and the South African legal order* Princeton: Princeton University Press (1978)

Esterhuysen W *Endgame: Secret talks and the end of apartheid* Cape Town: Tafelberg (2012)

Kane-Berman J *South Africa's silent revolution* Halfway House: Southern Book Publishers (1990)

MacDonald M *Why race matters in South Africa* Cambridge: Harvard University Press (2006)

Magubane B *The making of a racist state: British imperialism and the Union of South Africa, 1875–1910* Trenton: African World Press (1996)

Maloka E *Friends of the natives: The inconvenient past of South African liberalism* Durban: 3rd Millennium (2014)

May H *The South African constitution* Westport: Greenwood Press (1970)

Murungi J *An introduction to African legal philosophy* Lanham: Lexington Books (2013)

South African Native Affairs Commission 1903–1905 *Report with annexures no. 1 to 9* Cape Town: Cape Times (1905)

Sparks A *Beyond the miracle: Inside the new South Africa* Chicago: Chicago University Press (2003)

Sparks A *Tomorrow is another Country: The inside story of South Africa's road to change* Chicago: Chicago University Press (1994)

Terreblanche S *A history of inequality in South Africa* Pietermaritzburg: University of KwaZulu-Natal Press (2002)

Terreblanche S *Lost in transformation* Randburg: KMM Review (2012)

### **Chapters in books**

Fowkes J "Founding provisions" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* Cape Town: Juta (2014)

Michie J & Padayachee V "South Africa's transition: The policy agenda" in Michie J & Padayachee V (eds) *The political economy of South Africa's transition* London: Dryden Press (1997)

Samaradiwakera-Wijesundara C “The fiction of the juristic person: Reassessing the ‘personhood’ of juristic persons in relation to ‘other people’” in Steyn M & Mpofo W (eds) *Decolonising the human: Reflections from Africa on difference and oppression* Johannesburg: Wits University Press (2021)

### **Journal articles**

Britton-Purdy J, Grewal D S, Kapczynski A, & Rahman, K S “Building a law-and-political-economy framework: Beyond the twentieth-century synthesis” (2019) 129(6) *Yale Law Journal* 1784–835

Goldoni M & Wilkinson M A “The material constitution” (2018) 81(4) *The Modern Law Review* 567–97

Handley A “Business, government and economic policymaking in the New South Africa, 1990–2000” (2005) 43(2) *Journal of Modern African Studies* 211–39

Kenyon K & Madlingozi T “‘Rainbow is not the new black’: #FeesMustFall and the demythification of South Africa’s liberation narrative” (2022) 43(2) *Third World Quarterly* 494–512

Klug H “Decolonisation, compensation and constitutionalism: Land, wealth and the sustainability of constitutionalism in post-apartheid South Africa” (2018) 34(3) *South African Journal on Human Rights* 469–91

Koelble T “Economic policy in the post-colony: South Africa between Keynesian remedies and neoliberal pain” (2004) 9(1) *New Political Economy* 57–78

Madlingozi T “Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution” (2016) 28(1) *Stellenbosch Law Review* 123–47

Marks S & Trapido S “Lord Milner and the South African state” (1979) 18(1) *History Workshop Journal* 50–80

Modiri JM “Conquest and constitutionalism: First thoughts on an alternative jurisprudence” (2018) 34(3) *South African Journal on Human Rights* 300

Mutua M “Hope and despair for a new South Africa: The limits of rights discourse” (1997) 10 *Harvard Human Rights Journal* 63–114

Odhiambo N “Growth, employment and poverty in South Africa: In search of a trick-down effect” (2011) 20 *Journal of Income Distribution* 49–62

Ramose MB “In memoriam: Sovereignty and the ‘new’ South Africa” (2007) 16(2) *Griffith Law Review* 310–329

Relly G “The costs of disinvestment” (1986) 63 *Foreign Policy* 131–46

Samaradiwakera-Wijesundara C “Reframing corporate subjectivity: Systemic inequality and the company at the intersection of race, gender and poverty” (2022) 7(1) *Business and Human Rights Journal* 100–16

Seekings J & Natrass N “State-business relations and pro-poor growth in South Africa” (2011) 23(3) *Journal of International Development* 338–57

Sibanda S “Not purpose-made! transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty” (2011) 22(3) *Stellenbosch Law Review* 482–500

## THE QUESTION OF UNDERLYING INTERESTS: ECONOMIC JUSTICE, CONSTITUTIONAL HISTORY AND THE CAPTURE OF THE SOUTH AFRICAN STATE

Sibanda S “When do you call time on a compromise? South Africa’s discourse on transformation and the future of transformative constitutionalism” (2020) 24(1) *Law Democracy and Development* 384–412

Strauss A “The 1992 Referendum in South Africa” (1993) 31(2) *Journal of Modern African Studies* 339–60

Tully J “Modern constitutional democracy and imperialism” (2008) 46(3) *Osgoode Hall Law Journal* 461–93

### **Constitutions**

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa, 1996

Union of South Africa Act, 1909

### **Treaties and conventions**

UNGA *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973)

### **Case law**

*Harksen v Lane* NO 1998 (1) SA 300 (CC)

*Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC)

*Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC)

### **Conference papers**

Knight R “Documenting the US solidarity movement – with reflections on the sanctions and divestment campaigns” (Conference on celebrating a decade of freedom: International anti-apartheid movements in South Africa’s freedom struggles – lessons for today 10-13 October 2004)

### **Internet sources**

African National Congress “ANC policy guidelines for a democratic South Africa” (1992) available at <https://www.anc1912.org.za/policy-documents-1992-ready-to-govern-anc-policy-guidelines-for-a-democratic-south-africa> (accessed 10 February 2022)

Camay P & Gordon A “The National Peace Accord and its structures” (date unknown) available at <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv03275/05lv03294/06lv03321.htm> (accessed 28 March 2022)

Free Market Foundation (date unknown) at <https://www.freemarketfoundation.com/about-us-history%20accessed%2028%20March%202022> (accessed 28 March 2022)

Harden B “S. African businessmen meet with exiled guerrilla leaders” (1985) *Washington Post* 14 September 1985 available at <https://www.washingtonpost.com/archive/politics/1985/09/14/s-african-businessmen-meet-with-exiled-guerrilla-leaders/331c11d6-1ef2-4e58-9d75-aeabe053674e/> (accessed 28 March 2022)

Madison J “The Federalist No. X” (1787) *New York Daily Advertiser* available at <https://mrwaddell.com/apgov/apgfd10.pdf> (accessed 14 November 2022)

South African History Online "The Convention for a Democratic South Africa (CODESA): CODESA 1" (date unknown) available at <https://www.sahistory.org.za/article/convention-democratic-south-africa-codesa-codesa-1#endnote-102> (accessed 28 March 2022)

Statistics South Africa "Inequality trends in South Africa: A multidimensional diagnostic of inequality" (2019) available at <https://www.statssa.gov.za/publications/Report-03-10-19/Report-03-10-192017.pdf> (accessed 6 June 2022)

**Theses**

Shivambu N *South Africa's negotiated transition from apartheid to an inclusive political system: What capital interests reigned supreme?* (MA thesis, University of the Witwatersrand, 2015)