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Citation

Frank I. Michelman, Liberal Constitutionalism, Property Rights, and the Assault on Poverty, 22 Stellenbosch L. Rev. 706 (2011).

Published Version

<http://hdl.handle.net/10520/EJC54797>

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LIBERAL CONSTITUTIONALISM, PROPERTY RIGHTS, AND THE ASSAULT ON POVERTY

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1 Introduction

Suppose we have three factors in play: a national project of post-colonial recovery from distributive injustice, prominently including land reform; express constitutional protection for property rights; and a Constitution whose other main features bring it recognisably within the broad historical tradition of liberal constitutionalism. Have we got a practical contradiction on our hands?

To what extent, if any, does or must the constitutional property clause (as distinct from its companion-liberal constitutional guarantees) particularly impede the social-transformation project? Crucially, the answer is not preordained but rather rests on how the clause is construed and applied by whoever is to decide which actions of the state the clause does and does not interdict.¹ Suppose that is a body of courts. The next question, then, might be about the extent, if any, to which we must expect that the Constitution's overall liberal affiliation will incline the courts toward deployments of that clause that are especially troublesome from the standpoint of reform.

The narrower claim of this essay is that the attractions of liberal constitutionalism do not come necessarily laden with a counter-reformative property clause. In what I would call a proper liberal view, the office of a constitutional property clause is to signal recognition of the connection between a decent respect for property and a decent respect for human dignity and freedom; it is *not*, however, to provide defenses for property rights beyond what constitutional protections for freedom, security, dignity, equality, and legality would anyway provide.

It may, even so, be true that the conditions of distributive justice within a national society will not always be achievable by means meeting the demands of an up-and-running liberal constitutional order. The essay's broader claim is that the fault in such cases does not, however, lie in a liberal conception of justice.

* My thanks go to STIAS. A fellowship there provided time and wonderfully supportive surroundings for the preparation of this article.

¹ This point receives apt emphasis from GS Alexander *The Global Debate Over Constitutional Property Rights* (2006) 6, 9, 29, 57-59. Throughout this essay, my necessarily summary observations in regard to the current state of the debate share much with Alexander's richly extended explorations.

1 1 A puzzle of transformative constitutionalism

Plain, deep, and insuperable are the South African Constitution's² liberal genes. So insists Sanele Sibanda in his highly compelling contribution to this Colloquium,³ even as he both grants and applauds the Constitution's "post"-liberal, transformation-minded reworkings of its liberal birthright.⁴ With Sibanda's uncompromising placement of the Constitution in liberal territory, I could not more wholeheartedly agree. Indeed, I may go further down that road than Sibanda does; for I mean to resist as far as possible any suggestion of a divide or contradiction between the Constitution's social-transformative pretensions and its indwelling liberal identity. To resist the suggestion, I say, but not entirely to crush it. In the end, something beyond the trivial will remain of that concern. Whatever that is, though, it will not be an out and out indictment of a liberal constitutionalist transplant to African post-colonial soil.

Sibanda's own powerful work stops somewhere short of that, at least for now. But Sibanda does deeply doubt the receptiveness – much less the positive conduciveness – of any possible practice of liberal constitutionalism, let it be of the most left-leaning conceivable variety, to a truly redemptive project of social transformation in South Africa now or elsewhere on this continent. And yet, as I read Sibanda, it is not the liberal-constitutionalist *ideal* that he rejects, but rather the notion that a liberal-constitutionalist establishment *here and now* will permit – let alone can inspire and provoke – a consolidation of the political will and the political means required to move the country from its here and now to its envisioned, socially transformed future condition. However humanely conceived and intended, a liberal-constitutionalist transformative project in the South African here and now is bound, Sibanda believes, to meet with fatal blockage by a dominant drive in liberal constitutionalism to limit the state as opposed to empowering and obligating it. "Transformative constitutionalism" becomes, to that extent, a contradiction in terms, an oxymoron; perhaps not necessarily so on an abstract theoretical plane (where limitation might give more ground to obligation), but still surely so within the currently prevailing and reasonably foreseeable political-cultural context here, coddled as that context is by a more classical-liberal understanding.

Sibanda's reservations start out from what we may all agree are fixed points of substance and procedure in liberal constitutionalism. Procedurally, constitutionalism means the channeling of raw political desire through institutional filters for deliberation, accountability, and control: representative government, divided powers, institutional checks and balances – "procedural democracy in the form of free and fair elections and the balancing of institutional power dynamics between the branches of government".⁵ Substantively, constitutionalism no doubt involves distinct limits on the lawful powers of the

² Constitution of the Republic of South Africa, 1996 ("the Constitution").

³ S Sibanda "Not Purpose-made! Post-independence Constitutionalism and the Fight Against Poverty" (2011) 22 *Stell LR* 482.

⁴ See generally KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146.

⁵ Sibanda (2011) *Stell LR* 494.

state, although I would be cautious about how far to go in positing a liberal commitment to political and legal sequestration of a “private sphere that [is] the preserve of private citizens”.⁶

As I read Sibanda, the problem he perceives is not that these liberal-constitutionalist ideas must necessarily, in the abstract or in all circumstances, act as obstacles to poverty-prevention by organised political means. There might, he allows, well be room to construe and apply them so that they need not. But liberalism’s characteristic instinct to fall back on procedural responses to otherwise seemingly intractable social conflicts suggests to Sibanda an overwhelming likelihood, in the current South African *milieu*, of a slide to moderation and complacency and even to callous indifference in the halls of power to the indefinite persistence here of what few would deny are morally intolerable conditions of poverty, indignity, and dispossession.

That crude summary misses the power, refinement, and pathos of Sibanda’s argument. Even as thus wanly restated, the argument is not one that I would know how to reject or rebut. Rebuttal, however, is not my aim, but rather a kind of interpretative next step. What I want to suggest is that the heart of the difficulty lies neither in the broadly speaking liberal nor in the specifically constitutionalist elements in the current South African regime. That is partly because the location of the heart of the difficulty is not within South Africa but in the world at large. Drain South African politics and law, if you could, of liberal normative ideas and ideals, to be replaced by something more radically solidaristic, communalistic, or perhaps (but now I stray beyond my competence) indigenous and African. Free South African politics and law, if you could, from constitutionalistic procedural and institutional fetters, to be replaced by some “constitution without constitutionalism” on the African model unforgettably and brilliantly described, explained, and analysed by Okoth-Ogendo.⁷ The obstacle, as I see it, would remain. It would, to be sure, be a fellow-traveler with liberalism, I think a corruption of it but that may be controversial. The obstacle would not, in my view, be liberalism pure and simple; it would not be the liberal normative essence or ideal. I do not take such a claim to contradict Sibanda. I want to partner, in a way with his argument: to leave it standing, only shorn of some possible misunderstandings.

In fact my claim here will be cast in somewhat narrower terms. Its specific focus will be on the guarantees respecting property and property rights that inevitably are somewhere found, implicit if not explicit in any practice of liberal constitutionalism.

⁶ Sibanda (2011) *Stell LR* 493 n 64. Compare J Rawls *Justice as Fairness: A Restatement* (2001) 166: “The principles defining the equal basic liberties and fair opportunities of citizens hold in and through all so-called [spheres or] domains... [T]he spheres of the political and the public, and of the not-public and the private, take their shape from the content and application of the conception of justice and its principles. If the so-called private sphere is a space alleged to be exempt from justice, then there is no such thing.”

⁷ HWO Okoth-Ogendo *Constitutions Without Constitutionalism: Reflections on an African Paradox* (1988).

1 2 Plan of the reflection

I offer, in what follows, a reflection on connections among three factors: constitutional property clauses, liberal constitutional culture, and national projects of recovery from post-colonial distributive injustice. I want to sort out, if I can, a tangle of ideas about the effects – for the better or for the worse – of constitutional protections for property rights on a society’s vigour in addressing the causes and cures of poverty; and I want to consider how the effects might be conditioned by the presumably liberal – or at any rate “postliberal”⁸ – mindset of constitutions containing such protections.

The reflection proceeds through a series of questions running from quite narrow to quite broad, as follows:

- i) What special, concrete legal work (if any) is done by the inclusion of a property clause in an otherwise complete constitutional bill of rights?
- ii) Aside from any such work it is expected to do, what other sorts of aims or concerns might prompt or explain the inclusion of a property clause in an otherwise complete constitutional bill of rights?
- iii) Which among the results from our preceding queries best explain the inclusion of a property clause in a so-called “transformative” constitution that also contains evident, strong commitments to the eradication of poverty, the achievement of equality, and the fulfilment of human dignity for all from a starting position of wide-scale, unjust dispossession?
- iv) What (if anything) follows regarding the normatively preferred judicial deployment of a property clause when found within such a constitution?
- v) What (if anything) follows regarding the sustainability, in concept and in practice, of an idea of “transformative constitutionalism”, occurrent within the broad current of the traditions, discourses, practices, and cultures of liberal constitutionalism?

The earlier questions in my series may seem aimless or ungrounded when first taken up. My hope is that by the end they will not seem so, but rather will stand justified as parts of an agenda of questions for further study and debate, by and among those currently committed to the pursuit of socially transformative aims (including the eradication of poverty), by what I will broadly call constitutional-legal means, in what I will broadly call post-colonial settings. I emphasise “for further study and debate” because the reflection here can only, on the whole, be rudimentary – to the point, indeed, of being merely cursory in some places. But let us begin.

⁸ Klare (1998) *SAJHR* 151-156.

2 Special, concrete legal work from a constitutional property clause?

What special, concrete legal work (if any) is done by the inclusion of a property clause in an otherwise complete constitutional bill of rights?

Several terms require definition: “property clause”, “otherwise complete”, and “special, concrete legal work” – in that order.

As I use the term here, a *constitutional property clause* is a guarantee – as represented, say, by the first three sub-paragraphs of section 25 of the Constitution of South Africa⁹ – of (i) supreme-law support for (ii) defensive claims against (iii) disturbances of proprietary positions duly established under (iv) an extant legal regime that supports private ownership. Thus, my concern here is with constitutional guarantees respecting control and retention of assets currently recognised as yours, not with guarantees respecting what you will not be suffered at any time, or for long, to go without. (A constitution also may contain commitments of the latter sort – as does South Africa’s¹⁰ – but those are not what I mean here by property clauses.)

A constitutional property clause typically appears as one substantive guarantee in a list of several – a “bill” or “charter” of “rights”. That list may or may not be what I here call *otherwise complete*. Picture, if you will, a constitution that already includes (as, for example, South Africa’s does) robust substantive guarantees respecting personal freedom, security, dignity, and privacy; respecting non-discrimination and equality under the law; respecting legality and due process – but that contains nothing that refers specifically to property. By “guarantees respecting” these matters, I do not mean absolute and unconditional assurances. I rather mean what our constitutions typically are taken to mean: assurances against non-trivial infringements for which (or for the law’s allowance of which by others) the state does not provide a sufficient justification, in terms of some appropriately weighty or urgent moral or social purpose that is served by the infringement or by the law that authorises or allows it.

My question, at this first stage of the reflection, is about what (if any) *special, concrete legal work* is expected to be done by addition of a property clause to such an otherwise complete bill of rights. Now, by “special, concrete legal work” I mean making a directly traceable difference in the disposition of some identifiable subset of cases at law from what the disposition otherwise would have been. What (if any) difference of that sort have we reason to

⁹ See s 25 of the Constitution:

- “(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application –
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected...”

¹⁰ See ss 25(5), 25(7), 26-28 of the Constitution.

expect from the introduction of a property clause into an otherwise complete constitutional bill of rights?

Especially if you are a lawyer, you will find it hard to free yourself from the thought that inclusion of the property clause must have been aimed at raising the litigation-success rate for some subset of constitutional claims above where it otherwise ought to lie. Given our definition of “property clause”, the subset tagged for advantage would have to consist of claims stemming from disturbances of extant ownership positions, either perpetrated by the state or permitted by its laws. But now consider the fact (and is it not a fact?) that every conceivable instance of such a disturbance can support at least a bare claim of a *prima facie* infringement of one or more of a person’s constitutional claims to freedom, security, dignity, privacy, equality (non-discrimination), legality, or due process, thus putting the state to its burden of justification. Appreciation of that point allows us to enrich somewhat our account of the concrete legal work (if any) that addition of the property clause to an otherwise complete bill of rights must be expected to do. It seems that some but not all cases of alleged infringement on those other rights – freedom, dignity, *et cetera* – will involve an ownership disturbance as occasioning the alleged infringement. Addition of the property clause must be expected to give claimants *in that particular subset of cases* some sort of extra litigation benefit or advantage they would not otherwise enjoy. I shall soon try to be a bit more precise about the sort of extra advantage the property clause might be expected to provide for ownership-disturbance claims. But to aid us in seeing what could be going on here, we can make use of a hypothetical case.

Let it be a case of a law on eviction control.¹¹ Say, it is a law that bars an owner from evicting anyone from quarters occupied by that person as his home, unless and until a court has determined that replacement housing is available to that person, within his means and also within practicable reach of that person’s established place of work, if he has one, or of locations where work will be available for him if he is capable of working. This statutory barrier to eviction is plainly written to apply to any and all cases of attempted evictions of people from their current homes, regardless of any conceded entitlement of the applicant to immediate possession under basic and simple property and contract law (because, for example, the applicant is the owner and the lease has expired, or perhaps the occupation is nakedly illegal).

Under a constitution containing an otherwise complete bill of rights but lacking a property clause, sundry applicants for eviction, when first met by blockage from this law, could be expected to invoke against it their constitutional rights to freedom, security, dignity, privacy, equality, and legality. At least at the beginning, before courts had been able to develop any

¹¹ I must ask South African lawyers to set aside the obvious special bearing on this instance of ss 25(6) and 26(3) of the Constitution. Those familiar with the South African mineral-resources legislation recently held unconstitutional in *Agri South Africa v Minister of Minerals and Energy* 2011 3 All SA 296 (GNP), or with the burial-rights provision, s 6(2)(DA) of the Extension of Security of Tenure Act 62 of 1997 as amended, held constitutional in *Nhlabati v Fick* 2003 7 BCLR 806 (LCC), might want also to have those laws in mind.

substantial body of qualifying doctrine,¹² a great many such claims should easily suffice to establish a *prima facie* limitation of one or another of those rights, thus putting the state to its burden of justification. Now, while the state could easily lose some fraction of the cases, it doubtless would prevail in others. (Perhaps, say, the violation of the lease-condition was accidental and enduring, the owner has no different use in mind for the space, the tenant is poor and lacks alternatives, and (for good measure) the eviction is prompted by spite.)

Add a property clause to the mix. Might cases now arise under our anti-eviction law in which a court would find an unconstitutional infringement of *the property clause*, even though, in context, the court would have detected no unjustified infringement of anything else in the otherwise complete bill of rights? If the answer is no, then addition of the property clause is not doing any special, concrete legal work. But how can the answer possibly be yes?

Here is how. We suppose that the presence of the property clause, and only the presence of the property clause, allows the owner to argue approximately as follows:

My owner's title to this land is an asset, an item of property. The law in question, as applied to this case, has created in the current occupant a new asset, consisting of his legally protected, indefinitely continuing privilege to occupy the space in question. The law's bestowal of that asset on him perpetrates a redistribution from me to him – thus, a withdrawal from my asset portfolio, a contraction of its boundaries. The property clause flatly prohibits withdrawals of assets from owners by the state without just and equitable compensation, and no compensation has been provided.

Suppose that argument is allowed to go through just as stated. Then we can easily see a special, concrete legal consequence from the addition of the property clause to the otherwise complete bill of rights. When – and only when – what is up for decision is a claim to supreme-law protection against disturbances of existing positions of asset-holding or asset-definition, the property clause gives the claimant a special entitlement to a strongly rule-formalist style of adjudication, as opposed to the more insistently contextualised, proportionality approach that is used in regard to all the rest of the bill. Where owners cry out only in terms of “liberty”, or “dignity”, or “privacy”, or “equality”, or “legality”, the gravity of the claimed infringements is tested – “weighed” – against the state's countervailing moral purposes. Where owners cry “property” and can show a non-compensated asset-redefinition or redistribution wrought by or pursuant to the state action in question, there is no such further weighing that the claim is required to undergo.

¹² As, for example, the Constitutional Court of South Africa has done for the property clause in the lines of cases beginning with *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services*; *First National Bank of Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC). See generally AJ van der Walt *Constitutional Property Law* 3 ed (2011); T Roux “The ‘Arbitrary Deprivation’ Vortex: Constitutional Property Law after FNB” in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 265.

Granted, the property clause need not necessarily work that way.¹³ The owner cries “property” and shows an infringement of his property right by non-compensated destruction, re-assignment, or impairment of an asset or of its value to him. The case could then proceed as usual to the justification stage, where the court tests the gravity of the property-right infringement against the state’s moral or other social purposes. But then it seems that the property clause may be doing no special, concrete legal work, because – as we have seen – any instance of a property loss or impairment can always be re-described in terms of an infringement on freedom, security, privacy, dignity, equality, or legality. If or insofar as we lawyers really think that addition of the property clause *must* be meant to extend a “property” claimant’s level of protection beyond what the other clauses would anyway provide, it seems that can only occur by somehow specially easing the claimant’s burden, or specially toughening the state’s, in that subset of bill-of-rights cases in which a claimed *prima facie* infringement on freedom *et cetera* takes the special form of a disturbance of an ownership position.

From decades of immersion in US constitutional property law, my sense of the way the property clause is supposed to do that is by making courts more receptive to rule-formalist argumentation in ownership-disturbance cases than in most other cases of claimed infringements on freedom or the rest.¹⁴ Perhaps that is wrong, or perhaps it does not hold more widely in the world. My point remains that where it does *not* hold, the presence of the property clause in the otherwise complete bill of rights does no clear-cut, concrete legal work; and so lawyers (especially) may be tempted to think that the constitution containing the clause poses no more of an obstacle to social transformation than does the constitution lacking it. But such a restricted lawyer’s-eye view would be incomplete.

3 Other grounds and explanations for inclusion

Aside from any special, concrete legal work it is expected to do, what other sorts of aims or concerns might prompt or explain the inclusion of a property clause in an otherwise complete constitutional bill of rights?

A number of possible answers come to mind. It will be convenient to give them labels, as follows: “signaling function”, “property in the margins”, “possessive individualism”, “institutional guarantee”, and “necessity”.

Signaling function. Constitution-makers might be concerned about the legal culture’s possible future insensitivity to the severity of the impairments of personal freedom and dignity that can result from disruptions of secure

¹³ As of course it does not in South Africa, but that may be in significant part because the South African property clause, in full context and with its nine sub-paragraphs, is specially and uniquely drafted to avoid such an effect, see Van der Walt *Constitutional Property Law* 16; *Phumalela Gaming and Leisure Limited v Gründlingh* 2006 8 BCLR 883 (CC) para 38:

“The constitutional property clause is not absolute and should not be employed in a manner that ignores other rights and values... If the Court were to develop the common law test of wrongfulness to protect Phumelela’s property rights to the detriment of the values on the other end of the scale, it would be discarding the nuanced test that has been developed through case law.”

¹⁴ See generally FI Michelman “Takings, 1987” (1988) 88 *Colum L Rev* 1600. Critics from the right of US constitutional property law have objected that it moves insufficiently far in this direction. See RA Epstein “Property, Speech, and the Politics of Distrust” (1992) 59 *U Chi L Rev* 41.

control over things external to the self. The property clause then might be meant to serve as a firm and salient reminder of this political-moral truth (as the framers see it), so that policy-makers and adjudicators will not overlook or disparage it.

The expected or desired signal might carry either or both of a left-leaning or a right-leaning inflection. To the left, we have “property in the margins”; to the right, we have “possessive individualism”.

“*Property in the margins*”.¹⁵ In a transformative constitutional setting, and in alliance with the equality and other clauses, the property clause can serve as a call to recognise the dependency of a person’s freedom and dignity no less (and oftentimes more!) on possessory positions traditionally classified as weak, subordinate, and vulnerable (labour tenancies, non-formalised occupations), than on positions of full, formal ownership. The clause works to demand full equality of consideration for these formally weaker claims when conflicts arise among contestants for the same space or other asset.

“*Possessive individualism*”. (I take this term from Macpherson’s widely known, adversarial exposition of an emphatically privatistic and self-centered form of liberal political thought.)¹⁶ Our notion of “special, concrete legal work” was set up to look for some special advantage for constitutional claims involving proprietary disturbances as compared with claims that do not. But we must not overlook how inclusion of a property clause might work to signal a general “atomistic” tilt (as some might call it) in a country’s over-all political value-ordering – or, in other words, a wholesale stiffening, against socially compelled consideration for others, of individual defensive claims across the board, from free speech to free trade (or whatever), with consequent impediment to state efforts toward social transformation.¹⁷

Institutional guarantee. The normative prompt to include a property clause may not come at first from contemplation of the liberal individual entitled (by nature?) to strong supreme-law possessive-defensive rights. The aim may rather be toward the public or social good. It may be to provide to the world at large what is sometimes called an “institutional guarantee”.¹⁸ The clause, then, is put there to serve as a confirmation of the state’s long-term commitment to an ownership-enabling (also efficiency-enabling) form of institutional order, in which persons, by voluntary action, can acquire, keep, exchange, and bestow positions of more-or-less secure and exclusive control over specified assets.

¹⁵ This neat term is drawn, of course, from AJ van der Walt *Property in the Margins* (2009).

¹⁶ See C Macpherson *The Political Theory of Possessive Individualism: From Hobbes to Locke* (1962).

¹⁷ Jennifer Nedelsky has written extensively on the property right’s representation of the political-moral salience of the separateness of persons and boundaries around them, most recently in her *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (2011) 91-96. See also J Nedelsky *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (1990) 1-9. For an account of spillover from property-as-boundary to controversies over free speech and democratic reform, see FI Michelman “Possession vs. Distribution in the Constitutional Idea of Property” (1987) 72 *Iowa LR* 1319 1340-1350.

¹⁸ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 85.

No doubt such a broadly programmatic guarantee can carry concrete legal consequences. A market order contemplates a characteristic assemblage of laws and facilities: background laws of delict (trespass) and contract, deeds registries and probate offices, and so on. Read as a programmatic guarantee, a constitutional property clause commits the state to the maintenance of the requisite public facilities and bodies of private law – so that for example, a failure to uphold the laws of trespass or of contract,¹⁹ or a move to socialise some economic sector,²⁰ becomes challengeable as an alleged deviation calling for specific justification.²¹

Necessity. Constitution-makers who see no other, normative reason of their own to include a property clause in an otherwise complete bill of rights might feel compelled to do so by explicit or implicit pressure from a global investment community. Without a specific (and perhaps hyper-formalised) constitutional guarantee against deprivation and appropriation of property, the drafters might conclude, the country will be unable to attract and hold the investment required to rebuild or sustain its economy.

4 Why, then, all things considered, a property clause?

Which among the results from our preceding queries best explain the inclusion of a property clause in a so-called “transformative” constitution that also contains evident, strong commitments to the eradication of poverty, the achievement of equality, and the fulfilment of human dignity for all from a starting position of wide-scale, unjust dispossession?

4 1 Normative reasons for constitutional property clauses

We have assembled a number of possible, normative reasons for adding a property clause to an otherwise complete bill of rights (in addition to “necessity,” to which we will return later). The clause may be meant to accomplish any or all of the following:

- a) to do some special, concrete legal work by providing a distinct litigation advantage to claims of unconstitutional infringement on freedom, dignity *et cetera* when the alleged infringement takes the form of a detraction from an ownership position;

¹⁹ See, for example, *Truax v Corrigan* 257 US 312 (1921).

²⁰ See, for example, *Act of Nationalization* Decision No 81-132 DC of 16 January 1982 (*Conseil Constitutionnel*); BVerfGE 50, 361 [1985] (“Co-determination case”); *South African Post Office Ltd v Van Rensburg* 1997 4 All SA 523 (E). In *South African Post Office Ltd v Van Rensburg* 1997 4 All SA 523 (E), the (unsuccessful) challenge to the state’s extensive monopolisation of the postal service was based on a clausal guarantee of freedom of economic activity, but a property clause construed as an institutional guarantee might also be cited in support of such a claim.

²¹ The institutional-guarantee idea goes a long way to explain the attribution of constitutional property rights to juristic persons or corporations. If constitutional complaints about property confiscation all had to be pleaded in terms of *prima facie* infringements on human dignity and freedom, it seems that corporation property would lack full and firm protection by constitutional law, even allowing that confiscations of corporate property would still have to clear constitutional guarantees of equality and legality. “But then why worry?” you might ask, as long as no real person’s freedom or dignity is affected. A felt need for an institutional guarantee to serve the public good provides an answer.

- b) without intending any such special *advantage* for property claims, merely to help ensure that policy-makers and adjudicators do not overlook or downgrade the dependence of freedom, dignity *et cetera* on (some greater of lesser degree of) security of ownership;
- c) to signal an overall possessive-individualist tilt in the assessment of claims to bill-of-rights protection;
- d) to lay down a marker of national commitment to the maintenance, in general, of a more-or-less marketised system of economic organisation, activity, and relationships – thus, an institutional guarantee.

4 2 “Social liberalism”

In order to test the relative, normative cogency and weight of these reasons in a given constitutional setting, we would need to have in hand some conception of a political value-ordering – or call it a conception of political justice – with which that constitution is understood to correspond. Here, we have specifically in mind a detectably liberal but also a dedicatedly transformative constitution – containing a property clause within its otherwise fulsome bill of individual rights but also marked by evident, strong commitments to the eradication of poverty and the achievement of equality from a starting position of wide-scale, unjust dispossession. As a plausibly corresponding, normative political conception, I here introduce an outlook that I will call “social liberal”. Its tenets include the following:

- i) Property – in some class or classes of objects, perhaps excluding some of society’s means of production, but not excluding all of them – subserves basic human interests in freedom, dignity, autonomy (self-development, self-expression), privacy, and self-respect – all of which interests and values together, in what follows, we shall compendiously call “basic liberties”.
- ii) A morally justified social order aims at assurance to all of enjoyment at all times of a full and adequate scheme of basic liberties.
- iii) A morally justified social order further aims at maintaining at all times secure provision for the basic material needs of each person, regardless of ability to contribute, in a manner conducive to each person’s dignity and self-respect.
- iv) A morally justified social order further aims at maintaining at all times a political-economic structure and practice that are consonant with “pure background procedural justice” – or, in different but equivalent terms, “fair equality of opportunity” to realise on one’s exertions of choice, effort, talent, contribution, risk, and so on.²²
- v) Without property, there are no markets. Markets (and very possibly only markets) enable levels of production permitting assurance to all of minimally acceptable levels of enjoyment of basic liberties (or the

²² Rawls *Justice as Fairness* 42-43, 50.

achievement of basic human capacities defined in some other way).²³ Markets, furthermore, serve human dignity directly by maintaining connections, for those who seek them, between individual choice, effort, talent, contribution, risk, and so on, and the course of a person's life.²⁴

Exactly how to specify these tenets further, and how to knit them together into a unified web of doctrine, are matters of debate among social liberals. John Rawls,²⁵ Ronald Dworkin,²⁶ and Martha Nussbaum²⁷ (say) would be leading exemplars of such differences.²⁸ But leaving such differences open, we can still see at least roughly how a broadly social-liberal outlook will respond to the various sorts of conceivable, normative reasons for a constitutional property clause we listed above (in part 4 I).

The first thing we can say is that reason (c) in our list ("possessive individualism"), would not occur to social liberals as a persuasive ground for inclusion of a property clause in an otherwise complete constitutional bill of rights. That is simply because social liberals will all be anxious to deny and reject any leaning in their creed toward possessive individualism (as conceived by Macpherson).

We can also easily see how social liberals might quite conceivably accept either or both of our reasons (b) (reminder of the property:liberty:dignity *nexus*) or (d) (institutional guarantee) as grounds for inclusion. But then the next point to notice will be that neither of those grounds will result in the clause's presence in the bill of rights doing any well-defined, special legal work – recalling that by "special legal work" we mean somehow specially easing the claimant's burden, or specially toughening the state's, in that subset of bill-of-rights cases in which a claimed *prima facie* infringement on freedom *et cetera* takes the specific form of a disturbance of an ownership position. For while reasons (b) and (d) do certainly demand that infringements on freedom or dignity, equality or legality, must not be ignored or discounted

²³ Compare *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 520. Ngcobo J wrote that a regulatory reduction in medicines prices would not be "appropriate" in terms of s 226 of the Medicines and Related Substances Control Act 101 of 1965 (construed in the light of the Constitution) if it

"will result in the closure of the pharmaceutical industry. For the need for the continued existence of pharmacies is implicit, if not explicit, from the [constitutionally mandated] objective to enhance the accessibility and affordability of medicines."

See also *Phumalela Gaming and Leisure Limited v Gründlingh* 2006 8 BCLR 883 (CC) para 36:

"The Bill of Rights does not expressly promote competition principles, but the right to freedom of trade, enshrined in section 22 of the Constitution is, in my view, consistent with a competitive regime in matters of trade and the recognition of the protection of competition as being in the public welfare."

²⁴ Compare *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 59:

"Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity."

²⁵ See, for example, J Rawls *Political Liberalism* (1993) 289-371.

²⁶ See, for example, R Dworkin *Sovereign Virtue: The Theory and Practice of Equality* (2000) 120-303.

²⁷ See, for example, M Nussbaum *Frontiers of Justice* (2006) 1-95.

²⁸ My statement of the tenets will easily be recognised as loosely Rawlsian, although by-passing certain distinctively Rawlsian specifications of priority-rankings amongst them. In general, I believe that John Rawls' unpacking of the leading aims of liberal constitutionalism is amply spacious to take in not only the case, which I treat as central, of a liberal social democracy, but also societies leaning – as plotted from that "center" – either rightward toward a straight market-liberal conception or leftward toward (with thanks and a nod to Karl Klare) a "post-liberal" conception. See Klare (1998) *SAJHR* 146.

just because they do take the form of an ownership disturbance, neither of them self-evidently demands any special tenderness towards infringements taking that form, as compared with infringements taking other forms.

4 3 Special treatment for “property” claims: Is defense of property a basic human right?

What about reason (a), then? Do we include a property clause in a social-liberal constitution just in order to provide a special litigation advantage for claims of unconstitutional infringement on freedom, dignity (*et cetera*) when the alleged infringement takes the form of an infringement of an ownership position? The obvious question is about what reason (apart from possible “necessity”) the authors of a social-liberal constitution could possibly have for wanting to do *that*. And the answer is that they would have no such reason.

Any positive answer would have to start by attributing to our authors a conviction that among the guaranteed basic rights that everyone should have in a just constitutional order is a firm shield against state-engineered and state authorised disturbances of asset-holdings lawfully established. But note, now – the point is crucial – that the reason for adding the property clause could not be merely a recognition that ownership-disturbances do sometimes amount to, or lead to, unacceptable infringements of other basic rights to freedom, privacy, dignity, quality, legality, or [you name it]. In the sight of social liberalism they surely sometimes do, *and when they do the clauses in an otherwise complete constitutional bill of rights should cover them*. The “basic right” reason for including a property clause would have to be that defense against ownership disturbances is a basic right *just in itself, regardless of any further ramification to freedom, dignity, equality and so on*.

Is it? We have among us those who emphatically answer yes. These are not confined to the neo-liberal or neo-con fringes, but include as well the so-called “classical” or “Lockean” liberals who regard strict constitutional barriers against ownership disturbances as an indispensable safeguard against encroachment by the state into matters morally reserved for resolution by the free acts and choices of individuals.²⁹ But here is where social liberals and classical (“possessive individualist”?) liberals part company. Social liberals deny that strict defense against asset-disturbances, severed from ramification to the other values informing an otherwise complete bill of rights, is either a basic human need or a demand of human dignity or of any other ascription to humankind that might plausibly motivate a universal human moral entitlement to political respect and regard.

Establishment beyond all dispute of this position’s proper location within liberalism is beyond the scope of this essay. But by way of providing a bit of evidence, I offer here a brief summary of John Rawls’ account of how, and to what extent, a guarantee respecting property belongs among what Rawls calls

²⁹ See, for example, R Epstein “Beyond the Rule of Law: Civic Virtue and Constitutional Structure” (1987) 56 *George Washington LR* 149.

the liberal “constitutional essentials”. Rawls’ credentials as a liberal political philosopher will not, I take it, be widely doubted.

Rawls does include among the constitutional essentials a right “to hold and have the exclusive use of personal property”.³⁰ But this Rawlsian liberal constitutional right to property does not stand on its own as a basic right; rather, it has a secondary, supportive role in the full Rawlsian scheme of basic rights.

In order to explain, I must next say a word about a certain idea of “moral powers” and that idea’s place in Rawls’ liberal political philosophy. In that philosophy, an ultimate aim or value, in whose overall pursuit the list or scheme of liberal basic rights or constitutional essentials is to be worked out, is service to an ascribed “highest-order interest” of every person in

“the adequate development and the full and informed exercise of [certain so-called] moral powers... [A basic right] is more or less significant depending on whether it is more or less essentially involved in, or it is a more or less necessary institutional means to protect, the full and informed and effective exercise of the moral powers...”³¹

But then what are these moral powers? Familiarly to Rawlsians, they are a brace of capacities “connected,” as Rawls says, “with...the idea of social cooperation”:

“[A] capacity for a sense of justice and a capacity for a conception of the good. A sense of justice is the capacity to understand, to apply, and to act from the public conception of justice which characterizes the fair terms of social cooperation...The capacity for a conception of the good is the capacity to form, to revise, and rationally to pursue a conception of one’s [own] rational advantage or good.”³²

The secondary, supportive role of the Rawlsian constitutional property right can now be more precisely stated. That role is “to allow a sufficient material basis for a sense of personal independence and self-respect, both of which are essential for the development and exercise of the moral powers”.³³ But of course the right then will extend no further than that purpose requires. Rawls therefore quite decidedly rejects the strong libertarian or Lockean idea (if it is, indeed, Locke’s idea) of a fundamental or “natural” human right to guaranteed, undiminished, everlasting control over assets lawfully acquired.

Since, for example, powers of bequest and inheritance are (in Rawls’ view) extraneous to providing a person with a sufficient basis of support for a sense of independence and self-respect, the constitutionally “essential” liberal property right does not encompass such powers. Nor does it necessarily, for all societies, encompass private ownership over “means of production and natural resources”. It might do the latter, or it might not: Exactly what modes, forms, and extensions of private ownership should be “accounted for as necessary” to “a sense of independence and self-respect [and the] development and exercise of the moral powers,” or to “the social bases of self-respect”, will depend

³⁰ Rawls *Liberalism* 298 n 14.

³¹ 333, 335.

³² 13-14, 18-19.

³³ 298.

on other features of the society's historical traditions and political-economic structures.³⁴

Rawls thus tailors the liberal constitutional property right to a certain specification of the core or ground of every person's equal and full entitlement to respect and regard in the operations of society and the state – or, in other words, to a certain conception of human dignity. As it happens, Rawls' particular specification of the “dignity” core in terms of the moral powers results from a special, philosophically grounded aim of his to develop what he calls a “political” conception of justice.³⁵ By no means do all (or perhaps most) philosophically inclined “social” or anti-poverty liberals share that aim or its closely linked moral powers-based conception of human personal dignity and entitlement to political respect. What it seems all anti-poverty liberals must, however, share with Rawls is (i) the notion of basic rights as components in a scheme aimed at over-all service to *some* conception of human dignity to which all equally lay claim; and, following from that, (ii) a refusal to distend any liberal basic or constitutional right – including the property right – beyond what is called for by such service.

5 Constitutional interpretation

What (if anything) follows regarding the best judicial deployment of a property clause when found within [a social-liberal] constitution?

The property clause undoubtedly dictates some kind and measure of supreme-law support for defensive claims against disturbances of proprietary positions duly established under an extant legal regime that supports private ownership. In a social-liberal constitutional setting, the clause is understood to do so *not* in response to any recognition of a free-standing basic human right against ownership-impairments just as such, but rather as a part of the defense of valued human freedom and dignity against the kinds of impairments that ownership impairments can sometimes carry with them. But by valued freedom, then, we cannot mean – and social liberals never do mean – an unfettered right to dispose as you please over whatever you own, free of all social restraint. We must rather mean freedom relative to – freedom conceived and qualified in terms of – some conception of human dignity to which all equally lay claim. In a way, we might say, the only truly, ultimately basic right that is possible in a social-liberal constitution is everyone's equal right along with others to have one's dignity as a person duly recognised, respected, and protected. From that source spring further rights – to be defined accordingly – to freedom, security, privacy, equality, and legality.

It would follow, I think, that a property clause in a social-liberal constitution – verbiage permitting – should ideally be construed as if it carries the word “unfair” where the word “arbitrary” now appears in section 25(1) of the South African Constitution, thus:

³⁴ Rawls *Justice as Fairness* 114.

³⁵ See, for example, FI Michelman “The Subject of Liberalism” (1994) 46 *Stan L Rev* 1807 1816-1826.

“No one may be deprived of property except in terms of law, and no law shall permit the [unfair] deprivation of property.”

I have in mind that the meaning of “unfair” in this context would be developed much as the South African Constitutional Court has developed it in the context of section 9(3)’s guarantee against (not “discrimination” unmodified, but only) “unfair discrimination”. “Unfair,” there, as many reading this will easily recall, has been construed to mean that the discrimination (or, as I would have it, the detraction from an ownership position) works “to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner”.³⁶ And then what might further be in order would be the sort of gloss on “dignity” advanced by Sachs J in the case of *City Council of Pretoria v Walker*.³⁷ As I have elsewhere summarised that view, it holds that in deciding whether a South African suffers damage to his dignity as a consequence of public actions that are differentially burdensome to a racial or other “suspect” group to which he belongs, we must pay him the respect of supposing that he shares the grand project of his country’s Constitution, which “envisage[s]” equality as “something to be achieved through the dismantling of structures and practices which unfairly obstruct or unduly attenuate its enjoyment”.³⁸ And so, it seems, it would have to be with defensive property rights under an avowedly transformative constitution.

Of course that may not be possible. Not pure normativity but rather necessity may dictate otherwise. In the world as we find it, an aim of bringing to an acceptable level the prospects of the economically least advantaged for exercise and enjoyment of basic liberties and capacities may be non-achievable without a kind of institutional securitisation of investment that (as we might find) only a strongly rule-formalising form of defensive property guarantee can provide. And with that observation, we move toward the close of the reflection.

6 Conclusion

Where does all of this leave us? I will take up some thoughts that come to mind, in ascending order of probable anguish for those who place their stock in a social-liberal constitutionalist destiny for South Africa.

We start with necessity. In the social-liberal view as I have presented it, the property clause provides only (as we may say) soft but not hard legal protection for defensive property claims. That, indeed, is the turn in the story that social liberals hope and expect will allow the clause to recede from excessive legal blockage of the state’s anti-poverty activities. But what if the

³⁶ *Harksen v Lane NO* 1998 1 SA 300 (CC) para 53.

³⁷ 1998 2 SA 363 (CC).

³⁸ See FI Michelman “Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa” (2004) 117 *Harv L Rev* 1378 1413 (quoting from *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) para 109). Compare *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 76 (Ngcobo J):

“The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution. What is required, though, is that the process of transformation must be carried out in accordance with the Constitution.”

world investment community simply insists on hard protection and on taking its play elsewhere if it does not get it? Well, social liberals can say, if it does so insist then it does. The country, then, will have to choose between providing hard defensive property protection and trying to conquer poverty by some internal distribution of the product available from a national economy cut off from private and outside capital investment. If the latter achievement is deemed impossible, and if poverty-eradication is not to be abandoned as a chief national commitment, then the necessitation of hard defensive property protection will supersede *any* choice of regime-form the country might make on (other) normative grounds. “Necessity,” then, will pose no more of an argument against liberal/postliberal constitutionalism than it will against any regime-form that would reject neo-liberal doctrines of hard property protection.

Come, then, to *false* necessity. Maybe it is not true – we only rush to think it is – that soft-protection-only will deprive us of the requisite level of investment. Or maybe it is not true – we only rush to think it is – that a fully socialised national economy, severed from dependence on private and foreign capital investment (but not foreign trade; we can still aim to have diamonds, gold, crops *et cetera* to exchange with the outside), can possibly produce enough to lift and keep everyone here out of poverty. And maybe these false beliefs we hold spring from illusions inevitably bred in us by the same general cultural *milieu* that also sponsors our attraction to liberal/postliberal constitutionalism, so that ridding ourselves of that attraction, which we can only do by ridding ourselves of the practice, is a necessary part of the cure. To that, all that any dedicated social liberal can say is: “Believe it if you do, but I neither believe it nor have ever seen any good reason to believe it.”

That was the easy part; now it gets harder. A judicial softening of protection against interference with property can only, within liberalism (however “post” you want to make it), take you so far. Unfair is still unfair, and “unfair”, even in the version proposed by Sachs J, still carries its irreducible liberal (individualist) gloss. The freedom and the dignity *of the person*, and (in that light) legality and equality – perhaps especially equality when combined with dignity – still do set limits that it seems could be fatal, in practice if not in theory, to the transformative project laid down by the Constitution.

No doubt some headway is possible: The burial-rights law can surely be upheld as in *Nhlabati*. The *Agri-SA* judgment will be sharply contested before the Constitutional Court; if it is not overturned it may be substantially circumventable by a judicious re-write of the statute. The anti-eviction law can be given effect if many or most, if not in all, cases of its invocation, and ways can still be found to vindicate the claims of owners to fair treatment.³⁹ How much of a dent, though, does all of that really make on South Africa’s post-apartheid legacy of poverty and dispossession? Dispossession, say, of the land and everything that means in regard not just to wealth but to power,

³⁹ See, for example, *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).

status, and dignity?⁴⁰ And not just of the land as land or natural resource but the land as capital input to housing? And how could it be judged remotely, liberally fair – or consonant with a decent care for liberal dignity – that the current owners of acreage should pay a hugely disproportionate share of society’s (or even say of white society’s) bill for repair? But how, otherwise, is it possible to make the repair within tolerable time, given the current and expected state of the economy and, relatedly, the public treasury?

To questions such as those, I think social liberals must choose between two lines of response. The first would be that we don’t know until we really try, and we have not yet really tried. Maybe, with wisdom concertedly applied to issues of time, terms, trade, and taxation, there is a workable way to acquire land for redistribution that liberal equality and dignity can accept. That is a line that social liberals should not easily give up. The other response-line would be that, alas, we cannot get there from here by a liberal/postliberal constitutionalist path. That still does not sideline whatever (otherwise) normative preference for social-liberal/postliberal constitutionalism you may retain. Because on the morning after – after the blow-up of the current situation, after the start-over revolutionary redistribution of the land and natural resources – you will still want to start the country out again on the path you think is right, and so you will want to shape the intervening events in ways that do the least destruction possible to hopes for such a future. The words of Ngcobo J (as he then was) still ring in our ears. There can be, as he wrote, no “sacrifice” of transformation “at the altar of stability.” But that does not give us free rein. The transformation still “must be carried out responsibly and its adverse impact must be minimised.”⁴¹

SUMMARY

Suppose we have three factors in play: a national project of post-colonial recovery from distributive injustice, prominently including land reform; express constitutional protection for property rights; and a Constitution whose other main features bring it recognizably within the broad historical tradition of liberal constitutionalism. To what extent does or must that Constitution’s overall liberal affiliation or its inclusion of a property clause impede the social-transformation project?

The narrower claim of this essay is that the attractions of liberal constitutionalism do not come necessarily laden with a counter-reformative property clause. In what I would call a proper liberal view, the office of a constitutional property clause is to signal recognition of the connection between a decent respect for property and a decent respect for human dignity and freedom; it is not, however, to provide defenses for property rights beyond what constitutional protections for freedom, security, dignity, equality, and legality would anyway provide.

It may, even so, be true that the conditions of distributive justice within a national society will not always be achievable by means meeting the demands of an up-and-running liberal constitutional order. The essay’s broader claim is that the fault in such cases does not, however, lie in a liberal conception of justice.

⁴⁰ See, for example, M Lipton *Land Reform in Developing Countries* (2009) 16-40.

⁴¹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 106.