In Favorem Libertatis: The Prospect of Liberty in the Transformation(isation) of South African Law

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Dedicated to those scholars and activists who stand up for individual liberty and private property rights, even when the tide of politically correct opinion has turned against them.

Whether I'm right, or whether I'm wrong,
whether I find a place in this world or never belong:
I gotta be me, I gotta be me.
What else can I be but what I am?

I want to live, not merely survive.
And I won't give up this dream
of life that keeps me alive.
I gotta be me, I gotta be me,
the dream that I see makes me what I am.

That faraway prize: a world of success,
is waiting for me if I heed the call.
I won't settle down, won't settle for less,
as long as there's a chance that I can have it all.

I'll go it alone, that's how it must be.
I can't be right for somebody else
if I'm not right for me.
I gotta be free, I've gotta be free;
daring to try, to do it or die,
I've gotta be me.

I'll go it alone, that's how it must be.
I can't be right for somebody else
if I'm not right for me.
I gotta be free, I just gotta be free;
daring to try, to do it or die,
I gotta be me.

"I've Gotta Be Me" (1968) by Sammy Davis Jr

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SUMMARY

The idea of the social contract has in many ways always been primarily concerned with the distribution of freedoms and powers between the State and legal subjects. It has effectively become trite that the State may, through legislation, limit if not extinguish the liberty of individuals. At the same time, there appears to be widespread agreement that the law is at least also relevant to the protection of the individual's freedom to self-determine their own affairs.

One school of thought, libertarianism, elevates the recognition and protection of individual rights, including private property rights, to the main, if not the sole, purpose of law. Another, distinctively South African school that may be referred to as Transformationism, does not, and appears willing if not eager to sacrifice individual freedom on the altar of wide-ranging socio-economic and political change in society.

In this study, three broad, multi-faced objectives are pursued, each roughly corresponding to Chapters 2, 3, and 4 respectively.

First, the legal-jurisprudential component of libertarianism is extracted from its political-philosophical discourse and described and considered in detail. This includes, primarily, a determination of what libertarianism's approach to the individual's place in society entails, how the individual's inalienable rights were brought about, and how and why the law must protect those rights. Some of the legal implications of this state of affairs are also identified.

Second, the emerging ideological basis of new South African law, mostly in the form of legislation and superior court judgments, called "Transformationism", is considered. Some of the latent undercurrents of this school of thought, including so-called "Critical Legal Studies", "Critical Race Theory", and "transformative constitutionalism", and how certain ideas from these currents have made their way into the law are also discussed.

Third, key aspects of Transformationism are selected for a theoretical reply by libertarianism. Those aspects are the Transformationist aversion toward the freedom of the individual (particularly when it comes to private property rights), the emphasis on so-called substantive equality in legal policy, and the subversion of constitutionalism, understood to be a doctrine aimed at limiting the scope and exercise of government power.

The study concludes that the best account of law is that it exists chiefly for the recognition and protection of individual liberty, and that third parties, including the State, may not interfere uninvitedly in the affairs of individual persons unless they themselves are interfering in the affairs of others. In other words, the law's role is fixed and protective, not creative and offensive. South African law (indeed all law), particularly having regard to the contemporary influence of Transformationism, should therefore be developed *in favorem libertatis*.

Keywords: Libertarianism, individual rights, private property rights, jurisprudence, legal philosophy, Transformationism, transformation, social engineering, limitation of rights, role and function of rights and law

CHAPTER 1: INTRODUCTION

1. MOTIVATION AND BACKGROUND

1.1 The individual and the law

Individual liberty and the law are historically linked phenomena. Italian political theorist Giovanni Sartori was of the view that in protecting individual liberty, “from the time of Solon to the present day, the solution has always been sought in obeying laws and not masters”.[1] The idea that law, as an institution that transcends political borders, has a universal character, however, has come to be criticised. In an early manifestation of Transformationist thinking in South African jurisprudence, Hugh Corder and Dennis Davis wrote:

> “Law and legal institutions are by their very nature representative of and dependent upon the value systems of the societies in which they operate. The days when law was seen as some ahistorical, universal human good are long in the past.”[2]

While this is perhaps a correct description of the contemporary *status quo*, Corder and Davis left open the question of whether this reality is jurisprudentially correct.

More specifically, it has been questioned whether protecting individual liberty itself is necessarily the core function of law. In *Ferreira v Levin*, for instance, Ackermann J, in a unanimous Constitutional Court decision, said the following:

> “[Labour laws cannot be struck down as unconstitutional because] the interventionist role of the state is no longer seen, in broad terms, as being limited to protecting its citizens against brute physical force and intimidation from others only, but is seen as extending to the economic and social realm as well. Second, there are specific provisions in the Constitution itself which will ensure that appropriate

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1 Sartori G. “Liberty and law”. (1976). 5 *Studies in Law*. Institute for Humane Studies. 14.

2 Corder H and Davis DM. “Law and social practice: An introduction” in Corder (ed). *Essays on Law and Social Practice in South Africa.* (1988). Cape Town: Juta. 2. Corder himself was part of a group of jurists who argued in the 1990s that the Constitution should contain no guarantee of private property rights. See footnote 149 in Van der Walt AJ. “Property rights, land rights, and environmental rights” in Van Wyk D, Dugard, J, De Villiers B, and Davis DM (eds). *Rights and Constitutionalism: The New South African Legal Order*. (1995). Cape Town: Juta. 479, 485. Acknowledging that such an ideal could not be attained, however, they proposed a property provision that balances “individual and social interests”.

labour and other social legislation will not be invalidated because of a 'misguided understanding' of what liberty requires."[3]

This approach is uncontroversial in contemporary legal thinking: Essentially, government's role in society is that role which legislation deems it to be. Legislation, usually understood as synonymous with "law", is in turn whatever government, through the legislature, deems it to be. This approach is, however, contested by libertarians, or so-called classical liberals, who consider the role of government by law, if any, to be limited to the protection of persons' individual and property rights while government must respect individual self-determination. The Italian libertarian jurist, Bruno Leoni, believed that "those who value individual freedom should reassess the place of the individual within the legal system as a whole" in light of the growing encroachment of legislation on affairs formerly left to individual and community initiative.[4] This study aims, in part, to be such a reassessment of how individual freedom is at present treated by the legal system.

In the political philosophy of libertarianism, individuals, regardless of culture, sex, race, or political opinion, are bearers of inherent rights. To many libertarians in the natural rights tradition, this results from the conviction that individuals are, with the exclusion of all other individuals, capable of taking decisions on their own behalf.[5] The individual mind, *ceteris paribus*,[6] decides what the body does, and everything else in society follows from this basic anthropological fact. This does not mean the individual always acts reasonably or with perfect information, but simply that individuals have final control over their actions and are most likely to possess the information most relevant to their decisions. "Most relevant" here means most relevant to the needs and desires of the individual themselves, rather than "relevant" to some or other socio-economic or political objective, such as health, moral order, or the *boni mores* of the community. As a result, the individual bears a natural entitlement to decide what actions to take (or not take), and bears natural responsibility for those actions or omissions. For the

[3] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para 66.

[4] Leoni B. *Freedom and the Law.* (1972). Los Angeles: Nash Publishing. 9.

[5] Morris CW. "Human autonomy and the natural right to be free". (1980). 4(4) *Journal of Libertarian Studies*. 381.

[6] Autonomism and acting as the coerced instrument of another are notable intervening factors that negate this general principle. This study does not inquire into the debate between determinism and free will. Bearing in mind that in practice it is irrelevant whether action is predetermined or freely chosen (the same thing happens regardless), free will is assumed.

purposes of this study, this reality will be referred to as "individual self-determination", or "self-determination", not to be confused with national, ethnic, or State self-determination.

The law, understood in the final analysis as an institution that regulates human behaviour through enforcement by government,[7] would *prima facie* appear to give recognition to self-determination by way of the doctrine of subjective rights. There are alternative views on the nature of law. For instance, the American libertarian legal scholar John Hasnas argues that the law is not, and should not, be considered a State monopoly,[8] and the German-American jurist Edgar Bodenheimer posits that there seems to be certain principles of justice that exist in society regardless of the existence of the State.[9]

Despite this apparent recognition of self-determination, it would appear that the individual person's right to do as one pleases with one's self and the accumulation of property that results from this freedom, has not adequately been respected, at least not in South Africa.

Indications of this may be found in Parliament's recent adoption of a motion that may see the Constitution[10] amended to provide for expropriation of private property without compensation.[11] Another example of a similar disregard for individual self-determination is the controversial first version of the Prevention and Combating of Hate Crimes and Hate Speech Bill,[12] which would have seen ordinary, harmless expression criminalised. On close analysis, both these interventions would appear to be manifestations of the socio-political doctrine of Transformationism.

Transformationism, briefly, is a conscious legal-political ideology and strategy aimed *inter alia* at bringing about socialism, thereby radically changing the social, political,

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7 The terms "government" and "State", while theoretically distinct, are more often than not treated as the same concept, which is also the approach for the purposes of this study.

8 See generally Hasnas J. "The myth of the rule of law". (1995). *Wisconsin Law Review*.

9 As quoted in Malan K. "Deliberating the rule of law and constitutional supremacy from the perspective of the factual dimension of law". (2015). 18(4) *Potchefstroom Electronic Law Journal*. 1208.

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

11 Gerber J. "National Assembly adopts motion on land expropriation without compensation". (2018). *News24*. https://web.archive.org/web/20180308193132/https://www.news24.com/SouthAfrica/News/breaking-national-assembly-adopts-motion-on-land-expropriation-without-compensation-20180227/.

12 Prevention and Combating of Hate Crimes and Hate Speech Bill (2016).

and economic dispensation, which includes the centralisation of political power in the hands of the State, in an effort to "liberate Africans in particular and blacks in general" from "national oppression and class exploitation" against the backdrop of Separate Development (or "Apartheid"), and in so doing "create a non-racial, non-sexist, democratic, united and prosperous nation".[13] Koos Malan writes that the "quintessential feature of [Transformationism] is a full-fledged egalitarian society: a truly equal society based on (a particularly strong version of) substantive equality, if not sameness – a classless socialist society which is essentially homogenous in the public sphere".[14]

I attempt to achieve three objectives in this study. The first is to outline the core philosophy of libertarianism and its jurisprudential implications. The second is to outline the core philosophy of Transformationism in a legal context. Finally, the third objective is to assess Transformationism against libertarian jurisprudence. Indeed, the American libertarian constitutional scholar Randy Barnett notes that if "law has a purpose, it is legitimate to ask if a given legal system is successful or unsuccessful" and "to craft a better means",[15] and this study seeks to tick each box of this question: What is the purpose of law? Has the law's current configuration in South African been successful? If not, what is a better alternative?

The purpose of this study is normative in character, and fundamentally asks whether Transformationism meets the standard of justice when measured against individuals' rights to determine for themselves and to be left alone, as conceived by libertarianism. Indeed, this study attempts to answer WA Joubert's 1958 challenge when he opined that, "the concept of law, of which subjective rights forms only a part, can only be determined by way of a legal-philosophical investigation into the position of the law in the overall reality". Determining the position of law in reality means the law needs to be compared and contrasted with "other aspects of reality", like morality, history,

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13 There is no uniform idea of what Transformationism entails. Various conceptions are discussed in this study. See African National Congress Youth League. "The National Democratic Revolution". (2009). http://www.ancyl.org.za/docs/political/2009/NDR%20Presentationb.pdf and Nzimande B. "What is the National Democratic Revolution?" (2006). *Umsebenzi Online*. http://www.sacp.org.za/main.php?ID=1850/.

14 Malan K. *There Is No Supreme Constitution: A Critique of Statist-Individualist Constitutionalism*. (2019). Stellenbosch: Sun Press. 196. Citations omitted.

15 Barnett RE. "Theory a theory of legal naturalism". (1978). 2(2) *Journal of Libertarian Studies*. 100.

economics, and psychology.[16] Joubert is credited for, to a great extent, introducing the doctrine of subjective rights into South African jurisprudence.[17]

The economist, Jan Lombard, wrote in *Freedom, Welfare and Order* that:

> "There is, in fact, a basic functional relationship between the legal order and the economic system. Actually, we are not really considering two independent systems, one of which deals with freedom and the other with material welfare. The rules which determine the nature of the legal system and the rules which determine the nature of economic activity are merely aspects of one single set of institutions, or institutional order. Only certain combinations of legal and economic arrangements are possible. In particular a society in which personal freedom is not recognised as such, cannot produce goods and services by means of private enterprise. One's ideas about the best economic order largely determine one's approach to the legal system, and vice versa. It is, indeed, a 'package deal'."[18]

I submit that when individual liberty is considered as a matter of legal philosophy, inquiring into economics is unavoidable. If that is avoided and the economic dimension disregarded, one would be left with an incomplete picture at best, and intellectual dishonesty at worst. Leoni wrote that the notion of freedom transcends economic and political discourse and also, if not chiefly, concerns itself with matters of law. As he wrote in *Freedom and the Law*, "freedom is not only an economic or a political concept, but also, and probably above all, a legal concept".[19]

This indicates clearly that all three disciplines – economics, politics, and law – are important factors when considering freedom as an abstract ideal. That individuals should decide for themselves is as much an economic principle as it is a legal principle, with the economics of the matter providing much-needed support for the law of the matter.[20] Thus viewed, this study, therefore, also includes an economic dimension –

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16 Joubert WA. "'n Realistiese benadering van die subjektiewe reg". (1958). 21 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg.* 99. My liberal translation from the original Afrikaans.

17 Van der Walt AJ. "The doctrine of subjective rights: A critical reappraisal from the fringes of property law". (1990). 53 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*. 316.

18 Lombard JA. *Freedom, Welfare and Order.* (1978). Pretoria: Benbo. 44-45.

19 Leoni (footnote 4 above) 2.

20 A brief example comes in the form of value subjectivity. Austrian school economists have put much emphasis on the notion that what is and is not 'valuable' can only be determined with reference to subjective (individual) human preferences. This economic theory's relevance to jurisprudence generally and to the present study particularly, might be that the notion of the 'public interest' does not, in fact, exist.

focusing on the institution of private property as an incidence of individual self-determination – which will be considered from the perspective of the Austrian school of economics. Modern libertarianism, as will be discussed below, was developed largely by Austrian-school economists like Friedrich von Hayek, Ludwig von Mises, and Murray Rothbard. This school of thought's affinity for individual choice renders it an obvious economic companion to libertarianism's legal and political insights.

1.2 'Liberty' defined

Where reference is made to 'freedom' or 'liberty' (without qualification) in this study, the definition provided in the 2017 *Human Freedom Index* of the Cato Institute is intended. Their comprehensive definition is as follows:

> "Freedom in our usage is a social concept that recognizes the dignity of individuals and is defined by the *absence of coercive constraint*. (That contrasts with a mechanistic concept whereby anything that limits a person's ability to do what she wants – be it a natural, physical barrier or another person who happens to be standing in her way – is considered an infringement on her freedom.) Freedom thus implies that *individuals have the right to lead their lives as they wish as long as they respect the equal rights of others*."[21]

AV Dickinson, in turn, defines freedom as "the state of being free to act, and not being subject to arbitrary control or restraint". This is a standard and adequate definition of freedom. However, Dickinson adds a proviso, the nature of which this study is concerned with: "In other words, [freedom] means being free to act *subject to any restraints imposed by the law*".[22] What follows is in some measure a critical examination of the notion that the law may impose "any" restraint upon freedom.

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[21] Vásquez I and Porčnik T. *The Human Freedom Index 2017: A Global Measurement of Personal, Civil, and Economic Freedom.* (2017). Washington DC: Cato Institute. https://object.cato.org/sites/cato.org/files/human-freedom-index-files/2017-human-freedom-index-2.pdf/. Citations omitted, my emphasis. There are other conceptions of freedom, such as that of Rosseau, who regarded freedom and the will of the majority in society as synonymous. This means, in essence, that individuals have to forgo pursuing their own self-interest in favour of conforming to whatever the majority wills. See Malan K. *Politocracy: An Assessment of the Coercive Logic of the Territorial State and Ideas Around A Response to It.* (2012). Pretoria: Pretoria University Law Press. 143. For an alternative interpretation of Rosseau, see Sartori (footnote 1 above) 19-25.

[22] Dickinson AV. "The freedoms of the individual" in May HJ. *The South African Constitution.* (1955, 3rd edition). Cape Town: Juta. 273. My emphasis.

For the purposes of this study, one might distinguish between "freedom in the objective sense" and "freedom in the subjective sense".

Freedom in the subjective sense (what Tara Smith calls “generic freedom”) is concerned simply with the *ability* of specific individuals (contrasted with the *concept* of the *abstract* individual) to do what they will. The question is thus concerned with whether one *can*, for example physically or financially, do something. It does not concern allowance – whether one *may* do something. Freedom in the subjective sense can exist anywhere, even in the most totalitarian of societies with an omnipresent State. The specific individual might pick up a cup to drink from, walk from their bedroom to their bathroom, or scratch an itch, and in all cases exercise freedom in the subjective sense. This type of freedom is concerned primarily with physical abilities in specific circumstances, and not with a "state of freedom" as a characterising feature of a society.[23]

Freedom in the objective sense (what Smith refers to as “rightful freedom”), which this study is primarily concerned with, is the state of freedom that exists between all people *inter se*. In other words, freedom in the objective sense means the allowability of each individual (rather than only the specific individual in their own circumstances) to do as that individual pleases. If individuals may, as of right, do as they please, it means each other individual has an obligation to refrain from hindering them from doing as they please; otherwise nobody may truly do as they please. Freedom in the objective sense is what one means when one talks of a “free society” or “having freedom”; indeed, it is a freedom of allowance rather than a freedom of ability.[24]

Viewed from this perspective, rights are concerned with freedom in the objective sense; whereas freedom in the subjective sense is rarely, if ever, a question of right (may), but usually a question of ability (can). I submit that the subjective rights recognised by the legal system must thus protect freedom in the objective sense, which of necessity protects freedom in the subjective sense, except where exercises of freedom in the subjective sense conflicts with freedom in the objective sense.

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[23] See the discussion on Sartori’s “situation of freedom” on page 78 below. See also Smith T. “On deriving rights to goods from rights to freedom”. (1992). 11(3) *Law and Philosophy*. 229.

[24] See also Smith (footnote 23 above) 229.

2. PURPOSE AND OBJECTIVES OF THE STUDY

2.1 Research objectives

The objective of this study is to set out the core theories underlying the libertarian doctrine of self-determination with respect to individual rights and property rights, and libertarian approaches to law. Thereafter, the socio-political doctrine of Transformationism[25] as well as its approach to jurisprudence will be considered. Finally, the study will consider libertarian responses to specific Transformationist legal-philosophical phenomena.

In so doing, this study will consist of three broad elements. Firstly, there will be an in-depth consideration of libertarian doctrine, especially from a legal perspective. The main theories and currents of the libertarian conceptions of rights and law from various jurists will be set out in as much detail as length allows. This, I submit, has not yet been done in legal scholarship, and therefore represents an original contribution to legal theory. Secondly, the doctrine(s) of Transformationism will be set out as coherently as the divergent theories themselves allow. While various schools and aspects of Transformationism in its legal sense have been widely considered and developed in legal scholarship, it appears that they have not yet been comprehensively considered as aspects of a coherent legal-political ideology. In this sense, too, this study is an original contribution. Thirdly, these two doctrines – libertarianism and Transformationism – will be pitted against one another in a conceptual dialogue.[26] While such a dialogue has, *prima facie*, been taking place under the surface of legal scholarship, it has not been explicit, certainly not from the libertarian (or classically liberal) perspective. The first two elements of this study – the legal philosophies of libertarianism and Transformationism – can therefore stand alone, whereas the final element depends on the research done in the former two.

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[25] "Transformationism" will be used throughout to distinguish it from the term "transformation". Within the context of this study, Transformationism is taken to mean a socio-political doctrine or ideology, whereas transformation is simply a synonym for "change".

[26] I do not claim to be impartial in this dialogue. I take it as a given that total philosophic-conceptual or ideological impartiality is impossible, and the pretence of it is intellectually dishonest. In this regard I follow the lead of Emile Zitzke when he writes that scholars must "be politically clear to enhance our understanding of each other's work […] and to ensure that there is the necessary theoretical depth in our work and thinking". See Zitzke E. "The history and politics of contemporary common-law purism". (2017). 23(1) *Fundamina: A Journal of Legal History*. 222.

2.2 Research questions

From the introduction and research objectives above, the following research questions are posed:

- How does the political-philosophical doctrine of libertarianism translate into jurisprudential, or legal-theoretical terms? Put differently, what does “libertarian jurisprudence” constitute?
- What are the main features of Transformationism as a legal-political ideology in South Africa?
- How do libertarian jurisprudence and Transformationism compare and contrast with one another, and moreover, is there a compatibility between the libertarian-jurisprudential conception of what the rights and law are intended for, and how Transformationism has influenced rights and law in South Africa?

2.3 Assumptions

I expect to find the following in the course of this research:

- Libertarian political philosophy has a coherent jurisprudential counterpart that, despite various differences between branches, at its core emphasises individual self-determination.
- A libertarian conception of rights and law is desirable, as opposed to a conception that prioritises social engineering and coercion.
- The doctrine of Transformationism by its nature is an incompatible affront to the principle of individual self-determination in libertarian jurisprudence.

3. APPROACH AND METHODOLOGY

3.1 Methodology

This study does, to a large extent, have a normative character. The existing legal position, that is, the doctrine of subjective rights, will be briefly analysed, but with a greater focus on the development (or retrogression) of South African law along Transformationist lines. This will be done against the background of value judgments and prescriptions, lent from the political philosophy and, where applicable, economic philosophy of libertarianism. As the libertarian philosopher and economist Walter Block

writes, “Libertarianism is a theory about what *should be* illegal, not what is *currently* proscribed by law”.[27] In other words, this study concerns the law as it ought to be (the *lex ferenda*), more than the law as it is (the *lex lata*). The study is distinctively theoretical in that the libertarian doctrine of self-determination will be compared and contrasted with Transformationism mainly in concept and to a limited extent legal practice, especially as it relates to property and liberty.

It is important to note that this study does not adopt a utilitarian or consequentialist approach in its defence of libertarian jurisprudence. This does not mean that liberty and particularly strong private property rights, as it is often accused of doing, only benefit an elite minority at the expense of the (often poor and vulnerable) majority. One can, and some have argued authoritatively, that respecting persons’ individual and property rights is of immense utility and as a result conducive to generating the most wealth and happiness for the greatest number of people.[28] However, that argument will not be advanced to any great extent in these pages.

3.2 Approach

The approach of this study is that of libertarianism and specifically (minarchist)[29] libertarian jurisprudence. The approach and the topic of this study is therefore obviously overlapping to a great extent. As such, the approach will be comprehensively set out in Chapter 2 below, where the philosophy of liberty is discussed.

What is meant by libertarianism will become evident in the main body of the study, but here it is important to note what is meant by the word “jurisprudence” – which contemporarily has come to refer mostly to legal pronouncements by superior courts – and how that influences the approach.

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[27] Block W. *Building Blocks for Liberty: Critical Essays by Walter Block*. (2006). Bucharest: Libertas Publishing. 304. My emphasis.

[28] Barnett RE. “A law professor’s guide to natural law and natural rights”. (1997). 20 *Harvard Journal of Law and Public Policy*. 679. Compare also Gwartney J, Lawson R, Hall J, and Murphy R (eds). *Economic Freedom of the World 2018 Annual Report*. (2018). Vancouver: Fraser Institute with Jahan S. *Human Development Report 2016: Human Development for Everyone*. (2016). New York: United Nations Development Programme. The countries with the most economic freedom (that is, protection for private property rights, free markets, ease of doing business, etc.) *tend to* also be the countries with the highest human development score.

[29] As discussed in Chapter 2.3 below.

Alan Thompson, in introducing the idea of jurisprudence in 1991 but from a critical, leftist perspective, writes that it is "the project of reason in pursuit of universal truths about law and justice". Jurisprudence is to be distinguished from "the study of the contents of legal rules and systems, which are self-evidently historically and culturally variable", because jurisprudence asserts, first, that there is "an unchanging and universal unity beneath the manifest changeability of laws", and second, "that there is a sufficiently discrete and distinct object, 'law in a universal sense', such that its study can constitute the distinct discipline of jurisprudence". The third assertion Thompson points to relates particularly to positivism, *viz*, that jurisprudence claims "value neutrality between different conceptions of the good, and presents itself as a disinterested enquiry".[30] This third assertion, clearly, becomes redundant by operation of the adjective of *libertarian* jurisprudence.

The political philosophy of libertarianism and its legal implications that will be fleshed out below thus informs the approach to jurisprudence employed in this study. The early classical liberal jurist Claude-Frederic Bastiat set out the libertarian conception of law most succinctly: The law exists to protect the personality, liberty, and estate – the life, liberty, and property – of individuals alone or individuals associated into groups like communities or firms. Where the economic dimension of the study becomes relevant, the approach is that of the Austrian school of economics,[31] and its primary principles that (1) value is subjective and (2) only the individual in question (as opposed to a central planning authority) usually has the relevant information relating to their own welfare and desires.

4. DEFINITIONS OF CONCEPTS

Aggression. Aggression refers to the use (or threat[32]) of initiatory, that is, offensive, physical force. Aggression does not *necessarily* imply intent. Aggression, within the context of libertarian thought, may be committed in the absence of *dolus* or negligence.[33]

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30 Thompson A. "Taking the right seriously: The case of F.A. Hayek" in Fitzpatrick P (ed). *Dangerous Supplements: Resistance and Renewal in Jurisprudence*. (1991). London: Pluto Press. 69.

31 Particularly in the tradition of Carl Menger, Ludwig von Mises, Friedrich von Hayek, Murray Rothbard, and Hans-Hermann Hoppe.

32 Hospers J. "Libertarianism and legal paternalism". (1980). 4(3) *Journal of Libertarian Studies*. 261.

33 Van Dun F. "Against libertarian legalism: A comment on Kinsella and Block". (2003). 17(3) *Journal of Libertarian Studies*. 66.

Constitutionalism. It has been convincingly argued that constitutionalism *per se* is not necessarily statist in nature, but that it is broader.[34] However, where reference is made to constitutionalism in this study, the term refers to constitutionalism as it relates to the State, unless the context dictates otherwise.

Left, left-wing and leftist. Transformationism is obviously but also self-consciously situated on the left of the political spectrum. Where the terms related to 'left-wing' are employed, it means a general approach to political, social, and economic issues that involves expanding, by law, the power of the State to interfere in what are traditionally considered to be private (individual, communal) affairs, with the usual intention of bringing about *inter alia* centralisation of control over society in the hands of the State and socio-economic equality between various population groups.

Libertarian, liberal, classical liberal. Unless the context dictates otherwise, these words are used synonymously. This term is an adjective or noun describing supporters of, or the state of, individual liberty and private property rights as the preeminent values of public policy and subjects of rights.

State, government. It is acknowledged that State and government are recognised in political philosophy as conceptually different. But for purposes of this study, "government", unless the context clearly dictates otherwise, invariably refers to the government of a State, and "State" (capitalised to avoid confusion with "states", which refers to countries) will invariably refer to the institution managing that state, that is, government. The State, in this study, refers to that entity that is commonly perceived to have the legitimate authority to enforce its will, even without the consent or agreement of legal subjects or, particularly, property owners.

5. OVERVIEW OF CHAPTERS

This chapter, Chapter 1, serves as a general introduction and overview of the study. It considers *inter alia* the research questions and assumptions, methodology and approach, and definition of concepts, of the study.

Chapter 2 concerns libertarianism, which is the approach to this study. Firstly, the political philosophy of libertarianism is explored. Secondly, the differences between

[34] Malan (footnote 14 above) 7, 19-20.

libertarian minarchism and libertarian anarchism are briefly enunciated, and the reasons why libertarian minarchism is preferred for purposes of this study are elaborated. Thirdly, the existing legal paradigm is considered against the backdrop of libertarian principles. This serves to ground the study within a contemporary legal context. Finally, a theory of minarcho-libertarian jurisprudence is advanced, which includes an exploration of the libertarian approaches to various jurisprudential phenomena, such as the concept of law and the nature of rights.

In Chapter 3, the doctrine of Transformationism as the emerging overarching political ideology of South Africa's political class (that is, law-making, law-executing, and law-adjudicating sectors in the constitutional order, as well as ancillary institutions and formations) is considered. Firstly, the context and development of Transformationism in South Africa is sketched against the background of the country's recent history. Secondly, some philosophical, but primarily *legal*-philosophical currents of Transformationism are explored. Finally, so-called transformative constitutionalism is identified as the dominant current of Transformationism and the likely direction of South African law, and elaborated in detail with occasional reference to statutory interventions and judgments of the superior courts of South Africa.

The interaction and disagreements between the doctrines are briefly explored in Chapters 2 and 3 are then considered in Chapter 4. Firstly, the Transformationist approach to liberty and property is considered. Secondly, the Transformationist approach to social justice and equality is considered. Finally, the Transformationist approach to constitutionalism is considered. In each case, the Transformationist position is contrasted with the libertarian one.

The study is concluded in Chapter 5.

CHAPTER 2: LIBERTARIANISM

1. CHAPTER INTRODUCTION

The aim of this chapter is to introduce the philosophy or ideology of libertarianism as I interpret, understand, and where applicable, critique it. To this end, I approach libertarianism from a general, philosophical or interdisciplinary perspective and, given the jurisprudential nature of this study, the bulk of this chapter approaches it from a legal-philosophical perspective.

Firstly, I outline the contours of the philosophy of libertarianism. Secondly, I briefly consider the two main camps of contemporary libertarianism – anarcho-capitalists and minarchists – and justify why this study assumes a minarchist perspective. Thirdly, I consider the intellectual tradition of rights theory in the South African context, against the background of libertarianism. Finally, I set out the libertarian approaches to rights and law.

It is worth noting at the outset that many of the sources consulted, indeed many libertarian thinkers and philosophers, were not trained in legal science, particularly that of Roman-Dutch law. This is especially the case where American sources and thinkers are consulted. For this reason, many sources and quotes might seem confusing, or simply incorrect, to the legally trained eye. Where this happens, an attempt is made to explain or find the closest legal-doctrinal equivalent to the respective libertarian concept.

Before entering into the substance of what libertarianism is and its implications for legal philosophy, the semantics of the word 'libertarian' must briefly be dealt with.

Liberalism as a political philosophy has been deeply entwined with the idea of liberty under law, especially in the Anglo-American common law tradition. Sartori writes that the Constitution of the United States of America was the most successful instance of liberalism guaranteeing freedom in law. While, according to Sartori, liberalism *per se* did not arise from the idea of individual freedom, "it did invent the way to guarantee

and institutionalise a balance between government by men and government by laws".[35]

Outside particular social contexts, 'liberalism' and 'libertarianism' mean essentially the same thing in the political-philosophical sense. Oxford's *Lexico Dictionary* defines 'liberal' as "favouring individual liberty, free trade, and moderate political and social reform", and 'libertarianism' as "an extreme laissez-faire political philosophy advocating only minimal state intervention in the lives of citizens".[36] The hyperbolic "extreme" notwithstanding, these definitions align closely. Indeed, the root of both words is the Latin *liber*, which means free, unimpeded, unconstrained, or unencumbered.[37]

In the early twentieth century, however, strong political factions in the United States adopted the 'liberal' descriptor for themselves. It is notable that these factions stood against the political-philosophical values that liberals had (classically) believed in.[38] This was a gradual process, but by the 1950s the word 'liberal' had become completely associated with what are essentially leftist social democratic values, at least insofar as the United States was concerned. 'True' or classical liberals were therefore in need of a new descriptor, and finally decided upon 'libertarian'. Dean Russell of the Foundation for Economic Education outlined the reasons for this in 1955. He wrote:

> "[…] the leftists have now corrupted that once-proud term [liberal] to identify themselves and their program of more government ownership of property and more controls over persons. As a result, those of us who believe in freedom must explain that when we call ourselves liberals, we mean liberals in the uncorrupted classical sense. At best, this is awkward and subject to misunderstanding."[39]

Barnett calls libertarianism "the modern American variant" of classical liberalism.[40]

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35 Sartori (footnote 1 above) 15.

36 "Liberal". *Lexico*. https://www.lexico.com/en/definition/liberal; "Libertarianism". *Lexico*. https://www.lexico.com/en/definition/libertarianism.

37 "Liber etymology history in Latin". *Etymologeek*. https://etymologeek.com/lat/liber/19928292.

38 See Von Mises L. *Liberalism in the Classical Tradition*. (1985 edition). Irvington-on-Hudson: Foundation for Economic Education. xvi-xvii and Block (footnote 27 above) 345.

39 Russel D. "Who is a libertarian?" (1955). 5(5) *The Freeman*. https://fee.org/articles/who-is-a-libertarian/.

40 Barnett RE. "The moral foundations of modern libertarianism" in Berkowitz P (ed). *Varieties of Conservatism in America*. (2004). Stanford: Hoover Institution Press. 51.

Essentially, it is submitted that libertarianism is liberalism in its historical, or classical, sense. The origin of modern libertarianism can be traced back to about the mid-twentieth century, with thinkers like Ayn Rand, Murray Rothbard, Henry Hazlitt, and Leonard E Read.[41] Roger Pilon regards the publication of Friedrich von Hayek's 1944 *The Road to Serfdom* as the point when libertarianism was reborn as classical liberalism.[42] Read, the founding President of the Foundation for Economic Education, claimed that he was responsible for the popularisation of the term 'libertarian', even though he had stopped using the word himself because it had apparently become associated with anarchism and even socialism.[43]

Unless the context dictates otherwise, 'libertarian' and 'classical liberal' will be used interchangeably.

A comprehensive discussion of the philosophy of libertarianism and all its potential implications would be impossible but I now venture upon a discussion of this topic to the extent of relevance to the study.

2. THE PHILOSOPHY OF LIBERTARIANISM

Libertarianism is simply the *political philosophy* or *ideology of liberty*,[44] by which individual liberty is regarded as the imperative and organising principle of law, politics, and governance. Libertarianism regards each person as having the right to choose for themselves how they live and what they do – self-determination – provided that they respect this very same right of all other persons. According to the American political theorist David Boaz, libertarianism implies "all human relationships should be voluntary; [and] the only actions that should be forbidden by law are those that involve the initiation of force against those who have not themselves used force".[45]

Murray Rothbard, the American political philosopher and economist regarded as the doyen of modern libertarianism, went as far as to characterise libertarianism as a *discipline* in its own right, albeit not yet fully developed, because it touches on many

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41 Kinsella S. "The origin of 'libertarianism'." (2011). Ludwig von Mises Institute. https://mises.org/wire/origin-%E2%80%9Clibertarianism%E2%80%9D.

42 Pilon R. "On the origins of the modern libertarian legal movement". (2013). 16(2) *Chapman Law Review*. 257.

43 Machan T. "Educating for freedom: An interview with Leonard Read". (1975). *Reason*. 5. https://fee.org/resources/leonard-read-and-the-ideal-of-freedom/.

44 Block (footnote 27 above) 303.

45 Boaz D. *Libertarianism: A Primer*. (1997). New York: The Free Press. 2

"areas of the study of human action: economics, philosophy, political theory, history, even – and not least – biology".[46]

2.1 Individual self-determination

Within the libertarian, and more specifically the anarcho-capitalist theoretical framework (a strand within libertarianism), the natural right of every individual to make sovereign decisions about their own affairs and the affairs of their property, is often expressed as "self-ownership". For the purposes of this study, the term "self-ownership" is only used when quoted or when necessary within the particular context. This is because the notion of self-ownership introduces conceptual difficulties in legal science: One cannot be both the object and the subject of a right. As a general rule, the term "self-determination" is therefore used to accord with recognised terminology within contemporary legal discourse.

Reduced to juridical terms, libertarianism is concerned with the role of law in society. Self-determination as a libertarian principle, therefore, seeks to answer the following question: What is government, as the dominant enforcer of positive law, allowed to do and not to do?[47]

2.1.1 Self-proprietorship

To Ngaire Naffine, "[t]he concept of the person as a self-proprietor has a secure place within our modern liberal political theory and liberal jurisprudence".[48] Self-ownership as a legal phenomenon is a type of shorthand that refers to individual rights, to "the fullness of the rights enjoyed by persons in relation to themselves and to others". Despite this idea's "secure place" within jurisprudence, explicit legal analysis of self-ownership has been neglected.[49]

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[46] Rothbard MN. "The discipline of liberty" in Salerno JT and McCaffrey M. *The Rothbard Reader*. (2016). Auburn: Ludwig von Mises Institute. 56.

[47] It is worth noting that there is no single libertarian theory of law. See Bell TW. "The Constitution as if consent mattered." 16(2) *Chapman Law Review*. 269.

[48] Naffine N. "The legal structure of self-ownership: Or the self-possessed man and the woman possessed". (1998). 25(2) *Journal of Law and Society*. 193.

[49] Naffine (footnote 48 above) 194-195.

Naffine writes that a person's property and its attributes render separate individuals distinctive. A person's property, in other words, "delimits and individuates the person, marking the borders between" them and others.[50] Naffine continues as follows:

> "[Property] defines the limits of my sphere of influence over the world; it defines the borders of my control over things and so marks the degree of my social and legal power. The claim of property in oneself is an assertion of self-possession and self-control, of a fundamental right to exclude others from one's very being. It is a means of individuating my person, of establishing a limit between the one and the other: between mine and thine; between me and you."[51]

Naffine, however, argues that "self-ownership was conceived as male"[52] and that "women were never intended for inclusion in the concept".[53] The very nature of the concept of self-ownership, however, extends itself to all individuals regardless of sex, a matter Naffine does not deal with. Any reference to a male-centric conception of self-ownership should therefore be treated as being sex-neutral.

John Locke, who may perhaps be regarded as the first thinker to articulate a 'libertarian'[54] conception of self-determination, expresses himself as follows in his 1690 *Two Treatises of Government*:

> "Though the earth, and all inferior creatures, be common to all men, yet every man has a 'property' in his own 'person'. This nobody has any right to but himself. The 'labour' of his body and the 'work' of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left in it, he hath mixed his labour with it, and joined to it something that is his own, and thereby making it his property."[55]

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[50] Naffine (footnote 48 above) 197. See also Von Hayek FA. *The Constitution of Liberty: The Definitive Edition*. (2011). Chicago: University of Chicago Press. 123, 212, 216, 219.

[51] Naffine (footnote 48 above) 198.

[52] Naffine (footnote 48 above) 194.

[53] Naffine (footnote 48 above) 203.

[54] The term 'libertarian' is a relatively recent invention, having become popularised from the 1950s onwards. See Kinsella (footnote 41 above). The libertarian tradition, however, extends back to John Locke and perhaps even earlier, with the writings of natural law thinkers like Hugo Grotius whose *Introduction to the Jurisprudence of Holland* was published in 1631, some 58 years before Locke's *Two Treatises of Government*. These thinkers would, however, not qualify as libertarian today given the conceptual innovations that have taken place in the philosophy over the last century alone.

[55] Locke J. *Two Treatises of Government*. (1690). London: JM Dent & Sons. 130.

More clearly, Rothbard writes "that all resources, all goods, in a state of no-ownership belong properly to the first person who finds and transforms them into a useful good". This clearly accords with the law pertaining to *occupatio* as means of acquiring ownership which has for millennia been part of Roman law tradition. In libertarianism it is often described as the "homestead" principle.[56]

Based on this homestead principle (*occupatio*) Rothbard provided an apt summary of the starting point for many libertarians in *Anatomy of the State*. He wrote that people must use their minds to take resources from nature and "transform them into shapes and forms and places where the resources can be used for the satisfaction of [their] wants and the advancement of [their] standard of living." They then exchange these transformed resources for products created by others. Rothbard proceeds as follows: "The only 'natural' course for man to survive and to attain wealth, therefore, is by using his mind and energy to engage in the production-and-exchange process". This is done through mixing their labour with such natural resources, and converting them into property, which can then be exchanged. For Rothbard, property rights and a market economy are thus an inherent part of human nature.[57]

In *The Ethics of Liberty* Rothbard wrote:

> "The fundamental axiom of libertarian theory is that each person must be a self-owner, and that no one has the right to interfere with such self-ownership. From this there follows immediately the total impermissibility of property in another person."[58]

Tristan Roberts summarised self-ownership as follows, based on the Marxist, Gerald Cohen's critique of Robert Nozick's libertarian treatise, *Anarchy, State, Utopia*: No person is a slave to anyone else; therefore no person is owned, wholly or partly, by anyone else; therefore individual persons are owned by themselves; and therefore must be free to do as they wish, as long as they do not harm anyone else.[59]

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56 Rothbard MN. *The Ethics of Liberty.* (2002). New York: New York University Press. 56. See also page 47 below on *occupatio*.

57 Rothbard MN. *Anatomy of the State*. (2009). Auburn: Ludwig von Mises Institute. 13-14.

58 Rothbard (footnote 56 above) 60. Citations omitted.

59 Rogers T. "Self-ownership, world-ownership, and initial acquisition". (2010). 2(36) *Libertarian Papers*. 3.

2.1.2 The self and private property

In his 1850 *The Law*, Bastiat describes the three attributes of the human person: "Existence, faculties, assimilation – in other words, personality, liberty, property…" These attributes obviously pre-exist the notion of law, and "it is because personality, liberty, and property exist beforehand, that men make laws". Bastiat thus places the protection of personality, liberty, and property, at the centre of the social contract. These three attributes are described as the "preserving elements of life", each of which renders the other complete. The person itself is the starting point, and our faculties – our liberty – is an "extension of our personality", and our property is "an extension of our faculties".[60] The nineteenth-century American slavery abolitionist and jurist, Lysander Spooner, wrote in similar terms about natural rights, arguing that they "are a necessary attribute of man's nature". For this reason, Spooner regarded natural rights as inalienable, and points out that that they "can no more be surrendered to government – which is but an association of individuals – than to a single individual". According to Spooner, people cannot part with their natural rights any more than they can part with nature itself.[61] Spooner's natural rights philosophy is discussed in more detail below.

Elsewhere, Bastiat argued that denying property rights is akin to undermining the very right to life, as property – the result of the exercise of faculties – "is indispensable to the satisfaction" of those needs and wants necessary to sustain life.[62] It is this "law of Providence" that has created the phenomenon of self-interest, which to Bastiat is a synonym for "the instinct for self-preservation and the desire for self-development".[63] Humans, like animals, can only live by appropriating the resources around them, and this is a natural phenomenon. According to Bastiat, property is appropriation that has

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60 Bastiat C-F. *The Law*. (2007 edition). Auburn: Ludwig von Mises Institute. 2.

61 Spooner L. *The Unconstitutionality of Slavery*. (1860). Boston: Bela Marsh. 8.

62 Bastiat C-F. "Property and law" in De Huszar GB (ed). *Selected Essays on Political Economy*. (1995). Irvington-on-Hudson: Foundation for Economic Education. 99. This essay by Bastiat was originally published in the 15 May 1848 issue of the French *Journal des Economistes*.

63 Bastiat (footnote 62 above) 106.

been rendered a right through labour.[64] To be perfectly clear, to Bastiat property is *not* a social institution, but a natural one.[65]

This position has support in the discipline of economics.

According to the nineteenth-century Austrian economist, Carl Menger, it is "not an arbitrary intention" that property rights is an inherent concomitant of man's very existence. Property, writes Menger, is "the only practically possible solution [to] the problem that is, in the nature of things, imposed upon us by the disparity between requirements for, and available quantities of, all economic goods". In other words, property (as opposed to mere 'things' and 'objects') exists as a consequence of resource scarcity; everyone cannot own and benefit from everything. Property cannot be "abolished" unless the quantity of currently-scarce resources is increased "to such an extent that the requirements of all members of society can be met completely," or unless man's needs are reduced "far enough to make the available goods suffice for the complete satisfaction of their needs".[66] If scarcity was so eliminated, most things considered property today would be rendered *res extra commercio* – outside of, and not requiring, the sphere of protective private rights.

The American jurist, Richard Posner, writing from the perspective of the law-and-economics theoretical framework, notes that property rights that demarcate who has the exclusive right to the entitlements of ownership "is a necessary rather than sufficient condition for the efficient use of resources". He continues, writing that "all resources should be owned, or ownable, by someone, except resources so plentiful that everybody can consume as much of them as he wants without reducing consumption by anyone else".[67]

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64 Bastiat (footnote 62 above) 100. This is not to say Bastiat necessarily subscribed to the so-called labour theory of value – the idea that things derive their value from the effort and labour expended upon them. More likely Bastiat was concerned with the fact that some human interaction is necessary to make a "thing" into "property".

65 Bastiat (footnote 62 above) 103.

66 Menger C. *Principles of Economics*. (1976 edition). Arlington: Institute for Humane Studies. 97.

67 Posner RA. *Economic Analysis of Law*. (1972). Boston: Little, Brown and Company. 10-12.

2.1.3 Separating personality and property

The concept of a "self-owner" has been criticised. In jurisprudential terms, a person cannot be both the subject and object of a right like property rights,[68] in contrast to the libertarian philosophy the notion of property rights goes beyond physical and intellectual property and applies to the self. Accordingly, Joubert writes of the Roman law tradition that for "the systematisation of private law, the Romans' distinction between property law and personality law is of the utmost importance".[69]

Immanuel Kant echoed this view in philosophical terms. He wrote that a person "cannot dispose over himself because he is not a thing; he is not his own property". Arguing that persons are their own property seemed contradictory to Kant, because a person "is a Subject in whom the ownership of things can be vested" and, if people could be their own property, they would have to be a thing over which they has ownership. "[I]t is impossible to be a person and a thing, the proprietor and the property", wrote Kant.[70]

Naffine attempts to answer Kant's criticism by referring to the presumed "internal division of the person" that divides a person into "the owner and the owned". The "incarnate mind", writes Naffine, "is divided from the carnal body". She continues:

> "The important thing for self-ownership is that the subject 'I' – the person as mind – should retain control of its object body; no one else should exercise this self-possession or self-control. The divided self must operate in this manner if personhood is to be retained."[71]

It is worth noting that Kant was engaging the topic of sexual objectification and selling sex for profit. He argued that when individuals allow their persons "to be used by another for the satisfaction of sexual desire", they are disposing over themselves as if they themselves were objects. This, Kant argued, cannot be, for "man is not at his own disposal". When individuals allow such, they are partly sacrificing their humanity and thus running "a moral risk". He continued, writing that "[t]he underlying moral principle

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68 Neethling J, Potgieter JM, and Visser PJ. *Neethling's Law of Personality*. (2005). Durban: LexisNexis Butterworths. 14-15.

69 Joubert (footnote 16 above) 98. My liberal translation from the original Afrikaans.

70 Kant I. *Lectures on Ethics*. (1930). London: Methuen. 165. As quoted in Naffine (footnote 48 above) 199. See also Joubert (footnote 16 above) 98.

71 Naffine (footnote 48 above) 201-202.

is that man is not his own property and *cannot do with his body what he will*".[72] In a similar vein, American law professor, Peter Halewood, argues that the "conventional objection to bringing property rights and the market to bear upon the human body" leads to the commodification of people. To Halewood, this notion of self-ownership "facilitates commodification of the person that is fundamentally at odds with human dignity and the notion of the body as a vessel of the soul".[73] This leap, that Kant and Halewood make, from the notion that individuals are not their own property (in a jurisprudential sense) to the conclusion that they therefore do not possess personal (including sexual) liberty, is unfounded. That the individual can own, but themselves not be owned, does not necessarily support the conclusion that liberty is or may be restricted.

Margaret Jane Radin writes of a 'continuum' between 'personal property' and 'fungible property'. The closer an object is to the personal property side of the continuum, the more deserving it is of legal protection. The closer it is to the fungible property side, the less deserving it is of protection.[74] This continuum manifests in relation to every particular person. This means that the same kind of object will be at a different location on the continuum for different people.[75] In expropriation cases, with objects that fall squarely on the fungible property side – for instance, taxing one's income – government would not need to pay any compensation and can at will take the property as and when it desires. Objects that fall squarely on the personal property side of things – like a family heirloom – are absolutely protected from government appropriation. Objects toward the middle of the continuum, presumably where most objects reside – such as houses, cars, etc. – can be taken with reasonable compensation paid.[76]

In presenting an argument that "people become bound up with 'things'," Radin normatively assumes without any ado that "the relationship between the shoe fetishist and his shoe will not be respected like that between the spouse and her wedding ring", and consequently that "moral recognition or legal protection" would not avail itself to

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72 Kant (footnote 70 above) 166. My emphasis.
73 Halewood P. "On commodification and self-ownership". (2008). 20 *Yale Journal of Law and the Humanities.* 161.
74 Radin MJ. "Property and personhood". (1982). 34 *Stanford Law Review.* 986.
75 Radin (footnote 74 above) 987.
76 Radin (footnote 74 above) 1005.

the shoe fetishist as it would to the spouse.[77] This theme is repeated throughout her article. American political philosopher Jessica Flanigan, however, notes pertinently that it would make no sense to limit the scope of freedom "by its popular support or generality". Even those liberties that fall completely into disuse – for instance, the liberty to follow a particular religion, or the liberty to engage in cultural dances or ceremonies – should remain protected and prioritised over competing social values. Flanigan notes that it is arbitrary to, for example, give special protection to some liberties, like freedom of religion (in the form of zoning protection and Sunday worship) but not to others, because it is not possible, in principle, to distinguish between so-called basic and non-basic liberties (perhaps alternatively, fundamental and non-fundamental rights).[78] Indeed, to approach this from an Austrian-economic perspective: Value is subjective, and it may just be, in particular circumstances, that the shoe fetishist has a closer emotional and psychological bond with their shoes than does a particular spouse with their wedding ring. There must as a result be no arbitrary distinction in legal protection for either party.

2.2 Individualism

The ostensible polarity of individualism and communitarianism has been at the forefront of scholarship regarding the concepts of law and rights and invokes questions such as what role the *boni mores* of the community must or can play in the delimitation of the rights of the individual. For this reason, this study would be incomplete without briefly considering where libertarianism as a political philosophy finds itself on the question of individualism and communitarianism.

2.2.1 Community within the libertarian paradigm

Libertarian philosopher and natural rights theorist, Tibor Machan, argues in *Classical Individualism* that individualism is the view "that human beings are identifiable as a distinct species in the natural world and have at least one of their central attributes, namely the capacity to be rational individuals". Individuals are individuals because they are causal agents and initiators of behaviour. Machan writes, "different human beings

[77] Radin (footnote 74 above) 961.

[78] Flanigan J. "All liberty is basic". (2018). 24(4) *Res Publica*. 467. Flanigan's article is written as a development of the arguments made by John Tomasi in Tomasi J. *Free Market Fairness*. (2012). Princeton: Princeton University Press.

will be able to choose to exercise their conscious capacities and direct their ensuing actions differently". Only communities that do not inhibit the ability of individuals to excel in life *as individuals* are just communities.[79] Individualism, however, "does not deny the immense value of community, or that human beings are essentially social." Instead, individualism simply has a proper regard for the individual as the "ultimate decision maker, as the initiator regarding his or her most basic behaviour, namely, rational thought".[80]

Machan continues, writing that "one of the defining attributes of the human (kind of) being is the distinctive potential for individuality, based on both diversity and personal choice."[81]

What Machan refers to as "classical individualism" is distinct from "atomistic, bourgeois, or rugged individualism".[82] Koos Malan, referring to bourgeois individualism in *Politocracy,* regards liberals who conceive of individuals as essentially "atomistic" as problematic, writing that "the liberals have almost always avoided any discussion concerning a description of the citizenry".[83] Malan points out one of the problems in the statist paradigm is that individuals "exist in a state of atomism aimed at pursuing private personal interests".[84] Elsewhere, Malan writes that the "abstract universal individual was unknown to Classicism, the Middle Ages and to a considerable extent also to modernity", being either unknown or only of marginal importance. Only later, with thinkers like Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, did the idea of "the abstract universal individual" who exists in "fundamental equality" with all other individuals, came about. This abstract construction purports "to account for all concrete individuals".[85] In jurisprudence, the first signs of individualism came from the Glossators of the twelfth century, forming the basis of William Ockham's nominalism, which "allowed for the free individual person" who had to decide to do good deeds rather than being forced to do good deeds, in the fourteenth century.[86] Malan posits that this notion of individual rights came at the expense of communities, instead

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79 Machan TR. *Classical Individualism.* (1998). London: Routledge. xi.
80 Machan (footnote 79 above) xiv.
81 Machan (footnote 79 above) xii. See also the discussion on Christopher Morris' work on page 54 below.
82 Machan (footnote 79 above) xiii.
83 Malan (footnote 21 above) 91.
84 Malan (footnote 21 above) 115.
85 Malan (footnote 14 above) 232-233.
86 Malan (footnote 14 above) 238-239.

monopolising the notion of constitutionalism solely for the interaction between the State on the one hand and the individual on the other.[87] Malan argues that in the absence of communities, justice, as the goal of constitutionalism, is unsustainable. Further, government cannot be effectively limited if communities are not part of the checks-and-balances framework. Malan furthermore argues that the claim for individual rights does not reflect social reality, in that the concept itself – of exclusive rights – is untenable outside of a communal context.[88] Malan then proceeds to discuss how various apparent individual rights, such as the rights to freedom of association, language, and political rights, can only be exercised in the framework of a community, or at least socially, in that the right can only be exercised in a way that makes sense when people other than the respective individual are involved.[89]

Elsewhere, Malan has also written that individuals *qua* individuals cannot defend themselves against oppressive government:

> "An individual on her or his own cannot, however, constitute a power-base capable of enforcing her or his interests, and cannot serve as a force capable of effectively counter-balancing a potentially rights-infringing government. Individual rights alone cannot guarantee that governments refrain from violating rights. Only communities of people, effectively organised in autonomous non-statist institutions of civil society, can constitute such counter-balance.
>
> Several of the most astute political observers, going back to Alexis de Tocqueville, emphasised the need for strong communities and institutions of civil society – intermediary formations between the individual and the state – as the indispensable guarantee for constitutionalism and bulwark for freedom."[90]

With the conclusions reached in these arguments, that is, that communities – or at the very least, other individuals in a social context – are indispensable for rights to make sense, libertarians would probably not disagree. Where libertarians do disagree, is that while communities are indispensable, rights nevertheless accrue to each individual,

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87 Malan (footnote 14 above) 233-234
88 Malan (footnote 14 above) 244.
89 Malan (footnote 14 above) 248-251.
90 Malan K. "The totalitarianism of transformationism". (2018). *Politicsweb*. http://www.politicsweb.co.za/opinion/the-totalitarianism-of-transformationism.

universally, for no reason other than that person's individuality and humanity. Communities, in other words, do not *give* individuals their rights, even though they might play a crucial role in protecting them. In this respect, Malan's argument that communities are an object of rights is readily acceptable: Communities and all the benefits they hold are often "the goods, assets and resources in respect of which rights are exercised and without which individual identity is restricted and what is called individual rights, cannot be enjoyed."[91] Libertarians would also hold forth that communal rights – if they do exist independently of individual rights – may not trump, or indeed even be balanced against, individual rights, as the latter must always prevail. As will be discussed below in Chapter 2.5, libertarian jurisprudence only recognises the rights of other individuals as capable of 'limiting' individual rights. Put simply, freedom means the right to do as one pleases without infringing on that very same right of others. Should libertarians concede that communal rights are capable of trumping individual rights, the libertarian conception of liberty would collapse, and with it the entire doctrine of libertarianism.

The libertarian, Machan, posits that the "basic metaphysical and epistemological teachings" of the Aristotelian philosophical tradition "do not preclude understanding human beings fundamentally – though not solely – as individuals. Aristotle, for example, understood a person to have the capacity to make moral choices and thus to be personally responsible for becoming or failing to become virtuous, for flourishing or failing to do so".[92] This, according to Machan, "lays the foundation for an ethics and politics of classical individualism, a form of ethical individualism and libertarianism".[93]

According to the philosopher, Thomas Patrick Burke, in *No Harm*, detractors of libertarian individualism believe that it would lead to "a deficient sense of community, an extreme individualism which isolates human beings from one another, reduces their concern for others, and leaves them lonely victims of alienation." The unbridled free market, according to these detractors, "stands for narrow-self-interest, and the dominance of 'economic man', who is not swayed by any considerations of the public good but aims only at his own benefit".[94] Detractors, then, justify the intervention of

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[91] Malan (footnote 14 above) 254-255.
[92] Machan (footnote 79 above) xiii.
[93] Machan (footnote 79 above) xiv.
[94] Burke TP. *No Harm*. (1998). Vadnais Heights: Paragon House. 151.

government in the economy on the basis that the community "provides each individual with the indispensable material out of which he fashions whatever it is that he achieves; the community is the necessary condition for the existence and accomplishments of the individual".[95] Malan makes this argument, writing that "the communities to which we belong and the people who form part of these communities are in fact the indispensable common asset of all of us – one of the most precious *res publica*, without which no meaningful life and individual achievement would be possible." Malan continues, similarly to what was argued above, that individuals have the community "to thank for his ability of satisfying his needs, as well as for his achievements".[96]

Malan reinforces his position by arguing that "the existence of something like a sovereign individual – a free-floating individual, acting at random – is out of the question. An individual can only *will* and *comprehend, believe* and *do* within the horizon of the community or communities in which he is present".[97] Machan, however, disagrees, writing that "the self is inescapably attested to whenever one begins to explore any intellectual or scientific topic.[98] I am talking about the self as the human individual's essential being, what makes that person who he or she is – the 'I' that thinks, recalls, creates, produces, invents, errs, is blameworthy, and so forth." Machan argues that man's rationality is an individual, not a collective, power.[99] Burke concisely sets out the most likely libertarian position on community as follows:

> "The choice between an unregulated market and a regulated one is not a choice between selfishness and community, but a choice between two kinds of community, one voluntary and one created by force. [...] Is it possible to create a genuine community by law, that is, by the use of physical force?
>
> If by a community we mean a group of people who share an inner attitude of mutual concern for one another's welfare in a positive sense, it is surely clear that law by itself, no matter with what penalties it may be fitted out, is utterly incapable of

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95 Burke (footnote 94 above) 152.
96 Malan (footnote 21 above) 297.
97 Malan (footnote 21 above) 278.
98 Such as, writes Machan, the debate about "whether human beings are in some fundamental respect individuals or members of some collectivity." Machan (footnote 79 above) 157.
99 Machan (footnote 79 above) 159.

creating such a reality. [...] Concern for the welfare of others is something that must develop willingly."[100]

Where Malan and Burke would likely agree, however, is where Burke acknowledges that individuals are to a large extent shaped by their communities, "dependent on them […] not only for their existence but also for their education." Burke argues, however, that despite this, it would be incorrect to confuse society[101] with government, with which Malan agrees. "It is not government which gives birth to the child and brings it up," writes Burke, "but its parents." Bastiat also eloquently made this point that government and society were confounded in 1850s France – and this persists to this day. He lamented the fact that when classical liberals object to "education by the State" or "a State religion" or – quite relevant to South African society today – object to "equality which is brought about by the State" – it apparently amounts to opposing education, religion, and equality *per se*. This, of course, is untrue, as opposing *the State doing something*, does not amount to opposing *something being done at all*.[102] Burke concludes that merely establishing that the individual is dependent on society is an insufficient reason for government interference in the market.[103]

The South African economist, Geert de Wet, writes that intervention in the economy is necessary to ensure that the interests of the community take precedence over the interests of the individual members of the community. While De Wet endorses the market-based economy, he argues that externalities (costs that accrue to parties who did not choose to incur those costs, such as pollution) and the provision of public goods necessitate intervention to protect the individual interests of those who happen to be on the detrimental end of the externalities and the lack of access to public goods.[104] This line of thinking is indicative of the "common welfare" exception common among some liberal-inclined legal theorists who agree with the market economy but with

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[100] Burke (footnote 94 above) 168.
[101] In this context, Burke is using "community" and "society" interchangeably. It is worth noting, however, that community and society are distinct concepts.
[102] Bastiat (footnote 60 above) 22.
[103] Burke (footnote 94 above) 172.
[104] De Wet G. "Liberalisme in die ekonomie" in Dreyer PS (ed). *Afrikaner Liberalisme*. (1977). Arcadia: Boekenhout-Uitgewers. 91.

various provisos, usually to protect or otherwise insist upon State assistance to the community.[105]

Machan, defending the compatibility of community and individual, writes that being "a good citizen or a charitable person" is only truly possible if done voluntarily. If one displays these attributes due to being "scared of the state placing one in jail," writes Machan, "one would not be a good citizen or person but barely more than a circus animal." Conduct undertaken of someone's own free will is fundamentally different from conduct regimented "by some planning authority, politburo, or regulatory agency".[106]

Insofar as the compatibility of communitarianism and libertarian individualism relates, Machan notes that within "the framework of individual rights," there remains "ample room for uncoerced communitarian values".[107] In fact, some, like the libertarian Von Hayek, argue that the framework of individual rights and liberty can only be supported with strong communitarian values and beliefs:

> "It is indeed a truth, which all the great apostles of freedom outside the rationalistic school have never tired of emphasizing, that freedom has never worked without deeply ingrained moral beliefs and that coercion can be reduced to a minimum only where individuals can be expected as a rule to conform voluntarily to certain principles."[108]

In a similar vein, Malan writes that people "do act in accordance with the law particularly when they are in agreement with the law. This is where the *consensual basis* of the rule of law comes into the picture".[109] Bodenheimer, too, writes of how voluntary buy-in into a community's legal system is preferable:

> "We are justified, therefore, in taking the position that the necessity for primary reliance on government force as a means for carrying out the mandates of law

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[105] See in this regard, for example, Dickinson's proviso mentioned on page 6 above that individual freedom must take place within the framework of positive law.

[106] Machan (footnote 79 above) 11. It is reasonable to assume that one could include "regimented by the community" in Machan's line of thought here.

[107] Machan (footnote 79 above) 11.

[108] Von Hayek (footnote 50 above) 123.

[109] Malan (footnote 14 above) 13. My emphasis.

indicates a malfunctioning of the legal system rather than an affirmation of its validity and efficacy."[110]

The doctrine of self-determination is individualist in nature, however, this individualism does not exclude communitarian values. As Machan notes, there is ample room for the exercising of communitarian values, on a voluntary basis, within a free society.

2.2.2 Individual and collective freedom

Sartori writes of the crucial distinction between individual liberty and what could be called collective freedom. In the former's case, individuals have the freedom of action to do and make decisions about things private to themselves and those who consent, without fear of invoking an aggressive response from the State. In the latter's case, one might argue that freedom is achieved by allowing a group of people – an ethnic community, for instance – the ability to make their own laws and 'govern themselves'. For example, while considering the issue of attaining republican status for South Africa, independent of the will of the United Kingdom, in 1961, SL Barnard and AH Marais wrote that the "freedom ideal [*vryheidsideaal*] is like a golden thread in the history of the Afrikaner".[111] In other words, sovereign state independence is associated with the concept of freedom. Similarly, the struggle against racial separation and discrimination (Apartheid) has been and is regularly referred to as a struggle for freedom. In many circumstances, upon deeper inspection, one realises that 'freedom' in this context, too, is not taken to mean freedom of individual action, but instead the arguable 'freedom' of a collective majority to impose its will.[112] In the United States, for instance, the conservative jurist, Robert Bork, wrote, "One, of the freedoms, the major freedom, of our kind of society, is the freedom to choose to have a public morality", by which he meant the ability of groups to take away the power of individuals to make their own decisions.[113]

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110 Bodenheimer E. *Jurisprudence: The Philosophy and Method of Law.* (1974). Cambridge: Harvard University Press. 274. Quoted from Malan (footnote 14 above) 82.

111 Barnard SL and Marais AH. *Die Verenigde Party: Die Groot Eksperiment.* (1982). Durban: Butterworths. 137. My liberal translation from the original Afrikaans.

112 See for instance Rapatsa M. "Remodeling the Constitution's transformation trajectory: From normative legal instruments to normative moral approaches". (2018). 14(3) *Acta Universitatis Danubius*. 70, 79.

113 As quoted and discussed in Shiffrin SH. *The First Amendment, Democracy, and Romance*. (1990). Cambridge: Harvard University Press. 211.

Here Bork and others clearly are not concerned with the liberty of individuals to make decisions and do things that their fellows do not (legislatively, regulatively) approve of. Sartori writes:

> "Furthermore, we are free not because we actually wanted the law that those legislators enacted, but because we limit and control their power to enact them. If the liberty that we enjoy lay in our personal share in lawmaking, I fear that we would be left with very few liberties, if any."[114]

This is why this study distinguishes between individual self-determination and the much more commonly understood notion of self-determination that involves groups collectively making decisions and then imposing those decisions on members of the group, even if those members are individually unwilling to agree to the decision. For instance, section 235 of the Constitution, titled "Self-determination", provides:

> "The *right of the South African people as a whole to self-determination*, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the *right of self-determination of any community* sharing a common cultural and language heritage […]"[115]

In both the emphasised phrases, the right to determine for the 'self' refers to the 'self' as a group, rather than an individual. As has been noted above, however, libertarianism does not take issue with group or community self-determination. It simply subjects such self-determination to the provisos that 1) being a part of the group must be mutually-voluntary from the perspective of the individuals concerned, and 2) the group's exercising of its self-determination takes place on private property owned by the group, or on the private property of those who consent (as individuals or juristic entities) to such activity. In other words, libertarianism stands opposed to group self-determination only if a group should intend to *force* any individual to join the group unwillingly, or should wish to exercise self-determination on property of any person who is unwilling to join the group.

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[114] Sartori (footnote 1 above) 29.
[115] My emphasis.

2.2.3 *'Atomistic' individualism*

It is incorrect to construe the libertarian or strict conception of rights as being ruggedly or unrealistically individualistic or as being based on the assumption that individualism is atomistic and incompatible with the communal nature of human beings. This view accords with the following statement by Sartori:

> "Critics have repeated to the point of saturation that this idea of freedom comes from an erroneous individualistic philosophy based on the false assumption that the individual is an atom or a monad."[116]

Indeed, there would have been no need any conception of rights and liberty if humans were not social animals. Freedom is inherently a relational phenomenon. If every individual had in fact been an island unto themselves, there would have been no need for any conception of freedom because, like Robinson Crusoe, such individual would have no need to compete with anyone else for resources. In the absence any other people the idea of 'rights' and 'liberty' would not arise. Stated otherwise: It is *because* of the existence of human society that libertarians and classical liberals make the case for strong individual and property rights. It is because libertarians and individualists appreciate that the vast majority, if not all people, will grow and develop within the context of some or other community, that the protection of rights and liberty is so strictly insisted upon. We must all live together productively and in harmony, and for this reason there must be a delimitation (rights) setting out that certain things belong to certain people and are beyond the reach of others. Were this not the case, there would be constant suspicion, tension, and resentment between people. People would not know whether the tool they crafted today will tomorrow still be there. They will constantly have to guard their crops without a moment's rest. It is only because of our ability, firstly, to communicate that "this is mine" and secondly, to respect the implications of such communication, that people can live in harmony. It is submitted that this ability lies at the root of the vast development of the Western world.[117]

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116 Sartori (footnote 1 above) 8.

117 See Michel C. "Why we have rights" in Hülsmann JG and Kinsella S. *Property, Freedom, & Society: Essays in Honor of Hans-Hermann Hoppe.* (2009). Auburn: Ludwig von Mises Institute. 212-213.

It is a fundamental *essentiale* of libertarianism that individuals should and do have the right to freely associate with one another along whatever lines they choose.[118] From a libertarian perspective, this is the bedrock for the development of a sustainable, stable community: Voluntarily, freely chosen association.

2.3 Aggressive and defensive force

While libertarianism rejects aggressive or initiatory force (that is, aggression), it upholds defensive force as morally justified. Read sums up the position as follows:

> "Defensive force is never an initial action. It comes into play only secondarily, that is, as the antidote to aggressive force or violence. Any individual has a moral right to defend his life, the fruits of his labor (that which sustains his life), and his liberty – by demeanor, by persuasion, or with a club if necessary. Defensive force *is* morally warranted."[119]

Read usefully sets out the libertarian conception that all State conduct is inherently coercive. I reformulate his illustration for the South African context.

The relevant South African government authorities decide to introduce a new national tax on entertainment, accompanied by relevant enabling legislation. As such, every user of media streaming services like Netflix must pay government a percentage levied on top of their subscription fees. A, one such user, responds to the tax authorities that she has thoughtfully considered government's request, but that she will not pay the additional monies on top of her fee because she does not agree with it and did not consent to it. The government, if it decides to respond peacefully to this at all, will inform A that there is no question of freedom of choice in this circumstance: *The law requires her to pay, and pay she must.* A and the government might exchange some more letters thereafter, with A refusing to pay and perhaps explaining why, and the government still demanding payment. Eventually, however, A will receive a summons to appear in court, as the government will seek the assistance of the judiciary to enforce compliance. It is worth noting that by now the government might already have taken other actions, like attempting to order Netflix to stop its service to A, despite her

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[118] Fodder TA. "Toward a libertarian framework for Indian rights". (2013). 19 *The Journal Jurisprudence*. 207.

[119] Read LE. *Anything That's Peaceful: The Case for the Free Market*. (1964). Irvington-on-Hudson: Foundation for Economic Education. 33. Read's emphasis.

being currently and historically able and willing to pay for the actual service used. If the legislation that provides for levying the tax has been validly enacted and is not obviously inconsistent with a provision of the Constitution, the court will find in favour of the government and order payment. A, however, makes her case in court as well: *She did not voluntarily enter into a new arrangement with the government, and as such still does not consent to pay the additional tax.* If A refuses to comply with the court order, the order will be executed by the sheriff, if need be with the assistance of the police with a view of attaching A's property and selling it in execution. If A resits this, an arrest will follow, and resisting arrest will lead to whatever necessary force is required to effect the arrest. This might well escalate to bodily harm perpetrated on A. Alternatively, the court might order A's wages garnished, which A's employer might refuse, again, leading to the executive stepping in with force.

In this way government relatively innocuously introducing a new tax to be paid can, and perhaps must, inevitably lead either to imprisonment or bodily harm. This more often than not will depend on how eager legal subjects are to stand on principle or hold on to more of their own property. This scenario characterises typical government conduct.[120] Read notes that the respective government institutions – the tax authorities, the judiciary, and law enforcement agencies, in our case – did not act illegally. The tax authorities were acting in terms of a provision of new national legislation enacted by the South African government; the judiciary simply interpreted the obligations created by that legislation; and the law enforcers simply acted as directed by a court order. "The fault here is with the law," writes Read. But more importantly from a libertarian point of view, A, by resisting arrest, is resorting to defensive force, whereas the law enforcers embark on aggressive force. A is acting in a morally warranted fashion, in contrast to the police who are acting unjustifiably. Read writes, "The law, and the people who are responsible for it, determine whether a police action is defensive or violent, whether it keeps the peace or acts unpeaceably".[121]

2.4 Libertarianism, morality, and other disciplines

Block writes that "libertarianism says nothing about culture, mores, morality, or ethics" but asks only one question, that is, whether non-consensual aggression has been

[120] Read (footnote 119 above) 37-38.
[121] Read (footnote 119 above) 42-43.

employed against a person or their property. On anything outside of the ambit of this question, libertarians have no view. But this does not mean libertarians are necessarily libertines, for libertines "champion prostitution, drug addiction, sado-masochism, and the like", whereas libertarians *qua* libertarians are indifferent.[122] A libertarian might also be a libertine, but other libertarians might be culturally conservative.[123] Barnett writes that libertarianism "is a *political*, not a moral, philosophy; one that can be shown to be compatible with various other moral theories".[124] Canadian philosopher Jan Narveson formulates it as follows:

> "No point is more important concerning libertarianism than that its thesis is that we may do this, which is to say that it is permissible for us to do this – but it is not obligatory to do it – a point whose overlooking has given rise to an enormous amount of misunderstanding and misinterpretation of the libertarian view."[125]

Smith writes that "the possession of rights exclusively concerns a person's *freedom* of action rather than the final, all-things-considered moral propriety of his actions". This means that, in the libertarian paradigm, the fact that someone has the right or freedom to do something, does not mean that them doing that thing is appropriate or *morally* right. Having rights protects freedom of action, that is, the person's freedom may not be interfered with, even if that freedom is exercised inappropriately or immorally.[126]

Furthermore, libertarianism is unconcerned with conceptions of freedom outside those where aggression is a determinant factor. In this regard, Sartori writes of the difference between matters of coercion and matters of autonomy:

> "We can be coerced and still remain autonomous, that is, inwardly free. […] Likewise, we can be safe from any coercion and yet remain sleepwalkers because we are not capable of internal self-determination."

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122 It must be emphasised that this indifference relates exclusively to libertarians in their capacity as libertarians. As will be noted throughout this study, libertarians, who might have other convictions besides their libertarianism, are free to pass judgment and criticise decisions with which they morally disagree.

123 Block (footnote 27 above) 305-308.

124 Barnett (footnote 40 above) 54.

125 Narveson J. "The State: From minarchy to anarchy" in Long RT and Machan TR. *Anarchism/Minarchism: Is a Government Part of a Free Country?* (2008). Burlington: Ashgate. 104.

126 Smith T. *Judicial Review in an Objective Legal System.* (2015). Cambridge: Cambridge University Press. 105.

Sartori, therefore, notes that being free from coercion and being autonomous is not necessarily the same thing. The opposite of autonomy is not coercion or restraint, but rather heteronomy, that is, "passivity, anomie, characterlessness […] all of which are notions that concern not the subject-sovereign relationship but the problem of a responsible self".[127] Pilon, in turn, notes that simply because we have the *right* to something, or to do something (the objective sense of freedom), does not mean we do or must have the *power* to do so (the subjective sense of freedom). He uses the example of freedom of the press, an instance of the right to express oneself. Having this right means "that no one else has a right to interfere with our publishing what we please", but it does *not* mean that the "printing press, paper, etc." must be provided to us. Simply because one does not own the "conditions" that make exercising one's right easier or possible, does not mean one lacks that right. Pilon writes, "What has to be drawn here, however, is the distinction between the necessary conditions for *having* a right and the necessary conditions for *exercising* that right". All that a right amounts to is "a claim to the noninterference of others, which, in conjunction with the material conditions against which the agent acts, may or may not lead to the actual exercise of the named right at issue, according as the agent does or does not own those material conditions".[128] Having equal rights does therefore not mean everyone has equal opportunities[129] and, I might add, certainly not equality of outcomes.

In the same way, libertarianism is unconcerned with constraints on freedom that do not amount to aggression (such as a lack of access to food, housing, or being able to travel across private property). This is not to say that individual persons who are libertarians regard these considerations as unimportant, but rather that libertarians, *in their capacity as libertarians*, regard them as irrelevant. In other contexts, these individuals might consider access to food and housing to be of paramount importance.

[127] Sartori (footnote 1 above) 24.

[128] Pilon R. "Ordering rights consistently: Or what we do and do not have rights to". (1979). 13 *Georgia Law Review*. 1190.

[129] Pilon (footnote 128 above) 1191.

3. MINARCHISM AND ANARCHISM

3.1 Two schools to maximise liberty

It would be remiss to not very briefly note the theoretical debate between the two broadest schools of thought within libertarianism. Roderick Long and Tibor Machan, the former being a well-known anarchist and the latter a well-known minarchist, went as far as to write a book about this debate. The first school is so-called libertarian *minarchism*, a word constituted from "minimal" and the suffix "-archy", which is a combining form meaning "rule" or "government". The second school is libertarian *anarchism*, or *anarcho-capitalism*. This study does, however, not venture an attempt to provide a concrete final solution to this debate.

Minarchism, note Long and Machan, is associated with the tradition of John Locke, Adam Smith, Frederic Bastiat, and more recently, Ludwig von Mises, Ayn Rand, and Robert Nozick, and "calls for a constitutional government of strictly limited powers, which would be confined to the protection of everyone's negative (libertarian) rights". Anarchism, on the other hand, is associated with thinkers like Benjamin Tucker, Murray Rothbard, David Friedman, Bruce Benson, Randy Barnett, and Hans-Hermann Hoppe, and "proposes entirely abolishing government".[130]

3.2 Anarchism

Anarchists seek the abolition of government because a consistent application of the non-aggression principle (or a consistent respect for self-determination) inherently implies the absence of the State's 'legitimate' monopoly on initiatory aggression. The State, as contemporarily understood, cannot function, or presumably even exist, without aggressing against private property rights.[131] For instance, for a police detective to investigate *whether* a crime has been committed on private property, they would usually need to enter onto that property notwithstanding the consent of the owner. Most notably, the State would lose its power of taxation entirely if it were to respect the non-aggression principle. Taxation is inherently coercive and if it were

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[130] Long and Machan (footnote 125 above) vii.
[131] Narveson (footnote 125 above) 104.

voluntary, it would amount to nothing more than a donation or at best a service contract that could be terminated upon the non-performance of either party.[132]

3.3 Minarchism

Minarchists, or limited-government libertarians, generally regard the State as a necessary institution to protect liberty and property by law, however its scope and powers must be strictly circumscribed. To minarchists, the existence of government is an inevitability that will sprout even out of anarchistic or stateless societies as time goes by.[133] To some minarchists, like Objectivists in the tradition of Ayn Rand, rights themselves depend on the existence of government, because rights are an institution that justifies defensive force, and "government is an institution that establishes social rules within a geographic area, enforces them coercively, and cannot be challenged with impunity".[134] In other words, rights derive part of their meaning and value from the fact that government will enforce them violently against those who seek to infringe upon them.

Finding a solution to the long-lasting debate between anarchism and minarchism within libertarian circles is not the purpose of this study. Indeed, most, if perhaps not all, of the libertarian-jurisprudential insights and concepts that are considered throughout this chapter can be easily applied and adapted into both a minarchist and anarchist context. This study, however, whilst making perhaps equal use of the works of both anarchists and minarchists in the libertarian tradition, insofar as there are conflicts between these two worldviews, assumes a minarchist perspective.

4. LIBERTARIANISM AND EXISTING PRIVATE LAW DOCTRINE

Before proceeding to the libertarian approaches to rights and law, and Transformationism as a relatively novel phenomenon in South African law, it is worth briefly surveying the *status quo* of the law insofar as it relates to the recognition and protection of individual self-determination. This section also serves to situate the

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[132] See Long RT. "Market anarchism as constitutionalism" in Long and Machan (footnote 125 above) 146 and Narveson (footnote 125 above) 106.

[133] See Lee JR. "Libertarianism, limited government and anarchy" in Long and Machan (footnote 125 above) 18-19 and Reed A. "Rationality, history, and inductive politics" in Long and Machan (footnote 125 above) 35.

[134] Thomas W. "Objectivism against anarchy" in Long and Machan (footnote 125 above) 39.

questions and concerns this study seeks to answer within the contemporary legal-jurisprudential discourse in South Africa.

It would be impossible and outside the scope of this study to exhaust all the detail of subjective rights doctrine, particularly those intricacies that relate to the law of property and of personality. Only those aspects that are relevant to the broader theme of this section – how the legal *status quo* could relate to the libertarian political philosophy – will be considered.

4.1 Subjective rights: An overview

In discussing why South Africa did not have a bill of fundamental rights at that time, Marinus Wiechers wrote in 1967 that "in terms of our Roman-Dutch law, the right to life, person, liberty, honour and reputation, are the subjective rights of each person, and can be enforced both in general and everywhere".[135] He quoted Innes CJ in support of this reasoning, who said:

> "If any man's rights or personal liberty or property are threatened, whether by the Government or by a private individual, the Courts are open for his protection. And behind the Courts is ranged the full power of the State to ensure the enforcement of their decrees".[136]

With the benefit of hindsight, some might look upon these promissory declarations by Wiechers and Innes with a degree of scepticism. It is, therefore, useful to note how 'rights' are conceived of in Roman-Dutch legal doctrine, of which subjective rights has become one of the most dominant conceptions, especially in South Africa.

JTR Gibson defines a "legal right" as "an interest conferred by, and protected by the law, entitling one person to claim that another person or persons either give him something, or do an act for him, or refrain from doing an act".[137] HR Hahlo and Ellison Kahn write that rights do not exist in a vacuum, but attach to persons; and persons in law – that is, human beings or corporate entities with legal personality – are distinguished from things and generally patrimonial assets. The objects of rights can

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[135] Wiechers M. *Staatsreg*. (1967, 2nd edition). Durban: Butterworths. 129. My liberal translation from the original Afrikaans.

[136] *Krohn v Minister of Defence and Others* 1915 AD 191 at pages 196 and 197.

[137] Gibson JTR. *Wille's Principles of South African Law.* (1970, 6th edition). Cape Town: Juta. 45.

inter alia be things or other interests like a good name and physical integrity, and that the State recognises and protects such rights.[138] Bryant Smith defines legal personality as a person on whom legal rights have been conferred and legal duties imposed.[139] Hosten *et al.*, dealing specifically with subjective rights, write that "the norms of private law serve to regulate the relations between legal subjects by way of the delimitation and protection of their respective interests", and that subjective rights, as a result, deal with relationships: "… on the one hand the relationship between a legal subject, the bearer of a right, and the object of his right […] and on the other hand the relationship between the bearer of the right and all other legal subjects on whom the duty rests to respect and not to violate this right".[140]

These conceptions, closely related to subjective rights, appear quite different from a so-called 'human rights' formulation of rights, which is more closely related to a libertarian-*cum*-individual self-determination conception. Indeed, Beinart wrote of human rights that "for the linguists as well as lawyers", it means "the liberty to breathe, to live, to trade, to think and to speak, to play and so on without interference". In other words, "simply freedom from restriction".[141] The difference, then, between an individual libertarian or human rights-conception of 'rights' and the contemporary subjective rights conception is that subjective rights are focused on differentiating between the kinds of objects that rights pertain to, whereas an individual right is simply the freedom to act in general.

The notion of subjective rights is accepted as a facet of the European continental (civil) legal tradition and the erstwhile European colonial territories and successor states, such as South Africa. It provides the basis for conceiving of a legal subject's enforceable interests in relation to the various objects of law. The notion of subjective rights, then, comes about, according to WA Joubert, as a result of the recognition of the difference between the law as a set of norms (which in Afrikaans would be known as "*objektiewe reg*", which means "objective law", or "law") and law as a relationship (which in Afrikaans would be known as "*subjektiewe reg*", which means "subjective

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138 Hahlo HR and Kahn E. *The South African Legal System and Its Background*. (1973). Cape Town: Juta. 77-79.

139 Smith B. "Legal personality". (1928). 37(3) *Yale Law Journal*. 233.

140 Hosten WJ, Edwards AB, Nathan C, and Bosman F. *Introduction to South African Law and Legal Theory*. (1977). Durban: Butterworths. 276.

141 Beinart B. "The liberty of the subject". (1953). 16 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg.* 29.

right", "legal right" or "right").[142] This distinction is borne out by the fact that "the law, as a tool for social order, delimits the legal interests of persons *vis-à-vis* one another".[143] Joubert continues, writing that the notion that the individual has rights can be ascertained from the "history of law and from the struggle of the individual to secure against his fellows, the state, etc., that which by the endowment of God he is by right entitled to".[144] Joubert cautions, however, that to recognise the notion of subjective rights does not at the same time mean to adopt an individualist jurisprudence. He opines that the notion of an "absolute right" is a contradiction in terms, as one can only have absolute rights if one does not come into contact with other legal subjects (Joubert uses the analogy of Robinson Crusoe).[145]

Traditionally, there are four recognised categories of subjective rights:

- Real rights are rights to corporeal things (*res*), such as land and movable tangible things. The law of things, sometimes known as the law of property, determines and regulates real rights.
- Immaterial or intellectual property rights are rights in relation to immaterial (non-corporeal) goods, such as copyrights or patents, as regulated by intellectual property law.
- Personality rights are those rights that persons have in their own personality, such as the right to physical-mental integrity (*corpus*), dignity (*dignitas*), privacy, freedom (*libertas*), identity, a *fama* (good name or reputation), etc. The law of personality deals with personality rights.
- Personal rights (which should be distinguished from personality rights) are rights that entitle a person to claim performance by another in terms of a legal obligation, emanating from a contract, delict, and a variety of causes (*ex variis causarum figuris*).[146]

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142 In Afrikaans, the word "*reg*" is used for both "law" and "right". As a result, in Afrikaans legal terminology the notion of "*objektiewe reg*"/"objective law" was adopted to refer to law, and "*subjektiewe reg*"/"subjective right" was adopted to refer to rights. See footnote 1 in Van Heerden B, Cockrell A and Keightley R. *Boberg's Law of Persons and the Family.* (1999, 2nd edition). Cape Town: Juta. 1.

143 Joubert (footnote 16 above) 98. My liberal translation from the original Afrikaans.

144 Joubert (footnote 16 above) 100. My liberal translation from the original Afrikaans.

145 Joubert (footnote 16 above) 103. My liberal translation from the original Afrikaans.

146 See Van der Merwe D. "The dematerialization of print and the fate of copyright". (1999). 13(3) *International Review of Law, Computers & Technology*. 310 and footnote 3 in Amoo SK. *Property Law in Namibia.* (2014). Pretoria: Pretoria University Law Press. 41.

According to Johann Knobel, these subjective rights are "classified according to the legal objects to which they pertain", and a potential fifth category of subjective rights has also been proposed – that of a personal immaterial property right, which pertains to incorporeal intellectual products.

Knobel restates the origin of subjective rights: "[A] subjective right comes into existence when the law recognises and sanctions an individual interest as worthy of legal protection".[147] For a legal interest to be transformed into a subjective right, it must have "value", and "it must have a sufficient measure of independence to be capable of use, enjoyment" and perhaps disposal. In other words, it must "be susceptible of human control".[148] Knobel notes that various subjective rights have been taken up as fundamental rights in the Constitution, such as the rights to privacy, dignity, and bodily and psychological integrity (that is, freedom and security of the person).[149] In fact, all subjective rights are likely recognised as fundamental rights in the Constitution.

4.2 Subjective rights: Personality rights

It is worth briefly focusing on personality rights as that branch of subjective rights that speaks most closely to libertarianism's focus on individual rights as the *raison d'etre* of the legal system.

Personality rights "recognise a person as a physical and spiritual-moral being and guarantee his enjoyment of his own sense of existence", writes Johann Neethling. They may be said to be premised on "classical natural law, with its notion of innate, inalienable human rights".[150] Neethling writes of the various conceptions of personality rights, some of which include "not only true personality rights but also the legal personality itself, including freedom of economic activity" and others "recognise only specific rights of personality".[151] The personality interests that personality rights protect pre-exist legal recognition, and exist independently "in factual reality". The legal principles that come about to protect the said interests must accord with the factual

147 Knobel JC. "Trade secrets and the doctrine of subjective rights". (2001). 64 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg.* 575.
148 Knobel (footnote 147 above) 576.
149 Knobel (footnote 147 above) 579.
150 Neethling J. "Personality rights: A comparative overview". (2005). 38(2) *Comparative and International Law Journal of Southern Africa*. 210. Citations omitted.
151 Neethling (footnote 150 above) 215-216, 220. Citations omitted.

reality, otherwise risk leading to contradictions and injustice.[152] Neethling's conception of personality rights, in this regard, is practically at one with the libertarian conception of individual rights.

To Claus Köhler, personality rights are "the right to respect and to the free development of one's personality". This doctrine accordingly protects "intimate privacy", the "private sphere", including one's home, and the "sphere as an individual". He lists the various personality rights as "privacy", "personal honour", "protection against untruth and false allegations", the "right to self-determination", the "right to dispose fully of one's own image in public and to decide on one's own merchandising", the "right to dispose freely of one's own information", and the "right to one's own picture".[153]

To Liliana Mănuc, personality rights are "those extra-patrimonial prerogatives intimately attached to the person, expressing the quintessence of the human person, and which are being intrinsic to the human person".[154] She continues, writing that "both personality rights and freedoms are inherent to the personality, recognized to everyone, without distinction, are opposable *erga omnes* and they are extra-patrimonial rights intended to complete the personality".[155]

Personality rights "are extrapatrimonial; they are not transferable; they may not prescribe; and they are exempt from seizure". Since personality rights "are essential attributes of the person, they cannot be renounced, nor abdicated".[156] These rights are also "uninheritable; incapable of being relinquished or attached […] and they come into existence with the birth and are terminated by the death of a human being".[157] Popovici argues that the objective of personality rights is the protection of "the

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[152] Neethling (footnote 68 above) 24.

[153] Köhler C. "Personality rights in Germany". (2002). 7 *International Intellectual Property Law & Policy*. 33-1.

[154] Mănuc LM. "Features and evolution references to personality rights". (2012). 4(1) *Contemporary Readings in Law and Social Justice*. 362. For this definition she cites a French language source: Jugastru C. *Les droits de la personnalité.* (2006). Guer: Editions de la Tannerie. 31.

[155] Mănuc (footnote 154 above) 367. For this description she cites a Romanian language source: Nicolae M. *Prescriptia extinctivă*. (2004). Bucharest: Rosetti. 421.

[156] See Popovici A. "Personality rights – A civil law concept". (2004). 50 *Loyola Law Review*. 353. For this description he cites a French language source: Deleury E and Goubau D. *Le droit des personnes physiques*. (2002, 3rd edition). Montreal: Editions Yvon Blais. 73.

[157] See Neethling (footnote 150 above) 223.

attributes of the human person".[158] In this respect, from the perspective of the libertarian paradigm, it should also be borne in mind that Bastiat writes that in addition to liberty and personality, property is also an attribute of the human person. Popovici further notes that "personality rights, as subjective rights, comprise both an active and a corresponding passive side. The active side is the 'power' of the right's holder over the object of the right; the passive side of the 'duty' of others to respect this very same object". He cites the example of bodily integrity, writing that without consent of "authorization of the law" (including "good morals" or "public policy"), it is everyone's duty "not to interfere" with one's body.[159]

Neethling describes privacy – a category of personality rights – as embracing "all those personal facts which the person concerned has himself determined to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private", or, in brief, "seclusion from the public and publicity".[160] Another way of conceiving of the right to privacy is that it entails the right to be left alone[161] – a notion central to libertarian jurisprudence. Neethling goes as far as to consider self-determination to be the essence of privacy, given that a person "determines the destiny of [their] private facts and therefore the scope of [their] interest in privacy" themselves.[162] This conception of privacy excludes, for example, a prohibition on interference in questions of personal autonomy. This is justified, according to Neethling, because "a person's autonomy (freedom of decision-making) is related to the freedom of human self-determination in society, within the limits imposed by the law", and thus falls under the notion of legal subjectivity along with "freedom of activity".[163] But while Neethling does not consider violations of personal autonomy by the State to be within the ambit of the right to privacy, he does argue that there should be protections "against (unreasonable) regulations of the state that restrict" such

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158 Popovici (footnote 156 above) 352. For this reasoning he cites a French language source: Gonthier CD. "Linfluence d'une cour supreme nationale sur la tradition civiliste qudbdcoise". (1990) 5 *Enjeux et Valeurs d'Un Code Civil Moderne*.

159 Popovici (footnote 156 above) 354-355.

160 Neethling J. "The concept of privacy in South African law". (2005). 122 *South African Law Journal*. 19.

161 See generally Warren SD and Brandeis LD. "The right to privacy". (1890). 4(5) *Harvard Law Review.*

162 Neethling (footnote 160 above) 20.

163 Neethling (footnote 160 above) 25-26.

autonomy, and if the Constitution does not protect such autonomy in another way, the constitutional right to privacy should validly be employed for such protection.[164]

4.3 Subjective rights: Property rights

"The nature, contents and definition of ownership that we hold in this work are based upon western capitalism", write Neil van Schalkwyk and Pieter van der Spuy, "as has been brought to South Africa *via* the Roman Dutch law".[165] Ownership is regarded as a "mother-right" from which other 'rights' (or entitlements) flow.[166]

The Dutch Roman law expert JE Scholtens writes that ownership entitles owners with "the right to use and to enjoy" their property.[167] RW Lee writes that ownership means *inter alia* the right to possess, and that this right by nature "implies the right to vindicate, that is, to recover possession from a person who possesses without title to possess derived from the owner". Furthermore, ownership concerns exclusivity, that is, the ability of owners to exclude others from using or possessing the property in question.[168] Ownership "is a composite right consisting of a conglomerate of rights, powers and liberties".[169]

The Pandectists' understanding of ownership – that it is virtually unrestricted – as articulated in the nineteenth century, is what was eventually received into South African law. This "highly individualistic" German understanding was stronger than that of the Dutch authorities of the seventeenth- and eighteenth centuries.[170]

The acquisition of ownership is categorised into original and derivative acquisition. Original acquisition is defined by Van Schalkwyk and Van der Spuy as being:

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[164] Neethling (footnote 160 above) 26.

[165] Van Schalkwyk LN and Van der Spuy P de W. *General Principles of the Law of Things.* (2012, 8th edition). 93.

[166] Van Schalkwyk and Van der Spuy (footnote 165 above) 94.

[167] Scholtens JE. "Law of property" in Hahlo HR and Kahn E. *South Africa: The Development of Its Laws and Constitution.* (1960). London: Stevens and Cape Town: Juta. 578.

[168] Lee RW. *An Introduction to Roman-Dutch Law.* (1931, 3rd edition). Oxford: Oxford University Press. 126.

[169] Scholtens (footnote 167 above) 578. Some classical liberals take issue with this bundle-of-rights conception of ownership. See Klein DB and Robinson J. "Property: A bundle of rights?" (2011). 8(3) *Econ Journal Watch.* 195. They write that the bundle theory makes of "government intervention, not the violating of property, but rather the rearranging or redefining of the bundle" and it "enables its adherents to avoid the implication that the regulatory state is a tide of wholesale incursions on ownership".

[170] Visser DP. "The absoluteness of ownership: The South African common law in perspective". (1985). 39 *Acta Juridica.* 46-48.

> "[…] established by the unilateral conduct of the acquirer and the 'new' ownership is established without the co-operation of a prior owner if there were one".[171]

Derivative acquisition occurs when there is:

> "[in the case of movables,] delivery of the thing with the intention of the owner (or his agent) to transfer ownership and the intention of the acquirer (or his agent) to receive the ownership. [And in the case of immovables, when there is] registration with the intention of the owner (or his agent) to transfer ownership and the intention of the acquirer (or his agent) to receive ownership".[172]

Ownership over corporeals is acquired – "the processes which, in law, make a thing mine" – *inter alia* through occupation, accession, or delivery. *Occupatio* occurs when unowned things (*res nullius*) are seized with the intention of becoming the owner.[173] *Accessio* is when one thing becomes associated – acceded – to another thing. The owner of that other thing (to which is being acceded) then becomes the owner of the acceding thing.[174] Delivery is, *ceteris paribus*, when the property is transferred voluntarily from the previous owner to the next[175] with the intention to transfer ownership and the corresponding intention to become the new owner. *Occupatio* and delivery are the most relevant to this study.

Occupatio is an original mode of acquisition, and delivery is a derivative mode of acquisition.

According to Pieter Badenhorst and others, "property" may mean "the right of ownership in a legal object" or "the legal object to which this right exists".[176] In a wider sense it may "include patrimonial rights, such as personal rights and immaterial property rights".[177] In this wider sense property might also refer to *jus in re aliena* such as servitudes or liens, which amount to having a real right in the things of another.

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171 Van Schalkwyk and Van der Spuy (footnote 165 above) 113.
172 Van Schalkwyk and Van der Spuy (footnote 165 above) 145.
173 See Lee (footnote 168 above) 137 and Scholtens (footnote 167 above) 584.
174 See Lee (footnote 168 above) 140 and Scholtens (footnote 167 above) 584.
175 Lee (footnote 168 above) 144-145.
176 Badenhorst PJ, Pienaar JM and Mostert H. *Silberberg and Schoeman's The Law of Property*. (2006, 5th edition). Durban: LexisNexis. 1.
177 Badenhorst *et al.* (footnote 176 above) 9.

Badenhorst further writes that legislation has apparently modified property rights to *inter alia* "protect the interest of consumers or to balance the unequal bargaining positions of parties to a contract". There is a distinction between property as "a constitutional concept" and property in "the private-law sense".[178] (As will be discovered below, the libertarian perspective emphasises a conception of property related to the fundamental tenets of constitutionalism. This is because the libertarian conception relates specifically to protection of property from infringement – especially from State infringement – instead of the nuances and complexities of the entitlements and types of property rights.)

In this regard, Badenhorst refers to the notion of "freedom of property", which means "a demand that society (as represented by the authority of the State) should guarantee the ability of owners to deal with their property as they deem fit and protect them against interference by others in the exercise of this freedom". He hastens to add, however, that "ownership […] as an absolute (unrestricted) right […] is unacceptable and unrealistic for modern society". It is therefore, according to Badenhorst, "meaningless to speak of freedom of property without bearing in mind the responsibilities it entails. The limits of property may be ascertained with reference to positive law, but the determination of the justifiability of these limits is an issue to be resolved from within the domain of constitutional law".[179]

Badenhorst asserts that "in a Western capitalist society", the content of the notion of ownership will be different from that of "ownership in a socialist and customary African society".[180] In arguing against the individualistic and apparent absoluteness of the notion of ownership in the Roman and Roman-Dutch conceptions,[181] Badenhorst writes that "it is obvious that changing social, economic and political conditions cannot justify a concept of ownership unchanged in content and function since Roman and

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178 Badenhorst *et al*. (footnote 176 above) 10. For this distinction the author cites *inter alia* Rautenbach IM and Malherbe EFJ. *Constitutional Law*. (2003 4th edition). Durban: LexisNexis. 344. and Van der Walt AJ. *Constitutional Property Clauses: A Comparative Analysis*. (1999). Cape Town: Juta. 353.

179 Badenhorst *et al*. (footnote 176 above) 3-4.

180 Badenhorst *et al*. (footnote 176 above) 91.

181 It is argued that the nineteenth century was when the notion of "absolute and unrestricted" property rights was dominant "in order to promote a free economy". Van der Merwe CG. "Things" in Joubert WA, Faris JA, and Kanjan A. *Law of South Africa*. (2014, volume 27). Page number unavailable. https://www.mylexisnexis.co.za/Index.aspx?permalink=TEFXU0EgLSBWb2wgMjcgUGFyYSAxI GZuIDQkMjk3NTUxJDckTGlicmFyeSRKRCRMaWJyYXJ5. Accessed: 16 August 2018.

Roman-Dutch times". Private property must serve the needs of contemporary society at large to remain legitimate.[182]

Birks argues that the notion of having absolute property rights is "impossible" (Badenhorst uses the term "intolerable"[183]), because "no community could tolerate ownership literally unrestricted in its content". He cites an example of someone using their firearm to shoot another and excusing it by arguing "that he was merely using his own weapon".[184] (This analogy, however, cannot be accepted as tenable. Briefly, by shooting another, one is denying the individual self-determination of that other, whereas by doing as one pleases with one's own property, the same cannot be said. One may not violate the property rights of another, otherwise no state of property rights can be said to exist – in other words, there must exist *equal* liberty of property and conduct. Infringing on the personality or property rights of another, per definition, cannot thus be legitimate within the logic of property rights itself.)

Richard Posner, from the relatively mainstream law-and-economics perspective, writes that legal protection for property rights serves the purpose of incentivising people to use their property – resources – efficiently. In the absence of such protection, indeed when scarce resources like land are regarded as not being ownable, or in fact being owned in common by all, the property will not be utilised to its maximum potential. Using the example of a farmer, Posner writes that if the farmer invests time, money, and effort into ensuring he has a profitable harvest in the future, only for their neighbours to seize the crop (without the farmer having any legal recourse) when it is ready for harvest, the farmer will not make such an investment again. I might add that some farmers and others, if they were unable to rely on law to protect their property, would in all likelihood use violence to protect it themselves. In other words, I submit that the law's role as an institution for conflict avoidance is itself evident from the function of the law as a protector of private property rights. Posner continues, noting three criteria for an efficient system of property rights: Universality (all scarce resources must be owned or ownable), exclusivity (owners must be secure in the knowledge that fruits that result from their investment in the property will be theirs to

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182 Badenhorst *et al.* (footnote 176 above) 93. As is discussed elsewhere in depth, the libertarian conception of property rights differs fundamentally with this perspective.

183 Badenhorst *et al.* (footnote 176 above) 94.

184 Birks P. "The Roman law concept of dominium and the idea of absolute ownership". (1985). 1 *Acta Juridica*. 1.

keep), and transferability. Transferability is important because initial or current owners are not necessarily the ones who would use the resource most efficiently or productively, and as a result there needs to be the possibility of them voluntarily transferring such property to others at will.[185]

The most important remedy that relates to property rights, for our purposes, is the *rei vindicatio*. It is defined as "the action with which an owner can reclaim his movable or immovable thing which is in existence and identifiable from any person who is in unlawful control of the thing", and is obviously aimed at restitution.[186]

5. MINARCHO-LIBERTARIAN JURISPRUDENCE

This study is not intended to be a formalistic description and comparison between individual self-determination and Transformationism. Indeed, this study is influenced by a normative political philosophy that insists on certain value judgments. As Tara Smith writes, legal philosophy is based on political philosophy and this, as a consequence, involves certain value judgments about the nature and purpose of law and government.[187] As a normative study on individual self-determination and Transformationism, therefore, the core questions of jurisprudence – what is the law, and what is its purpose?[188] – must be considered.

Libertarian scholarship has been dominated by economics and economists, chiefly by the likes of Friedrich von Hayek and Murray Rothbard, who wrote extensively on jurisprudence and the legal implications of the theories and principles they espoused.[189] The foundation of the Mont Pelerin Society by Von Hayek in 1947, the Foundation for Economic Education by Leonard Read in 1946, and the Institute for Humane Studies by Floyd Harper in 1961, among others, became "a significant force in bringing the modern libertarian legal movement into being".[190]

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185 Posner (footnote 67 above) 10-13.

186 Van Schalkwyk Van der Spuy (footnote 165 above) 169.

187 Smith T. "Neutrality isn't neutral: On the value-neutrality of the Rule of Law". (2011). 4 *Washington University Jurisprudence Review*. 54.

188 O'Neill B. "Natural law and the liberal (libertarian) society". (2011). Lecture at the inaugural Mises Institute Australia seminar. https://www.youtube.com/watch?v=vLvaq3F2y0I.

189 Von Hayek, for instance, wrote *The Constitution of Liberty* (footnote 50 above) and *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*. (1982 edition). London: Routledge, and Rothbard wrote *The Ethics of Liberty* (footnote 56 above).

190 Pilon (footnote 42 above) 257-258.

5.1 Law today as legalised "plunder"

Christian Michel writes:

> "[…] there are two means of creating predictability in human societies: commands (to do something) and rights (that we may not be subjected to something). *The fundamental difference between liberalism and all other political philosophies is that, in all instances, liberals accord rights precedence over commands*."[191]

Frederic Bastiat's *The Law* is a concise and authoritative description of the libertarian approach to rights and law, and speaks to the rights versus commands dichotomy. The iconic opening words of the book's English translation – "The law perverted!" – themselves summarise libertarians' discontent with the current state of jurisprudence around the world. Bastiat despondently noted that the law at the time of his writing – 1850s France – with "all the collective forces of the nation" following in its wake, was "not only diverted from its proper direction, but made to pursue one entirely contrary!"[192] Spooner, too, argued that the use of the word "law" had been perverted because governments have employed it in favour of "criminal exactions of unrestrained selfishness and power".[193] Elsewhere Bastiat writes of how the law has been used for social engineering instead of protecting rights. In so doing, the law has been deployed by the political class "to modify, impair, transform, balance, equalize, and organize property, credit, and labor", with the result of government having absolute power over people and property.[194]

Bastiat defines law as "the collective organization of the individual right to lawful defense". Multiple people – communities, society – come together in the legal-fictional sense and "organize a common force to provide regularly for this defense". Alternatively stated:

> "The law is the organization of the natural right of lawful defense; it is the substitution of collective for individual forces, for the purpose of acting in the sphere in which they have a right to act, of doing what they have a right to do, to secure persons,

[191] Michel (footnote 117 above) 218. Michel's emphasis.
[192] Bastiat (footnote 60 above) 1.
[193] Spooner (footnote 61 above) 10.
[194] Bastiat (footnote 62 above) 100.

liberties, and properties, and to maintain each in its right, so as to cause justice to reign over all."

This as a result of every individual person's "right of defending, even by force, his person, his liberty, and his property". This "collective right", to Bastiat, "has its principle, its reason for existing, its lawfulness, in individual right", and it cannot be used for any purpose other than the protection of life, liberty, and property.[195] In other words, it is evident that, according to Bastiat's libertarian theory of the social contract, at least, individual rights pre-exist the law, and the law is an institution that comes about to protect such rights. This order of precedence is adopted in this study as well.

Rather than adhering to this standard of lawfulness, the law now and during Bastiat's time, is not only used for other purposes, but it used *against* life, liberty, and property.[196] Bastiat goes as far as to argue that *whenever* there is an attempt to use "the law, whose necessary sanction is force", for something other than "securing to every one his right", perversion of the law is guaranteed. Bastiat talks of the law being used for "plunder" – which will again become relevant in the discussion in Chapter 4 – which he describes as happening when "a portion of wealth passes out of the hands of him who has acquired it, without his consent, and without compensation, to him who has not created it, whether by force or by artifice".[197]

5.2 Libertarian conceptions of rights

Sartori writes that "what protects our liberties today are 'rights', and not the law-as-form on which so many jurists seem to rely. And our rights are the institutionalization of a freedom *from*, the juridical garb of a liberty conceived of as absence of restraint". Individual liberty protected by law under constitutions that limit State power, is necessary for a free society.[198]

To Roger Pilon, there are two categories of rights and obligations: General (or natural) and special. General rights and their correlative obligations are those that come from the right to non-interference (that is, freedom of action, or simply the right to freedom). They are consistent and coherent, in that everyone's general rights involve general

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195 Bastiat (footnote 60 above) 2-3.
196 Bastiat (footnote 60 above) 4.
197 Bastiat (footnote 60 above) 16-17.
198 Sartori (footnote 1 above) 41. Sartori's emphasis.

obligations from all others, and they do not conflict. These rights are also "delineated by the material or property foundation [that is, the libertarian idea of self-ownership] that enable their exercise". They give rise to general relationships. Special rights and obligations arise from contacts and conduct. They are therefore not *natural* rights and obligations because they arise "historically" – what we choose to do with our general rights, in the context of space and time, leads to special rights and obligations. Special rights and obligations are also "held only by the parties to the events that create them". Examples of special rights are crimes and delicts, both of which infringe on (general) rights, and create involuntary obligations for those whose conduct gave rise to them. Contracts, having children, and creating associations (like businesses, clubs, etc.), are examples of voluntarily-created special rights and obligations. These rights and obligations give rise to special relationships.[199] General rights and obligations are "the background against which" special rights and obligations voluntarily come about, in that people act and create associations and contracts with the freedom afforded by the general right to non-interference. Actions also lead, on the other hand, to relationships that come about involuntarily: By, for example, intentionally or negligently crashing into another person's vehicle, one would be engaged in a delict. The special rights and obligations that come out of this relationship concern restitution, that is, "to return the wronged party to the prior status quo (in which the parties were generally related)", as opposed to how they are now related in a special rather than general relationship because of the delict.[200]

These general and special rights and obligations are "first-order" rights. Pilon recognises that so-called "second-order" rights pose a problem. These are the "rights of enforcement, rights of accused persons, and the whole issue of procedural justice", which cannot neatly be categorised into either of Pilon's aforementioned categories. "We are a very long way," writes Pilon, "from having an adequate theory of state-of-nature procedural justice".[201]

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[199] Pilon (footnote 128 above) 1188.
[200] Pilon (footnote 128 above) 1191.
[201] Pilon (footnote 128 above) 1192-1193.

5.2.1 How we come to have rights

Christopher Morris locates "the natural right to be free" in "the premise of human autonomy". "Persons are separate," writes Morris, "and human consciousness is that of a single, distinct self". This combined with the capacities that humans naturally possess "for free and autonomous choice and action" – like language and self-consciousness – to Morris, "give rise, according to [natural rights theory], to the principle forbidding the treatment of persons as mere means". Morris writes that to "deny the principle prohibiting the treatment of others as mere means is to deny the importance of the distinctness of human consciousness".[202] In dispelling the idea that people share some sort of collective consciousness – and thus that freedom is located at the collective rather than individual level – Morris explains that "distinct persons may seek the same thing, think the same thought, 'feel the same pain', but they do not thereby become a single subject with one set of capacities". They remain separate and distinct, regardless of shared interests or desires, and "to sacrifice one for the sake of another is simply to disregard their separateness". Morris submits that most theorists agree about this basic thesis – that individuals separately determine and follow their own conceptions of the good, even though these often overlap and intersect – but that there are disputes about its relevance. Thus, writes Morris, "Humans capable of free choice thus are understood as possessing the right to be free from coercion and other interference with their liberty".[203]

Tara Smith writes:

> "Each man is entitled to freedom of action. Each man holds the right to life, by which I mean that he is morally entitled to lead his life *by* his judgment, *for* his chosen ends, free *from* others' forceful interference."[204]

After criticising modern conceptions of human rights,[205] the political scientist Nigel Ashford describes what authentic human rights – "historically [called] natural rights" – are: Moral entitlements, "much more than a want or desire". The fact that the word 'human' is included in the term means that these rights "belong to all human beings,

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[202] Morris (footnote 5 above) 379-380.
[203] Morris (footnote 5 above) 381-382.
[204] Smith (footnote 126 above) 105. Smith's emphases.
[205] Which is laid out in Chapter 4.

regardless of nationality, religion, gender, ethnic group, or sexual preference". But it also means that they apply "to every human being that has ever existed". A real human right, thus, is not dependent on context. Ashford sets out three requirements that human rights must satisfy to be classified as such:

- Universality, "belonging to everyone throughout time";
- Absoluteness, in that "it cannot be legitimately limited by calls of public interest" but only "when human rights come into conflict"; and
- Inalienability, in that it "is not possible to surrender that right".[206]

5.2.2 Rights from the perspective of aggression

Walter Block summarises the libertarian approach to rights as follows: Because each individual "owns" themselves (otherwise stated, is inherently entitled to self-determination), there are certain legal-fictitious "boundaries" erected around each individual. Without consent, no person may invade the boundary set around another person's self-determination. Anything that intrinsically involves such an invasion, "such as rape, murder, theft, trespass or fraud" and the non-consensual appropriation of property – all examples of aggression – are therefore contrary to the libertarian conception of rights. But where one does provide consent, and "within one's own sphere", people may do as they please. Withholding support or "patronage" from others cannot be considered an invasion of self-determination – as indeed many on the leftist extreme of the political spectrum argue that there is no freedom without a certain standard of living. This is so because "it is the individual's right to withhold benefits of this sort, since such acts of omission cannot rationally be interpreted as a boundary crossing". No criminal penalty can, within libertarian rights theory, be imposed on someone in the absence of individual or property rights being invaded.[207] Block continues, arguing "that the libertarian legal code speaks in terms of the initiation of violence [without consent]" and not "hurting or injuring or damaging". Harm is too nebulous a concept, and many forms of harm – like drawing customers away from a competing business – Block argues, should not be proscribed. Block continues:

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206 Ashford N. "Human rights: What they are and what they are not". (1995). 100 *Political Notes*. Libertarian Alliance. 1.

207 Block (footnote 27 above) 240.

> "Since […] people only have a right to be free of invasions, or interferences with their persons or property, the law should do no more than enforce contracts, and safeguard person and private property rights."[208]

The philosopher John Hospers describes the libertarian notion of harm as "(a) bodily injury, such as assault and battery, (b) damage to or theft of property, and (c) violation of contract". It is only these forms of injury, damage or violation that libertarians desire law to prohibit.[209]

In other words, the non-aggression principle lies at the heart of the libertarian conception of rights. Indeed, Smith argues that rights "reflect a moral principle" – the moral entitlement to act free from aggression. This principle is based on the notion "that each man is an end in himself and that the initiation of force against a man is morally wrong".[210] Elsewhere, Smith writes that the "concept of rights addresses a jurisdictional issue: Who should control an individual's actions – that person himself, or someone else?" Rights are "designed to demarcate individuals' respective spheres of authority".[211] To Robert Baker, individual rights are infringed by involving someone, "directly or indirectly, in some form of social interaction against [their] will". The law's purpose is to prevent or rectify such infringements, irrespective of whether they were intentional, negligent, or erroneous. Baker continues, "[f]or every rule of the criminal law, there must be a corresponding right whose protection is the function of the rule", and these rules need to be universal, that is, because all individuals have the same individual rights, the law must treat them equally. They must also be clearly (pre-)defined, that is, the tenets of the Rule of Law, encapsulated in the principle of *nullem crimen sine lege* must be observed.[212]

The Dutch jurist, Frank van Dun, however, while accepting the legitimacy and centrality of the non-aggression principle to libertarian jurisprudence, disputes the idea that it is the *only* principle of libertarian jurisprudence. He argues that there "may be unlawful acts that are not invasions of a person's physical domain, yet justify the defensive use of force to prevent, stop, or exact compensation for such acts". The

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208 Block (footnote 27 above) 304-305.
209 Hospers (footnote 32 above) 256.
210 Smith (footnote 187 above) 54-55.
211 Smith (footnote 126 above) 106.
212 Baker RP. "On libertarian jurisprudence". (1993). 17 *Legal Notes*. Libertarian Alliance. 1.

notion that aggression and non-aggression correspond directly with unlawful and lawful respectively in the libertarian paradigm is thus rejected.[213] Van Dun argues that libertarian jurists "should not dissolve human action into merely behavioural components, assigning legal relevance only to the last component" – they must also pay mind to factors such as causation when determining lawfulness.[214] To Van Dun, jurists must have regard to natural law – that law which marks "the boundaries between any two human persons, their bodies, actions, words and works" – which would allow them to:

> "[…] classify *human actions of whatever kind* – not just those that can be fully described in physical terms – as either lawful or unlawful. The decisive criterion is whether, in performing an action, a human being does or does not respect those natural distinctions between himself and other persons, or between any two other persons."[215]

Van Dun, evidently relying on the personality rights tradition of his homeland, endorses this broader conception of unlawfulness in libertarian jurisprudence by arguing that:

> "Personal identity and integrity are the presuppositions of every personal right. They are part of every natural right of every natural person. Respect for persons implies respect for their identity and integrity as persons as much as it implies respect for their tangible property."[216]

Van Dun writes that libertarianism "should found its theories of legality on the natural law requirement of respect for persons". It must not be concerned exclusively "with its physicalist shadow", physical aggression. If it were not to do so, libertarianism would amount to "another revolt against nature". Instead, it must "be about justice and freedom for real [and not abstract] human beings".[217]

5.2.3 Natural law and natural rights

Libertarian theory around rights and law is historically and usually founded on a particular strand of natural rights theory: Basically, the idea that rights are not *granted*

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213 Van Dun (footnote 33 above) 65-66.
214 Van Dun (footnote 33 above) 78-79.
215 Van Dun (footnote 33 above) 84-85. Van Dun's emphasis.
216 Van Dun (footnote 33 above) 88.
217 Van Dun (footnote 33 above) 89.

to persons, but that persons have rights by virtue of their humanity, and that positive law must respect this phenomenon. Morris summarises the basic underlying principle of natural rights theory as follows:

> "[…] a simple prohibition of the treatment of persons as mere means to the ends of others. This principle generates moral boundaries between persons or constraints on their interactions. These constraints determine obligations to refrain from actions which violate the moral space of others, and these obligations are correlated with claim-rights on the part of others."[218]

Barnett notes that it might be true that certain facets of human nature are not natural, but rather the product of social or communal ties or conditioning, these facets are irrelevant to the arguments natural law theorists make. Barnett draws attention to some of those aspects of human nature that natural law theorists think are immutable and not subject to conditioning:

- Knowledge is limited. Most people only have access to personal and local knowledge, and don't know what others know.
- Self-interest. People prefer their own interests and the interests of those with whom they are familiar, over those whom they don't know or don't know well.
- Resources are limited. People need resources to achieve happiness, but these resources (which, I submit, pertinently includes the resource of time) are limited.[219]

Therefore, natural law theory goes "beyond whatever natural instincts people may have", which might be heavily dependent on their social or communal circumstances. In addition to this limited role played by behavioural tendencies, natural law is also concerned with "the physical needs and abilities of human beings and the physical properties of the physical world".[220]

Barnett identifies natural law reasoning closely with the axiom of action. He writes that "it is in the nature of human life that we must act", and that natural law reasoning assists us in deciding "how to act, and we ought to act as best we can". He continues, "It tells us what we should be looking for" as well as what we have looked for and

[218] Morris (footnote 5 above) 379.
[219] Barnett (footnote 28 above) 662.
[220] Barnett (footnote 28 above) 663.

why.[221] Natural law assists human beings to discover how we "are to survive, and pursue happiness, peace, and prosperity" while living in the same society. And because natural law concerns us in our social context, "it must be based on some such generalized features of human beings and the world that are common to all persons who are interacting with one another".[222] He hastens to add, however, that natural laws, unlike the laws of natural and physical sciences, can be broken, but that breaking such laws will always entail a cost. This is to say that natural law theorists do not assert that natural law is natural in the sense that it is unbreakable.[223]

Barnett writes that natural law is a "*method of analysis*" that attempts to answer this problem: "*Given* that the nature of human beings and the world in which they live is X, *if* we want to achieve Y, *then* we ought to do Z".[224] Thus, the natural law method can be applied to a variety of questions, some of which are unrelated to governance or law in the jurisprudential sense, like lifestyle choices.[225] Natural *rights*, on the other hand, is a theory related particularly to the question of how society should be structured, and the answer that it gives is that "each person [needs] a 'space' over which he or she has sole jurisdiction or *liberty* to act and within which no one else may rightfully interfere".[226] Barnett sets out the distinction between natural rights and natural law as follows:

> "Natural law is a broader term referring to the given-if-then method of evaluating choices based on the 'given' of human nature and the nature of the world. […] In contrast, a natural-*rights* analysis uses a natural law given-if-then methodology to identify the liberty or space within which persons ought to be free to make their own choices. It seeks to determine the appropriate social structure within which people ought to be free to do as they please."[227]

In other words, natural law "provides guidance for our actions" and "natural rights define a moral space or liberty […] in which we may act free from the interference of

221 Barnett (footnote 28 above) 664.
222 Barnett (footnote 28 above) 666.
223 Barnett (footnote 28 above) 664.
224 Barnett (footnote 28 above) 666. Barnett's emphasis.
225 Barnett (footnote 28 above) 667.
226 Barnett (footnote 28 above) 667-668. Barnett's emphasis.
227 Barnett (footnote 28 above) 668. Barnett's emphasis.

other persons." The ethics of natural law guides us, or "instructs us", on how to use our right to self-determination, which is in turn *protected* by natural rights.[228]

Pertinently, Barnett notes that conclusions reached through the natural law method should not be imposed through force, if that imposition would be contrary to the framework of society defined by natural rights.[229]

Lysander Spooner wrote that "*the rule, principle, obligation or requirement of natural justice*" is that "natural, universal, impartial and inflexible principle, which, under all circumstances, necessarily fixes, determines, defines and governs the civil rights of men". The ambit of this requirement of natural justice is defined as such: Its origin is in the natural rights of individuals and "keeps them ever in view as its end and purpose". It must be directed at securing "their enjoyment, and [forbidding] their violation". As far as property rights go, it must secure "all those acquisitions of property, privilege and claim, which men have a *natural* right to make by labor and contract".[230]

Spooner regarded natural rights as inalienable, even to government. Rights are as natural as nature itself and cannot be abandoned. All government conduct, as a result, must be consistent with natural rights. The only role, thus, that Spooner could conceive of for government, was the adoption of "means […] for the better protection of men's natural rights".[231]

5.2.4 Rights as a social phenomenon

Not all libertarians, however, adopt a natural rights approach to the theory of rights.

Michel argues that rights are "the means by which we can reasonably predict human behavior". We need to predict human behaviour because humans are generally dangerous to one another, and this fact conflicts with another aspect of human nature: That people are social. The question then becomes, "How can we reconcile our violent impulses with the need to live together?" To Michel, far from it being "in the nature of

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228 Barnett (footnote 28 above) 669. Barnett's emphasis.
229 Barnett (footnote 28 above) 669.
230 Spooner (footnote 61 above) 6. Spooner's emphasis. The "natural justice" Spooner wrote of must not be confused with how the largely procedural principles of natural justice are regarded in South Africa. Spooner's "natural justice" is instead a theory of natural rights.
231 Spooner (footnote 61 above) 8.

human beings to have rights", rights are "in the nature of human societies". Rights do not come from government or nature, but "are the very stuff of social existence".[232]

Michel further writes of how rights can be created contractually.[233]

5.2.5 The principle of generic consistency and argumentation ethics

The libertarian jurist Roger Pilon defines a right conventionally. It is "a justified claim to stand in a certain relationship with some other person(s) such that the other has an obligation correlative to the right". This means, simply, that someone has the obligation to either do or refrain from doing something.[234] Pilon, however, bases his idea of the origin of rights not on the traditional subjective rights theory, but on Alan Gewirth's principle of generic consistency which he (Pilon) developed within the framework of libertarian rights.

Gewirth's thesis can be summarised as follows: When individuals act, they necessarily make claims about themselves. They must accept that these very same claims apply to all other people as well, otherwise they are engaged in self-contradiction. In other words, one "must accept the implications of the claims he necessarily makes about himself; he must accept that others have the same rights he himself necessarily claims". These 'claims' are not necessarily verbal demands or requests for rights, but can manifest through our actions and, thus, be implicit.[235] Gewirth therefore argued that "because our actions are conative [that is, volitional], when we act we cannot avoid implicitly claiming rights to the integral generic features that characterize that action". To take a basic example, by simply climbing in a bathtub, a person is implicitly claiming (and cannot *but* claim) *inter alia* the right to undress, lift their leg, put it in the water, and immerse themselves in the water. And because a person implicitly claims this right, of necessity they also recognise and accept the right of others to do the same; for if they did not, they would be denying their own right to do so – a performative contradiction. A performative contradiction cannot be escaped by simply "explicitly asserting" that one does not, in fact, have such right to act, because in so doing one

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232 Michel (footnote 117 above) 211-213.
233 Michel (footnote 117 above) 214.
234 Pilon (footnote 128 above) 1176.
235 Pilon (footnote 128 above) 1177. Pilon's emphases. It should be noted that in the context of Pilon's article, he was responding critically to Gewirth's recent departure from his (Gewirth's) own earlier theory about rights.

would implicitly “be asserting that right” anyway, and thus “contradicting his denial: his denial, that is, is contradicted by the facts in the matter”.[236]

Pilon writes that one’s rights are “logically connected with his action and hence are his to claim and no one else’s.” But one cannot claim rights beyond “those generic features of *his* action that are *his* to claim”, and if one attempts to do so, the claim “would be to go beyond the foundation from which his claim springs, beyond the property – his action – in which the claim is grounded”.[237] For example, if one claims the (positive) right to internet access, one is no longer concerned with one’s own actions, but with obliging action from others.

Pilon writes:

> “[…] that human action is the basic subject matter of ethics, i.e., that ethical rules function to direct action, and that human action is voluntary, in that it proceeds from choice, the freedom entailed by that fact, and the claims to freedom implicit in our action, militate ineluctably against the forced association that ‘rights of recipience’ [positive rights] involve”.[238]

Proceeding to criticise the so-called positive conception of rights – or “rights of recipience” – Pilon sketches out how those who conceive of rights as such approach the issue:

> “It begins from the obligation not to cause harm and then argues that to refrain from assisting others is to cause them harm: hence the obligation not to harm entails a positive obligation to render assistance when others need it, the failure in which violates, if not their rights of recipience, at least their rights against harm.”

This, however, straightforwardly cannot be, because omissions (in the words of Pilon, “not-doings” and “refrainings”, for instance, from assisting someone) are not “causally efficacious”. This means that conditions like “peril, hunger, ignorance, general want” can be explained with reference to various causes – including self-inflicted causes – of which the “putative obligation-holder” is not one. A “not-doing”, argues Pilon, does

236 Pilon (footnote 128 above) 1179-1180.
237 Pilon (footnote 128 above) 1182.
238 Pilon (footnote 128 above) 1186.

not itself change anything in the world, and is therefore not "a causally efficacious event".[239]

The principle of generic consistency – "a principle of equal freedom" – holds that:

> "(a) there are no obligations toward others *to* act, (b) there are no obligations *not* to act when doing so involves no recipient, and (c) when there *is* a recipient there is an obligation not to coercive or harm him, i.e., to obtain his consent before involving him in transactions."

Pilon then concludes that "the most basic right" that flows from the principle of generic consistency is the "right to noninterference", in other words, "the right to be free".[240] The principle of generic consistency is therefore clearly both egalitarian and universal. It applies to everyone, across space and time, because of its grounding in human action.[241]

The contemporary libertarian philosopher and economist Hans-Hermann Hoppe developed the idea of argumentation ethics as the "ultimate justification" for libertarian philosophy, specifically the notion of self-ownership. Its nature is similar to the principle of generic consistency. Argumentation ethics, essentially, posits that by arguing for State action, that being conduct that infringes upon individuals' self-determination over themselves and their property, one is arguing for aggression (since wilful cooperation is dispensed with). By arguing for aggression, one is engaged in a performative contradiction, because by *arguing per se*, one is presupposing the exclusive right to control oneself and by merely being alive, one has also presupposed the right to appropriate resources (property) to sustain that life. As such, no *argument* for aggression (always to be distinguished from defensive force) is logically possible.[242] Philosopher Roderick Long, in turn, condensed the argumentation ethics argument to the following:

> "1. No position is rationally defensible unless it can be justified by argument.

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[239] Pilon (footnote 128 above) 1183.

[240] Pilon (footnote 128 above) 1184-1185.

[241] Pilon R. "Corporations and rights: On treating corporate people justly". (1979). 13 *Georgia Law Review*. 1269.

[242] Stolyarov G. "Doubt the action axiom? Try to disprove it". (2006). Ludwig von Mises Institute. https://mises.org/library/doubt-action-axiom-try-disprove-it.

2. No position can be justified by argument if it denies one or more of the preconditions of interpersonal argumentative exchange.

3. Interpersonal argumentative exchange requires that each participant in the exchange enjoy exclusive control over her own body.

4. To deny the right of self-ownership is to deny exclusive control over one's own body.

5. Therefore, the denial of the right of self-ownership is rationally indefensible."[243]

Rothbard, too, foreshadowed a type of argumentation ethics when he wrote, in the context of the right to life underlying the libertarian ethic:

> "[…] *any* person participating in any sort of discussion, including one on values, is, by virtue of so participating, alive and affirming life. For if he were *really* opposed to life, he would have no business continuing to be alive. Hence, the *supposed* opponent of life is really affirming it in the very process of discussion, and hence the preservation and furtherance of one's life takes on the stature of an incontestable axiom."[244]

The difference between Pilon and Gewirth's, and Hoppe's, approaches respectively is that Pilon and Gewirth have as their point of departure in the concept of *action*, in contrast to Hoppe's approach, which proceeds from the concept of *argumentation*.[245]

5.2.6 Nemo plus juris *applied to public law*

Ulpinian, when describing the *nemo plus juris* rule[246] in the Digest of the *Corpus Juris Civilis* stated that "(a) delivery of property should not and cannot transfer any more

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[243] Long RT. "The Hoppriori Argument". (2004). *Austro-Athenian Empire*. http://praxeology.net/unblog05-04.htm#10.

[244] Rothbard (footnote 58 above) 32-33. Rothbard's emphasis.

[245] See footnote 18 in Hoppe H-H. *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy*. (2006, 2nd edition). Auburn: Ludwig von Mises Institute. 315.

[246] The rule *nemo plus iuris ad alium transferre potest quam ipse habet* – one cannot transfer more rights than he himself has to another. See Smith (footnote 126 above) 109-110 for a contrary position. Smith argues that government's role as a protector of individual rights necessitates that it must have "unique authority that is greater than the sum of the individuals' authority that it replaces".

right in the same to him who receives it than he who delivers it possessed".[247] This rule has appeared in various places in private law, including the law of succession and property law, and, as we shall see, has certain applications in public law.

Leonard Read writes that politicians and government officials "can have no rights of action which do not pre-exist as rights in the individuals who organize government". In other words, if an official may not do something as a civilian, they may not do something as an official.[248] This is perhaps the libertarian public law counterpart to the *nemo plus juris* rule, which means that one cannot transfer a right which one does not oneself have; that is, a political community cannot 'vote' to give officialdom the right to aggress against individual and property rights, because the members making up that political community themselves do not have such a right. Indeed, *nemo plus juris* formed part of Roman public law as well, and it is nevertheless possible in legal theory to apply such legal principles to various contexts by induction.[249] But Read does not think *nemo plus juris* proscribes the existence of government. He writes that because all individuals have the right to defend (through force) themselves and their property, they may "delegate this right of defense to a societal organization. We have here the logical prescription for government's limitation". Thus viewed, the only legitimate role that a political community can ever bestow upon a State government is to protect individual and property rights.[250]

Malan notes that people have a "primordial right to personally protect his/her right to freedom from violence", and that the State "merely enforces this right on behalf of the citizen". By delegating this right to the State, individuals secure "public peace and social order", lest there be chaos as each person engages in legal self-help.[251] This is the quintessential version of the social contract. Where, however, the State "is incapable of effectively [protecting freedom on behalf of the people], individuals whose rights are under threat are at liberty once again to resort to self-help". Crucially, Malan writes that the renunciation of one's primordial right to protect their freedom and

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[247] Ulpianus. "On Sabinus, Book XXIX" in Scott SP (ed). *The Civil Law: Including the Twelve Tables, the Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions of Leo.* (1932 edition). Cincinnati: Central Trust Company.

[248] Read (footnote 119 above) 34.

[249] De Berier FL. "Remarks on the methodology of private law studies: The use of Latin maxims as exemplified by *nemo plus iuris.* (2015). 21(1) *Fundamina: A Journal of Legal History*. 66.

[250] Read (footnote 119 above) 34.

[251] Malan K. "The inalienable right to take the law into our own hands and the faltering state". (2007). 4 *Journal of South African Law*. 646-647.

property is never final, but always dependent on the effectiveness of the State on doing its duty. "The basic and foremost obligation of the state", argues Malan, "is to ensure the security of its citizenry". Failing to fulfil this obligation threatens the "(continued) existence and legitimacy" of the State.[252]

The implication of Read's thesis, however, should not be discounted, for within libertarian jurisprudence the ground of justification known as "official capacity" or "authority"[253] – particularly authority bestowed by legislation – might not be available to officials, especially to police officers, who engage in conduct that civilians themselves have no right to engage in. This might include stop-and-frisk, random vehicle searches, traffic stops, or internet surveillance, for example. This would especially be the case if it is found that the subject of the official's conduct – the person being searched, stopped, or surveilled – was innocent. This finds ironic resonance in the work of Murray Rothbard, the anarcho-capitalist jurist, who wrote:

> "[P]olice may use […] coercive methods *provided* that the suspect turns out to be guilty, *and* provided that the police are treated as themselves criminal if the suspect is not proven guilty. For, in that case, the rule of no force against non-criminals would still apply."

Indeed, Rothbard writes that no force may be used against non-criminals – those who have not infringed on others' rights – and if such force is used even by law enforcers, it is "an invasion of that innocent person's rights, and is therefore itself criminal and impermissible".[254]

This is ironic because Read stopped calling himself a libertarian as he opposed anarchism.

5.2.7 Economic and property rights

According to Bastiat, property is "the right that the worker has to the value that he has created by his labor", and regards property as an institution that pre-exists law. If his thesis is correct, Bastiat argues, legislators' "jurisdiction [must be] limited to guaranteeing and safeguarding property rights". If his thesis is incorrect, legislators

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252 Malan (footnote 251 above) 650-651.
253 See Snyman CR. *Criminal Law*. (2014, 6th edition). Durban: LexisNexis. 128-129.
254 Rothbard (footnote 58 above) 82. Rothbard's emphasis.

would be allowed "to organize, modify, and even eliminate property if [they deem] it good to do so". Just like the law does not create the human person, it does not create property. To Bastiat, "Property is a necessary consequence of the nature of man" – property is necessary to sustain human life, meaning it is inevitable that all people are somehow proprietors.[255] He summarises his approach to law and property rights aptly:

> "Property is prior to law; the sole function of the law is to safeguard the right to property wherever it exists, wherever it is formed, in whatever manner the worker produces it, whether individually or in association, provided that he respects the rights of others."[256]

To Bastiat, the very institution of law is the result of a collective desire to recognise and protect people's (pre-existing) property rights. In other words, "law is born of property, instead of property being born of law". Law is "the combined force of all members of society" aimed at protecting the property of the weak from the whims of the strong.[257] Notably, Bastiat does not arbitrarily identify this conception of law and property with his native France or with the West, but notes that even "a savage" who has mixed their labour with nature acquires property rights. Indeed, this uncivilised tribal context is where Bastiat finds the origin of law, where 'savages' sought an institution to stop the "abuse of force" that people engaged in to acquire property from one another.[258] Indeed, here Bastiat identifies law as a means to protecting property closely with what is sometimes called the social contract. With that said, Bastiat rejects Rosseau's conception of the social contract, because the latter regards rights, particularly property rights, as a social invention rather than a natural phenomenon.[259]

Bastiat wrote that in the United States, property rights were regarded as superior to law, and that government's attention was directed at giving effect to property rights. As a result, the uncertainty that Bastiat regarded as inherent to legal systems where property rights were regarded as an institution inferior to other social goals, did not prevail in America. It is therefore for that reason that economic growth and production were more easily attained in jurisdictions like the United States of America rather than

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255 Bastiat (footnote 62 above) 97-99.
256 Bastiat (footnote 62 above) 109.
257 Bastiat (footnote 62 above) 99-100.
258 Bastiat (footnote 62 above) 99.
259 Bastiat (footnote 62 above) 101-103.

Bastiat's native France. Entrepreneurs in France, whose time, labour, transactions – their property – could be disposed of by law at the legislator's whim, had no guarantee that their investments or initiatives would be safe; all because it was not believed that the law pre-existed and established property rights.[260]

One must not be deceived by Bastiat's repeated reference to property rights as opposed to other rights, for he more often than not uses the terms "property" and "liberty" interchangeably. To Bastiat, property is "the right to enjoy the fruits of one's labor, the right to work, to develop, to exercise one's faculties, according to one's own understanding, without the state intervening otherwise than by its protective action". This is also the definition he assigns to liberty.[261]

Randall Holcombe summarises how property comes to be legitimately owned within the Lockean-Rothbardian libertarian paradigm:

> "People own themselves, and come to own property by combining their labor, which they own, with unowned natural resources. Thus, someone can come to own a piece of land by combining his labor with unowned land to farm it, build a house, or in other ways combine his labor with the unowned land. The land then becomes the legitimately-owned property of the individual who combined his labor with it".[262]

Michel writes that it is rights, not property, that are transferable. In other words, even if an owner loses possession of their property, the "bond between that property and its owner" has not been broken.[263] This is an uncontroversial aspect of the South African common law (of things) as well: Possession and ownership are distinguished, and loss of possession does not translate into loss of ownership.[264] Where existing South African positive law and libertarian jurisprudence might diverge, is where under libertarian jurisprudence there is generally no recognised right to object or resist when an owner reclaims their property,[265] whereas law currently does recognise such valid objections, even if only in the abstract. For instance, unlawful possessors may approach the courts – under protection of *jus possessionis* – when the lawful owners

260 Bastiat (footnote 62 above) 107-108.
261 Bastiat (footnote 62 above) 109-110.
262 Holcombe RG. "Common property in anarcho-capitalism". (2005). 19(2) *Journal of Libertarian Studies*. 6.
263 Michel (footnote 117 above) 216.
264 See also Chapter 4.3 above.
265 Michel (footnote 117 above) 216-217.

require possession without the former's cooperation.[266] This is said to be part of the law's general aversion to self-help.

Jessica Flanigan writes that the failure to regard economic liberties, that is the right to own private property, freedom to contract, and pursue one's own economic affairs freely, as vital and on par with other liberties, has conceptual as well as practical consequences. To illustrate this point, she makes use of the arguments often put forward by social democrats[267] (like John Rawls) that there is a difference between so-called basic and non-basic liberties. Liberties are 'basic', and therefore must be prioritised over competing social values, if they facilitate individuals' ability to have a sense of justice, and their capacity to author their own life stories. Other liberties, which play no role in this facilitation, must be regarded as secondary to competing social values.[268]

Thus, for instance, freedom of expression to a social democrat is a basic liberty, and must, as a general rule, take precedence over social considerations of decency or quietness. So, a new mosque's call to prayer, as a manifestation of freedom of religion, should be allowed even if its continued presence might decrease the market value of the properties surrounding it. In the same breath, freedom of contract, to a social democrat, is not a basic liberty, and therefore as a general rule be subordinated to considerations of fairness.

Flanigan, however, writes that economic liberties are utilised by individuals to engage in self-authorship. For instance, some people's identities are "essentially linked to owning productive property". Furthermore, the reasoning social democrats employ to argue against the 'basicness' of economic liberties can be used to dispute the basicness of those liberties social democrats *do* regard as basic, like freedom of expression. For example, social democrats might argue that "absolute economic freedom" is not realistic. But the same could be said of freedom of expression.[269] Flanigan also later quotes an example made by libertarian philosopher Jason Brennan, who writes of how Epictetus was able to develop his sense of justice as well

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[266] Van Schalkwyk and Van der Spuy (footnote 165 above) 55.

[267] Flanigan uses the terms "egalitarian liberals" and "high liberals". I omit this terminology because the word "liberal" takes on a different meaning outside of the American context. In the South African context, social democrats might be conceived of as moderate Transformationists.

[268] Flanigan (footnote 78 above) 457.

[269] Flanigan (footnote 78 above) 458.

as his own life story better than most of his contemporaries, yet he was literally a slave. Thus, it can be said that virtually no liberty recognised today would qualify as 'basic' if the only criterion for basicness is that it must facilitate self-authorship and a sense of justice.[270] In other words, excluding economic liberties from the ambit of 'basic liberties' is conceptually problematic because it is arbitrary, as economic liberties do, in fact, facilitate individuals' capacity to author their own life stories. This exclusion also has a practical consequence, namely that without protection for economic liberties, other basic liberties will themselves be undermined, as economic liberty is important to such freedoms as communication, association, and movement, among other things.[271]

5.2.8 Limiting rights, conflict of rights, and the relational nature of rights

Perhaps one of the most contentious aspects of libertarian jurisprudence, and certainly the aspect where the tension with mainstream legal thought would be highest, is the legitimate extent of individual liberty and property rights. Jurisprudence has long been occupied with debates around the limitation, conflict, and balance of rights, and libertarian legal theory is no exception. The following paragraphs address some of the most notable elements in this discussion.

Roscoe Pound once noted:

> "No doubt there is a logical contradiction in terms in the phrase abuse of rights or abusive exercise of rights. Hence, it has been said that the right ceases when the abuse begins."[272]

In the South African context, Van der Merwe and Olivier write that the notion of "abuse of rights" is erroneous:

> "When a person exercises one of their rights or competencies, they are acting reasonably, and the consequences of that exercise cannot be unlawful."[273]

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[270] Flanigan (footnote 78 above) 461-462.
[271] Flanigan (footnote 78 above) 459.
[272] Pound R. "Critique: W. Friedmann's 'Law in a Changing Society'." (1961-1962). 46 *Minnesota Law Review*. 122.
[273] Van der Merwe NJ and Olivier PJJ. *Die Onregmatige Daad in die Suid-Afrikaanse Reg*. (1980, 4th edition). Pretoria: JP van der Walt. 68. My liberal translation from the original Afrikaans.

A 'limited right', then, from a libertarian point of view appears evidently to be a contradiction in terms, in that it cannot be said that a right has been exercised abusively if there is in fact no right to engage in such abuse. However, the mainstream view in legal scholarship today is that one's rights are *limited* by the rights of others, with such rights nowadays not merely including others' negative (liberty) rights but also an expanded definition of rights, including second- and third-generation rights. It is also said that rights may be limited in the public interest. The Constitution goes as far as to include a provision called "Limitation of rights" in section 36, in addition to the various other internal limitations on rights like those provided for in section 16(2) and section 25(2). The constitutions of various jurisdictions have similar provisions – to limit rights "for certain democratically justifiable purposes"[274] – like section 1 of the Canadian Charter of Rights and Freedoms,[275] article 19 of the German Basic Law,[276] and section 24 of the Constitution of Kenya,[277] the last of which is in part based on South Africa's section 36.

One libertarian argument regarding the limitation of individual rights is put forward by Rothbard, who posits that the confusion around limitation is evident from the fact that "human rights" are conceived of separately from property rights. According to Rothbard, human rights *are* property rights, and when it is not conceived of in that way, the conception turns "out to be vague and contradictory", leading to the weakening of those rights in the name of "'public policy' or the 'public good'".[278] Rothbard uses the example of freedom of expression, which he asserts is not an additional or independent right, but rather something manifested in the property rights of the person in question. The illustration often used by proponents of a limitable conception of rights to show how the "right" to freedom of expression cannot be absolute, was for example employed by Holmes J in the United States Supreme Court case of *Schenck v United States*, in which he said:

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[274] Ahmed D and Bulmer E. *Limitation Clauses: International IDEA Constitution-Building Primer 11*. (2017, 2nd edition). Stockholm: International Institute for Democracy and Electoral Assistance. 3.
[275] Part 1 of the Constitution Act, 1982.
[276] Basic Law for the Federal Republic of Germany, 1949.
[277] Constitution of Kenya, 2010.
[278] Rothbard (footnote 58 above) 113.

> "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[279]

This restriction of the "right" to freedom of expression could have been avoided, argues Rothbard, had this "right" been conceived of as part of property rights. Rothbard argues that had a property rights analysis been performed, two solutions to the problem would have presented themselves:

- If the shouter was the owner of the theatre: The owner would be "violating the property rights of the patrons" by effectively stealing the money they had paid for the ticket guaranteeing an enjoyable and eventless performance.
- If the shouter was a patron: That patron would be infringing on the property rights of the other patrons in the same way, but also on that of the owner, who did not authorise such conduct.

If any patrons were injured in the ensuing chaos, according to the libertarian self-ownership theory, they might also have property rights-based claims against the shouter. The personality right to bodily integrity would also be an acceptable source of a claim for damages. A similar invocation of personality rights for emotional shock, however, might be a more difficult argument to sell.

For Rothbard, prosecution would thus follow in terms of property rights (in the libertarian sense). That means that Holmes J's restriction of "the absolute nature of rights" would have been unnecessary.[280] Although Rothbard does not say so, contract law, which I submit is also fundamentally based in property rights, can also be employed to seek satisfaction. Where "rights seem to require weakening", argues Rothbard, it is usually due to the fact that the "locus of ownership", in those particular circumstances, have not been "precisely defined".[281]

Pilon, in turn, with his principle of generic consistency as discussed above, addresses the possibility of *conflicting* rights. He writes that when rights are conceived of as obligations (that is, 'positive rights'), rights will always be "in straightforward conflict", because if one party is *not* compelled to act, then another party cannot enjoy his/her

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279 *Schenck v United States* 249 US 47 (1919).
280 Rothbard (footnote 58 above) 114.
281 Rothbard (footnote 58 above) 117.

(the latter party's) rights; and if a party *is* compelled to act, that same party is unable to enjoy his/her ordinary, 'negative' rights.[282]

The theory of positive (welfare) rights then, is "inconsistent" because it "generates conflicting entitlements". Pilon notes that it would be morally proper and decent if all people did what they ought or should do, for instance, coming to the assistance of their fellows when called upon, but *rights* are concerned with "what we are *entitled* to do, or not do, quite apart from what we ought to do". The (libertarian) alternative, "described by rights to noninterference alone is entirely consistent",[283] in the case of both voluntary (contract, reproduction, etc.) and enforced (delict, crime, etc.) relationships. This is because when people, for example, commit a delict or crime, they are alienating "some of [their] general rights and obligations, which are replaced by new special rights and obligations". So, for example, if a criminal steals something or a reckless individual does damage to someone's property, "the general obligation not to interfere with the wrongdoer or his property is replaced by the special right to do that (to the extent required to rectify the wrong), thus preserving the symmetry of rights and obligations".[284]

It is often said in mainstream legal scholarship that rights are not absolute. This is trite.[285] However, the fact that rights are not absolute is usually taken to mean that rights may be limited or otherwise interfered with, usually through legislative and regulative interventions by the State. Whilst section 36 of the Constitution has made the limitation of rights constitutionally permissible, scholars regard rights as limitable both within *and* outside the context of the Constitution.[286] This, however, does not speak for itself.

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282 This should not be confused with the fact that every right has a corresponding duty by others to respect that right, which is an uncontroversial aspect of libertarian and mainstream jurisprudence. Rights-as-obligations, in this context, simply refers to the contemporary phenomenon whereby certain so-called 'rights' are conceptualised as mere obligations on others to provide those rights, such as a 'right to housing' simply meaning that housing must be provided, by others, and using others' resources.

283 Pilon (footnote 128 above) 1186. Pilon's emphasis.

284 Pilon (footnote 128 above) 1191.

285 See for instance, Basdeo, who describes this as a "truism". Basdeo V. "The constitutional validity of search and seizure powers in South African criminal procedure". (2009). 12(4) *Potchefstroom Electronic Law Journal*. 309.

286 See for instance Badenhorst PJ and Malherbe R. "The constitutionality of the Mineral Development Draft Bill 2000 (part 2)". (2001). 4 *Journal of South African Law*. 768 for a discussion on constitutionally-limited rights, and Hosten *et al*. (footnote 140 above) 277 and Dlamini CRM. "Academic freedom and institutional autonomy in South Africa". (1999). 62 *Tydskrif vir*

It does not follow that rights may be 'limited' simply because rights are not absolute. Usually when it is claimed that a right has been "limited", libertarians would claim that nothing less than an *infringement* of that right has occurred. But rights are inherently *relational* – to use Sartori's term below – and this means that the boundaries of individual rights are defined in the situation at hand, according to the facts of that situation. Rights, therefore, are relational *and situational*. One does not have an abstract right to shoot one's firearm; indeed, this right to freedom of action is only exercised and exercisable with reference to the facts of the case and the rights of others. Edmund Burke, today associated with Western conservatism, conceived of liberty similarly to libertarians:

> "It is not solitary, unconnected, individual, selfish liberty, as if every man was to regulate the whole of his conduct by his own will. The liberty I mean is *social* freedom. **It is that state of things in which liberty is secured by the equality of restraint. A constitution of things in which the liberty of no one man, and no body of men, and no number of men, can find means to trespass on the liberty of any person, or any description of persons, in the society.** This kind of liberty is, indeed, but another name for justice; ascertained by wise laws, and secured by well-constructed institutions."[287]

Shooting one's firearm, to libertarians, can similarly not abstractly be limited, with reference to policy considerations or the ostensible interests of society as determined by the State. There is no right to shoot a firearm in violation of another's rights – one would be exceeding one's right, rather than abusing one's right or making it liable for limitation – but shooting a firearm without infringing on the rights of another may similarly not be limited. Similarly, rights cannot 'conflict'. When one's rights are infringed by another who purported to exercise their rights, no 'conflict' of rights has occurred. Instead, the latter had no right to act the way they did in the first place, and

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Hedendaagse Romeins-Hollandse Reg. 6 for a discussion on the assumption that government may limit rights even in the absence of constitutional authority.

[287] Burke E. *Further Reflections on the Revolution in France*. (1992 edition, Ritche DE [ed]). Indianapolis: Liberty Fund. 8. Burke went so far as to argue that in the absence of liberty, virtue cannot exist (201). Citation found in Klein DB. "Conservative liberalism: Hume, Smith, and Burke as policy liberals and polity conservatives". (2020). *Journal of Economic Organization and Behavior*. 18. Burke's italics, my bold.

all that has happened was an infringement of the rights of the former. As Van der Merwe and Olivier put it:

> "Just as the infringement of a subjective right remains unlawful, the exercise of a right remains lawful. If a person, in the course of using his legal objects, negatively impairs another, this can only mean that they have exceeded their rights and thus have not exercised them."[288]

In other words, again, a right has been exceeded, not exercised in conflict with the rights of another. The same is true in situations where both parties are guilty or negligent in infringing one another's rights – as in the case where two drivers smash their cars into one another after both having driven recklessly.

In the final analysis – according to libertarians – it is not that rights *may be* "limited", but rather that rights *themselves* "delimit" the extent of freedom and self-determination. In the former's case, a new restriction is imposed upon one's rights, and in the latter's case, the only restriction is, and can only be, the same rights of others. Hosten and others put it aptly:

> "It is precisely through this limitation, or *rather delimitation*, of rights that the law, in its objective sense, regulates the interests of persons. If a person transgresses the limits of his right and in this way violates another's rights, an imbalance results which the law has to restore. So, if I by *exceeding my right* of ownership cause damage to my neighbour the law provides that I have to pay compensatory damages."[289]

Contrary to Hosten and others, however, libertarians would not accept the argument that, "[s]ometimes the right of the individual will be regarded as paramount, sometimes that right will be held to be subordinate to the interests of society".[290] The so-called "interests of society", an abstract phenomenon, should play no part in situational analyses where the boundaries of rights are to be defined, according to libertarian jurisprudence. Only the individual and property rights of other individuals, in the

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288 Van der Merwe and Olivier (footnote 273 above) 71. My liberal translation from the original Afrikaans.

289 Hosten *et al.* (footnote 140 above) 277. My emphasis, citations omitted.

290 Hosten *et al.* (footnote 140 above) 460.

situation, are relevant legal factors in this consideration and, as a result, individual rights must *always* be regarded as paramount.

One must not be confused by the ostensible concession that rights are inherently relational to mean that libertarians similarly concede that only some individuals are entitled to individual and property rights. It is a mainstay *essentiale* of libertarianism and as a consequence of libertarian jurisprudence that the generic individual,[291] regardless of their immutable characteristics, including their nationality, is by their nature entitled to self-determine. In other words, they have inalienable individual and property rights. Whether they are Zulu, indigenous American, born into a devout Sunni community in Iraq, or a cosmopolitan Swede, each community of which has its own rules of private law, libertarians would submit that they are all nevertheless entitled to the same liberty. As Von Hayek put it:

> "Law in its ideal form might be described as a 'once-and-for-all' command that is directed to unknown people and that is abstracted from all particular circumstances of time and place and refers only to such conditions as may occur anywhere and at any time."[292]

It is possible to think of this debate around rights in terms of the two juristic conceptions of 'freedom'. One may be referred to as a positivist (or residual) and the other a natural rights (or libertarian) conception.

As seen in Chapter 1, Dickinson provides an apt illustration of the positivist conception of freedom when he defines freedom as "the state of being free to act, and not being subject to arbitrary control or restraint […] *subject to any restraints imposed by the law*".[293] In the context of freedom of expression, Neethling writes that "infringement by the State on freedom of speech is unlawful, *except when a rule of law exists that authorises such infringement*." He continues, writing that the State is "bound to the law and that the rights and freedoms of the subject must be respected, *except in so far as the law has not curtailed* such protection against the State." He continues further,

291 As opposed to particular individuals in particularly societies or situations.
292 Von Hayek (footnote 50 above) 218.
293 Dickinson (footnote 22 above) 273. My emphasis.

writing that the State "has no right to infringe freedom and there exists a presumption of freedom *insofar as the State has not in the public interest restricted freedom*".[294]

The Cato Institute, on the other hand, provides an apt illustration of the natural rights conception of freedom. It defines freedom as:

> "[…] a social concept that recognizes the dignity of individuals and is defined by the absence of coercive constraint […] Freedom thus implies that individuals have the right to lead their lives as they wish as long as they respect the equal rights of others".[295]

In both these conceptions of freedom, there is a proviso. In other words, the respective *definitions* of freedom, in essence, consist of the right of the individual to do as they please, *subject to* a proviso. The proviso is where the conflict between the positivist and natural rights conceptions of freedom lies.

The proviso to the positivist conception is that individuals are free insofar as they are not free under the law. The State, through law, therefore, circumscribes freedom on an *ad hoc* basis. This may also be called the "residual" notion of freedom, where the legal subject is only free insofar as the law has not limited (or indeed extinguished) their freedom.

Thomas Jefferson aptly wrote of the characteristic problem with this conception that libertarians today share:

> "Of liberty I would say that, in the whole plenitude of its extent, it is unobstructed action according to our will. But rightful liberty is unobstructed action according to our will within limits drawn around us by the equal rights of others. *I do not add 'within the limits of the law,' because law is often but the tyrant's will, and always so when it violates the right of an individual*."[296]

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[294] Neethling J. "Enkele gedagtes oor die juridiese aard en inhoud van menseregte en fundamentele vryhede". (1971). *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*. 241, 242, and 247. My liberal translation from the original Afrikaans. My emphases.

[295] Vásquez and Porčnik (footnote 21 above). My emphasis, citations omitted.

[296] Thomas Jefferson to Isaac H. Tiffany. "Thomas Jefferson on Politics and Government". (1819). Legal History Sources. http://legalhistorysources.com/Law508/JeffersonRights.htm. My emphasis.

The proviso to the natural rights conception, then, is that individuals are free insofar as they do not impinge upon the same freedom of others. Freedom is, as a result, circumscribed by a fixed principle: Only where conduct violates the freedom of others, is freedom not present. This natural rights freedom posits that legal subjects are only free insofar as they do not infringe on the freedom of others.

When there is talk of libertarian freedom, many often immediately imagine that this means any single individual is capable of doing as they please without regard to the rights and interests of others. In other words, they can pillage, destroy, and undermine as and when they please without any hope of recourse or defence for their victims. This, however, is not freedom in the natural rights sense, because what is happening here cannot, *by definition*, be freedom. Even if formulated without a proviso, the definition of freedom by its inherent nature implies this proviso. That is: Individuals may do what they want. In other words, freedom means one can do as one pleases. It follows, therefore, that if someone, in the ostensible exercise of their freedom, without my consent physically attacks me, that my freedom is thus violated. That is to say, the definition of freedom defeats itself and is reduced to meaninglessness. By attacking me without my consent, my ability to do as I please has been undermined, since I do not please to be physically attacked. There is, as a result, no freedom in the objective sense. Sartori writes of "political liberty", which means "a permissive, instrumental, and *relational* freedom". Its goal "is to create a *situation of freedom*".[297] Juristically, this is often formulated as saying that every right has a corresponding duty, meaning that the freedom to do for one *inherently* means the obligation to refrain from doing for another.[298]

I submit that this makes the natural rights conception of freedom internally coherent, and that this definition of freedom is inherently more useful than the positivist alternative.

The positivist conception of freedom, on the other hand, is entirely *ad hoc* and, I submit, virtually meaningless. If government can, by law, determine for itself when it may infringe upon freedom, then there can be no notion of the individual having any true freedom from government infringement of their rights. For example, the

[297] Sartori (footnote 1 above) 7. My emphases.
[298] Hocutt M. "Rights: Rhetoric versus reality". (2012). 17(1) *Independent Review*. 54.

presumption in favour of freedom implies that one may own pornography on one's computer. However, this residual, positivist conception of freedom states that if government enacts an Act that prohibits possession of pornography on one's computer, this right is done away with. How can one then argue that the individual at any point in time truly had the right to possess pornography if, at any time, government could take that right away? This conception of freedom is completely arbitrary and depends in every instance on what government decides will be enumerated in the law. I submit that the positivist conception of freedom is, theoretically and especially practically, useless.

In contradistinction, the natural rights conception of freedom allows the legal subject to order their behaviour in such a way that their own freedom is left intact and they can avoid impinging on the freedom of others.

5.2.9 The singularity or plurality of "right(s)"

Finally, it is worth bearing in mind that from a libertarian-legal perspective, the concept of rights does not refer to a compendium of separate rights (that is, rights are not *plural*), for indeed the organising *essentialia* of libertarianism are individual self-determination and non-aggression. This means that one can do *whatever* one wants provided one does not deny this same right to others. In other words, there is no 'list' of rights that one 'has', but there is only a general right to do as one may.

Smith notes this confusion that often arises when one speaks about rights in the plural sense, like freedom of expression, assembly, gathering, or the right to privacy. Conceiving of right*s* as such creates the impression that all rights could, hypothetically, be enumerated. Smith argues convincingly that instead of conceiving of rights as a plural phenomenon, these plural instances are rather "applications of the *single right to freedom of action*".[299] Pilon writes that "specific rights" are "exemplifications" of the "basic general right" to non-interference. Barnett, in turn, writes:

> "*Rights are unenumerable* because rights define a private domain within which persons have a right to do as they wish, provided their conduct does not encroach upon the rightful domains of others. As long as their actions remain within this

[299] Smith T. "Rights conflicts: The undoing of rights". (1995). 26(2) *Journal of Social Philosophy*. 142. My emphasis.

rightful domain, other persons – including the government – should not interfere. Because people have a right to do whatever they please within the boundaries defined by natural rights, this means that the rights retained by the people are limited only by their imagination and *could never be completely specified or enumerated*."[300]

Pilon does not, however, endorse the view that (the libertarian conception of) rights should necessarily trump all other considerations. He writes that while rights are inherently concerned with protecting individual liberty (as opposed to generating high standards of living), this does "not always blend well with the vicissitudes of life".[301] He takes the example of someone who is drowning. Another person wants to rescue the drowner, which the former person by right may do. The problem is that to rescue the drowner, this individual must cross someone else's property and by necessity would need to do damage to that property. The property owner, by right, has no obligation to participate in the rescue. The question then becomes, writes Pilon, can the property owner prevent the would-be rescuer from saving the drowner? Must bystanders take the side of the property owner, or should they facilitate the rescue despite the owner's wishes? South Africa's common law of necessity recognises that coming to the assistance of such a drowner, even if the event is taking place on private property, would be legally authorised.[302] However, by a strict conception of rights from a libertarian perspective, the property owner can make use of "a further, second-order right to enforce [their] first-order rights", and thus prevent the rescue. A slightly weaker conception would disallow the owner to use force to prevent the rescue, but would require the rescuer to make restitution for the damage caused to the property. An even weaker conception would require the property owner to bear the whole or part of their loss. Pilon argues that both weaker positions are difficult to justify within rights theory and according to the principle of generic consistency. As a result, Pilon argues that rights will sometimes have to be overridden "as a matter of social policy". But, stresses Pilon, we must not confuse the fact that rights might need to be overridden with the

300 Barnett RE. "A Ninth Amendment for today's Constitution". (1991). 26(1) *Valparaiso University Law Review*. 425. My emphasis.

301 Pilon (footnote 128 above) 1193.

302 See for instance Snyman (footnote 253 above) 118-119, where the author discusses the requirements of successfully pleading necessity as a defence against being held criminally liable for unlawful conduct. Snyman writes that "One can also act in a situation of necessity to protect another's interest, such as where X protect Y against attack by an animal" (citations omitted).

absence of those rights in the first place, or with the existence of obligations that, in fact, do not exist. When social policy trumps rights, it amounts to nothing more than a "*violation* of rights" – however justified it might be – and that rights theory must not be bent to ensure "the right and the good come out always the same".[303] When rights are justifiably violated, it is "not in the name of rights" – as for example, I submit, taxes are increased exponentially in the name of so-called socio-economic 'rights' – but rather "in the name of shared values, which we should be candid enough to admit we are imposing upon those we are forcing to yield what is rightly theirs".[304]

5.3 Libertarian conceptions of law

5.3.1 Defining 'law' and its purpose

Smith writes, albeit in the context of judicial review:

> "[…] we cannot understand what counts as valid law (law that *should* be upheld by courts) without understanding the authority of the law. We must understand what legitimates the legal system's unique power to compel obedience to its strictures in order to know exactly how far that power extends and what constitutes its objective use."

To Smith, legal philosophy is based on political philosophy. As a consequence, determining the purpose of government is integral to the theory of a "proper legal system".[305] Elsewhere, Smith states this as follows:

> "A legal system's moral authority is not self-bestowed; no regime may arrogate to itself the license to act as it does, acquiring authority by self-declared decree. Because we are inquiring into the basics of legal authority, the explanation must rest in facts external to the legal system itself. And for this reason, an account of law's moral authority cannot stand apart from more foundational conclusions in political philosophy (which, in turn, rely on conclusions of moral philosophy)."[306]

Smith submits that the purpose of government and consequently of (State, positive) law, because of the moral impermissibility of initiating aggression against innocents,

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303 Pilon (footnote 128 above) 1194-1195. Pilon's emphasis.
304 Pilon (footnote 128 above) 1196.
305 Smith (footnote 126 above) 5-6.
306 Smith (footnote 126 above) 88.

is the protection of individual rights.[307] And the law must consist of such rules and practices that ensure the law itself does not "violate the rights that [it] intended to protect".[308]

The making of law relies "on suppositions about what we are entitled to force people to do", writes Smith. No legal rule, in other words, exists without being based on the notion that someone in the circumstances of that rule's application may be forced to act or refrain from acting in a certain way. Because of this, Smith argues that law "must stand on a moral foundation", lest government's action be unjustifiable. This means that "both the content of [government's] laws and the administration of its laws (including their formal requirements) must strictly adhere to its mission [to protect individual rights]".[309]

Spooner launched a scathing attack on the definition ordinarily assigned to law – that it is a set of rules made and enforced by the State, directing the behaviour of legal subjects – calling it *inter alia* arbitrary, indeterminate, partial, and amoral. He continued, writing that in terms of this definition, "there is no real distinction between law and force", and as such, "a command to do injustice, is as much law, as a command to do justice", as long as it is "from a will that is supported by physical force sufficient to coerce obedience".[310] To Spooner, this definition of "law offers no permanent guaranty for the safety, liberty, rights or happiness of any one". Instead, "It licenses all possible crime, violence and wrong, both by governments and individuals. The definition was obviously invented by, and is suited merely to gloss over the purposes of, arbitrary power". Without adopting the definition Spooner contemplates – that law is the rule, principle, obligation or requirement of natural justice (in essence, an institution that protects natural rights) – the "law is no longer a science: but a chaos of crude, conflicting and arbitrary edicts, unknown perchance to either morals, justice, reason or truth, and fleeting and capricious as the impulses of will, interest and power".[311]

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307 Smith (footnote 187 above) 54.
308 Smith (footnote 126 above) 82.
309 Smith (footnote 126 above) 82.
310 Spooner (footnote 61 above) 11-12.
311 Spooner (footnote 61 above) 14.

Spooner regarded law as a natural principle that results inherently from human nature. The law, which Spooner argued is an inflexible institution dedicated exclusively to the protection of rights, can only be changed or destroyed if human nature itself is changed or destroyed. And because of law's natural status, Spooner said it is the highest rule of conduct – it is "paramount law". Any other "arbitrary will of any man, or combination of men" must be regarded as inferior to law.[312]

The libertarian political economist Jesús Huerta de Soto defines law "as a series of rules and institutions to which people constantly, perpetually and customarily adapt their behavior". To him and others who subscribe to the theory of spontaneous order, the law did not come about as a result of consciously legislated will, but has rather "been developed and refined through a repetitive, evolutionary process".[313] This spontaneous order theory was developed by the economist Carl Menger and later by the polymath Friedrich von Hayek and jurist Bruno Leoni, and which De Soto summarises as follows:

> "[…] social institutions arise as the result of an evolutionary process in which innumerable human beings interact, each one equipped with his own small personal heritage of subjective knowledge, practical experiences, desires, concerns, goals, doubts, feelings, etc. By means of this spontaneous evolutionary process, a series of behavior patterns or institutions emerges in the realms of economics and language, as well as law, and these behaviors make life in society possible."[314]

Referencing Leoni's work, Italian political philosopher Carlo Lottieri writes:

> "[…] law is not oriented to preserve tradition or spontaneous order *per se*. On the contrary, Leoni thinks that a polycentric and evolutionary order is in a better position to safeguard individual rights. Rules that emerge from the interpersonal exchange of claims are tools that can effectively protect society from the rulers."[315]

It is worth noting that the German historical school of jurisprudence, often associated with Friedrich Carl von Savigny (1779-1861), postulated a very similar conception of

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312 Spooner (footnote 61 above) 7.

313 De Soto JH. *Money, Bank Credit, and Economic Cycles*. (2012, 3rd edition). Auburn: Ludwig von Mises Institute. 20-21.

314 De Soto (footnote 313 above) 21.

315 Lottieri C. "Classical natural law and libertarian theory" in Hülsmann and Kinsella (footnote 117 above) 200.

law in its *volksgeist* ("national-" or "people's spirit") doctrine. As private law jurist Andreas Rahmatian writes of Von Savigny's theory, "the private law of a people has grown out of, and is characteristic of, a given people, like its language, customs and constitution".[316]

Spooner defined law as "an intelligible principle of right, necessarily resulting from the nature of man; and not an arbitrary rule, that can be established by mere will, numbers or power".[317] Spooner wrote about how the term "law" used in a general rather than specifically jurisprudential context means the "*natural*, permanent, unalterable principle, which governs any particular thing or class of things", such as the "laws of mind" (psychology), the "moral law" (ethics), "physical laws" and "laws of motion", (physics, chemistry, etc.). Without such laws being "uniform, universal and necessary", Spooner argued they would not be regarded as laws *per se*. He continues, writing that any "rule, not existing in the nature of things, or that is not permanent, universal and inflexible in its application, is no law, according to any correct definition of the term law".[318] But, as noted above in the discussion on Randy Barnett's work on natural law and natural rights, it should not be assumed that Spooner meant natural law – like the law of gravity – is physically unbreakable.[319]

To Smith, "to do things by law is to do them by force (either is direct application or threat thereof)". Indeed, the law does not suggest or encourage, but enforces, despite the wishes of particular individuals under its jurisdiction to the contrary.[320]

Robert Baker writes that there is a need for law, even from the libertarian perspective, because "human beings are neither omniscient nor omnipotent", will always be capable of making mistakes, and "that something must usually be done about the social consequences of" those mistakes. A legal system, as opposed to the solving of problems through violence, lends "stability to men's dealings with each other", and this is a "prerequisite for a commercial civilization". The purpose of this legal system, for

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316 Rahmatian A. "Friedrich Carl von Savigny's *Beruf* and *volksgeistlehre*". (2007). 28(1) *Journal of Legal History*. 4.

317 Spooner (footnote 61 above) 5.

318 Spooner (footnote 61 above) 5-6. Spooner's emphasis.

319 See also Barnett (footnote 28 above) 664. It is further important to note that Spooner was using the notions of "natural law" and "natural rights" interchangeably, and this is arguably incorrect, which is discussed in the context of Barnett's work above. In the context of Spooner's work, assume any reference to natural law is a reference to natural rights.

320 Smith (footnote 126 above) 82.

Baker, is "to protect rights, and every particular law must in the first instance be weighed according to this criterion".[321]

Sartori, however, writes that the relationship between law and liberty had become tenuous:

> "We must nevertheless admit that the widespread scepticism about the value of the juridical protection of liberty is not unjustified. The reason for this is that our conception of law has changed, and that, as a consequence, law can no longer give us the guarantees that it did in the past. This is no reason for leaving, or creating, a void where law used to be, but it is certainly a reason for staying alert, and not letting ourselves be lulled by the idea that laws stand guard over us while we sleep twenty-four hours a day."[322]

Libertarians tend to regard their conception of law as value neutral. This means that law does not tell anyone how to live their lives: It "impose[s] nothing upon [people] but a mere negation" – no obligation other than abstaining from harming others. Law, in the libertarian sense, "violate[s] neither [someone's] personality, his liberty, nor his property", but simply "guard[s] the personality, the liberty, the property of others".[323]

5.3.2 Libertarian antipathy toward legislation

The above discussion of the role of law from a libertarian perspective might elicit the following question: What is the role of law-making according to libertarianism, or alternatively and more radically, can law really be 'made'? Libertarians direct both conceptual and practical criticisms at legislation as contemporarily understood. Indeed, legislation is today regarded by some as "the prime source of law", and that "deliberate law-making is a sine qua non for the efficient regulation of the modern state".[324]

British jurist Trevor Allan provides a useful summation of Von Hayek's approach to the notion of the Rule of Law and legislation. What follows in this section will be Allan's interpretation of Von Hayek, which I submit is correct.

321 Baker (footnote 212 above) 1.
322 Sartori (footnote 1 above) 34.
323 Bastiat (footnote 60 above) 19.
324 Hosten *et al.* (footnote 140 above) 244.

The law is, at its core, common civil and criminal law, and is fundamentally "a framework for social interaction and co-operation". Notably, this excludes administrative decisions or even legislation that goes beyond codifying common law or directing government structures (not legal subjects) to act in a certain way. Legal subjects should only be subservient to the requirements of this common law, as opposed to being "made an instrument in the pursuit of any specific governmental objective". In all respects other than the general rules of common law – the "universal rules of correct behaviour" that emerged spontaneously – legal subjects must be free to make their own decisions and pursue their own ends. To Von Hayek, administrative discretion is inherently offensive to the Rule of Law because it fundamentally co-opts "the individual or his property in the service of governmental ends". Furthermore, the contemporary tendency to regard all legislation passed by legislatures as 'law' undermines the Rule of Law. The so-called universal rules of correct behaviour emerge in judges' roles "to identify and supplement the rules that preserve an existing order of actions, protecting the expectations it has rightly generated". This order is found in the "inseparable trinity" of "[l]aw, liberty, and property". Judges should not concern themselves with any public policy or political objectives, but only with the principles that govern how free individuals may deal with one another in the spontaneous order of a free society. Crucially, "[t]he law serves no specific purpose intended by any political authority; it merely provides the means for the realization of the countless separate purposes of different individuals".[325]

Von Hayek characterised the traditional role of a legislature as to amend or revoke "rules no longer regarded [by society] as desirable" and to direct *government* conduct as opposed to that of legal subjects, who were instead bound by ordinary common law. Legislation, therefore, was and should play "a subsidiary role" to the spontaneous order of the common law. Von Hayek criticised legal positivists for attempting to replace this state of affairs – that being, that government may only coerce legal subjects when they have contravened the universal rules of correct behaviour – with the idea that whatever a legislature enacts as legislation is properly regarded as law,

[325] Allan TRS. *Constitutional Justice: A Liberal Theory of the Rule of Law*. (2001). Oxford: Oxford University Press. 33.

and thus government may coerce legal subjects because they are not complying with whatever political programme government has embarked upon.[326]

According to Leoni, who was a fellow traveller of Von Hayek so far as commentary on the Rule of Law and legislation was concerned, the codification of existing law – that being, law that came about spontaneously between ordinary people and which was discovered by jurists with reference to particular problems – was legislation's original purpose in both the European civil law tradition as well as the English common law tradition. Legislation that introduced into the law the opinions or whims of politicians and legislators amounts to the "subverting" of law, according to Leoni. Indeed, today in both traditions, legislation introduces novel 'law' that was not part of law prior to such introduction.[327]

To Leoni, it is absurd that ordinary people today accept, in principle, the reality that a ruling elite may at any time step in and dictate how (or whether) they may self-determine. This is absurd because people today make a great many decisions for themselves, like deciding whom to marry, do business with, chat with or how to spend their time, yet will defer to legislators should they decide to interfere in those decisions. In this context, Leoni defines legislation as "*the will of other people* (whomever they may be) *relating to our daily behavior*".[328] Bastiat puts it as follows. When the law is used to do things other than protecting life, liberty, and property; when it "imposes a form of labor, a method or a subject of instruction, a creed, or a worship", it is substituting the will of government – legislators – for the will of ordinary people, "the initiative of the legislator for their own initiative".[329]

Tracing the Roman law conceptions of 'law' (*jus*) and 'justice' (*justum*), Sartori relates that law was not conceived of as only a set of norms that take the *form* of law, but also as a set of norms with just *content*.[330]

Sartori disagrees with the idea that law can simply be 'found'. Indeed, he asserts (but without argument) that only "primitive or traditionalistic societies can do without deliberate and overt lawmaking", before making the point that law-makers must adhere

326 Allan (footnote 325 above) 38.
327 Leoni (footnote 4 above) 10-11.
328 Leoni (footnote 4 above) 7-8. Leoni's emphasis.
329 Bastiat (footnote 60 above) 19.
330 Sartori (footnote 1 above) 34.

to the tenets of the Rule of Law. He however condemns the "formalistic school of jurisprudence" – analytic and positivist jurisprudence – for naively believing that the Rule of Law or *rechtsstaat* principle saves the law from unjust content. This has resulted in the unfortunate state of affairs where "any State command" that takes the *form* of law is, in fact, regarded as law irrespective of its substance. He writes of the formalist conception of law:

> "According to the purely formal definition, a law without righteousness is nonetheless law. Therefore, legislation can be crudely tyrannical and yet not only be called legal but also be respected as lawful. It follows from this that such a conception of law leaves no room for the idea of law as the safeguard of liberty."[331]

Hennie Strydom, in considering the work of Lon L Fuller, criticises a similar phenomenon, noting aptly:

> "If Parliament is not bound by pre-positive legal principles when passing legislation for the country we can easily visualize a totalitarian regime authorized by its own formal legal instruments".[332]

From a practical perspective, Sartori writes that there is a principle of diminishing consequences that must be borne in mind when considering law-making. Liberty, to Sartori, concerns empirical considerations rather than logic in this context. He criticises those who employ the logical approach, whereby it is assumed that because all individuals participate in the electoral process (that is, by electing legislators), "it is *as if* we ourselves made the laws", because by choosing the legislator, the latter represents free people who have agreed to "obey norms that they have freely chosen". This Sartori calls "absurd" and "mental gymnastics", because this logical exercise has no bearing on reality. He writes that, empirically speaking, the fact that individuals may have contributed to the establishment of a legislative body or chosen representatives to go to that body, does not mean they can be assumed to consent or agree with everything that body decides. He illustrates it as follows:

> "[…] from the premise that I know how to swim it may follow that I can cross a river, but not that I can cross the ocean. The 'cause', ability to swim, cannot produce

331 Sartori (footnote 1 above) 34-36.
332 Strydom HA. "The legal theory of Lon L Fuller" in Corder (footnote 2 above) 130-131.

> everlasting effects. And the same applies to the empirical realm of politics to the 'cause', participation and elections."

This is the principle of diminishing consequences: Liberty is not *necessarily* a result of a free and participatory democratic process.[333]

Leoni made the similar point, quoted by Sartori, that the more people who are involved (in other words, a large number of people are 'represented' by a single legislator) and the more issues are at stake (that is, the more the scope of the legislature's reach expands), the less relevance does the so-called 'representation' have. To Leoni, the only way for representation, in its political sense, to regain meaning, is to ensure "a drastic reduction either in the number of those 'represented' or in the number of matters in which they are allegedly represented, or both".[334]

Malan goes so far as to argue that democracy has been conceptualised in such a way that it is designed "to uphold the modern territorial state and to protect it against change". The State and statist intellectual community determine "the nature of its distinctive legitimate government institutions and procedures", and these are "in conformity with its [the State's] needs and interests", and not necessarily the interests of individual liberty or the public good. In other words, "modern democracy and democratic theory (in politics, political theory, and constitutional law) are the thoroughbred offspring of the statist paradigm".[335] To Malan, democracy has become a servant of statism rather than a tool of "direct self-government and the empowerment of individuals and communities', as democracy should be.[336] The idea that people are in fact engaged in self-government in contemporary democracies is a fiction, argues Malan, for the same reasons submitted by Sartori. Malan goes further, however, and argues that this fiction is used to legitimise democracy and defuse any criticisms of that system. He writes:

> "The reality of modern democracy in the large territorial state with its mass population, reveals the notion of a self-governing *demos* to actually be only one of two things. It is either a descriptive myth or demagogic knavery. It is a fiction that

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333 Sartori (footnote 1 above) 31-32.
334 Leoni (footnote 4 above) 19.
335 Malan (footnote 21 above) 175-176.
336 Malan (footnote 21 above) 270.

contributes hugely and efficiently to maintaining the reigning order. While everybody remains under the impression that they are participating in self-government, all people are naturally quite satisfied and happy with the present order of statist democracy. The effect of this is that statist democracy therefore remains stable and indemnified against any possible insistence on change."[337]

It should be evident, however, where statutory instruments like constitutions or legislation are applicable, libertarian jurisprudence adopts the *favorem libertatis* rule of interpretation, which is well-known to mainstream legal scholarship. As Spooner writes, "all language must be construed '*strictly*' in favor of natural right".[338]

5.4 Crime and delict

From the above sections on the libertarian approaches to rights and law, an unavoidable question presents itself: If legal wrongs can only be committed against an individual, what happens to the distinction between criminal law and the law of delict? Does the criminal (*wrong against society*) versus civil (*wrong against an individual*) distinction persist according to libertarian jurisprudence?

Delicts and crimes are similar in that both concern a wrong done by one against another. Contemporary *mala prohibitia* crimes – formal crimes – usually created by legislation, are an exception to this rule, in that no harm was done to anyone but the act itself was criminal (for instance, reckless driving or unauthorised border crossings). The institution of these crimes is certainly intended to protect people or society from some harm or another. However, libertarianism obviously rejects *mala prohibitia* crimes offhand, as it cannot be said that an infringement of liberty – a consequential crime – has occurred, and no victim has therefore been wronged. Some tangible wrong, for example a vehicular crash as a result of reckless driving, must first occur before libertarians would recognise the act as criminal. It must be noted that some statutory crimes, like contravention of section 36 of the General Law Amendment

[337] Malan (footnote 21 above) 188-189. Citations omitted.
[338] Spooner (footnote 61 above) 17-18.

Act,[339] still amount to *mala in se*, because in the event of such contravention there is a discernible victim and an infringement of liberty.[340]

The law of delict is a sector of private law and concerns civil wrongs that have been committed against another person, resulting in some harm to them for which they may claim damages or satisfaction (which libertarians would refer to only as "restitution"). Criminal law is a sector of public law and concerns those wrongs committed not only against persons, but also said to be committed against society as represented by the State, and instead of restitution to the harmed person, it entails punishment by the State.[341] The South African jurists JC de Wet and HL Swanepoel wrote of how all "law was originally private law", including criminal law.[342] In fact, in the customary law of South Africa,[343] which is aimed at giving redress to victims, there is still no clear distinction between criminal law and the law of delict.[344] So-called Western 'crimes' like theft and assault were addressed, prior to the imposition of Western law, through restitution, and in the case of the latter, a fine.[345]

Bruce Benson relates how, in the English legal tradition, the restitution-based, victim-centric (tort) system of the Anglo-Saxons was progressively undermined and replaced by the punishment-based, State-centric (criminal) system from around the twelfth century onwards.[346] Taking the example of prisons, Benson writes of how the Anglo-Saxons were hesitant use prisons for punishment, because such detention led to idleness and the inability to make restitution for the damage caused by the wrong.[347] Rothbard, too, writes of how law prioritised restitution over punishment in *inter alia* medieval Ireland and colonial America. As the State replaced the victim as the focus

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339 General Law Amendment Act (62 of 1955).

340 Section 36 of the Act provides: "Any person who is found in possession of any goods […] in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft". See Snyman (footnote 253 above) 515-519.

341 Snyman (footnote 253 above) 3-4.

342 De Wet JC and Swanepoel HL. *Strafreg.* (1949). Durban: Butterworths. 1. My liberal translation from the original Afrikaans.

343 This is a generalisation. It is acknowledged that there exists no monolithic "customary law".

344 Knoetze E. "Customary law of delict" in Rautenbach C, Bekker JC, and Goolam NMI. *Introduction to Legal Pluralism.* (2010, 3rd edition). Durban: LexisNexis. 105.

345 Knoetze (footnote 344 above) 114-115.

346 Benson B. *The Enterprise of Law: Justice without the State.* (1990). San Francisco: Pacific Research Institute for Public Policy. 60-76.

347 Benson (footnote 346 above) 71.

of criminal law, punishments became more severe and victims received less restitution for the harm done to them.[348]

Rothbard defines a 'criminal' as someone who infringes upon the property rights of another (bearing in mind that to Rothbard, *all* rights are fundamentally property rights): Those rights "to the control and ownership of [one's] own body, and to unused land resources that [one] finds and transforms". Stolen property must be restituted to the owners.[349] If the infringement is not strictly quantifiable, for instance, in cases of assault, the victim acquires the right to themselves assault the wrongdoer (again, bearing in mind that to Rothbard, the perpetrator loses their rights *to the extent* they have deprived the victims of theirs). On this point, Rothbard is upfront about the fact that in libertarian jurisprudence, 'taking the law into one's own hands' is allowed, because fundamentally "*all* rights of punishment derive from the victim's right of self-defense".[350]

A complete allowance of self-help would, however, defeat the idea of law, even from a libertarian perspective. If avoiding litigation and legal processes (even and perhaps especially outside of the statist context) is regarded as appropriate, then the protection of liberty and property would become very elusive, as chaos would reign, and might would make right. The more appropriate position is likely akin to Malan's formulation discussed above: The greater the law's inefficiency at achieving its purpose, that is safeguarding freedom and security of the individual, including their property, the greater the individual's right to self-help.[351] In other words, where the law is remarkably effective, there is no right to take the law into one's own hands; but where the law does not come to the assistance of imperilled individuals at all or, at worst, *itself* betrays its own purpose, the right to self-help is absolute.

The libertarian theory of 'criminal' law, according to Rothbard, posits that there are only two relevant parties: The victim and the alleged perpetrator. The State, or society, is not a party.[352] To Rothbard, applying a proportionality principle, victims may exact

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348 Rothbard (footnote 58 above) 87.
349 Rothbard (footnote 58 above) 60.
350 Rothbard (footnote 58 above) 89-90. Rothbard's emphasis.
351 Malan (footnote 251 above) 650.
352 One can ascribe this to the fact that Rothbard is of the libertarian anarchist persuasion. However, it is worth bearing in mind that even within the libertarian minarchist paradigm, there is little reason to regard the State as an imperative participant in the criminal justice system. Indeed, libertarian theory only posits of necessity that the State, by law, *protects* persons' individual and property

punishment on wrongdoers to the extent that the wrongdoer deprived the victim of their rights, and that the death penalty can as a result only be invoked (if the victim so chooses) in cases of murder.[353] Thus, for instance, if someone does R20,000's worth of damage to another, they would not only be required to provide restitution of R20,000, but in fact pay another R20,000, because the wrongdoer is *himself* deprived of his rights to the extent that he deprived the victim of theirs.[354] The proportionality principle is thus based on both restitution *and* retribution,[355] rather than paying a debt owed to society.[356] The specificity of how this principle would operate, however, appears to discount the fact that in any legal dispute, the adjudication will take into consideration all the relevant facts of the case. It might be, for instance, that there are factors that mitigate against ordering the wrongdoer to pay the additional, full R20,000. As Leon Louw notes, correctly so in my submission, libertarian thinkers have not taken adequate heed of the "four or six thousand years of very fine jurisprudence" that could enrich and assist the application of libertarian principles to particular cases.[357]

Rothbard rejected the deterrence theory of criminal law, writing that it involves unjust punishments and that it is a slippery slope especially if deterrence was the sole objective of the system. He also regarded the rehabilitation theory as arbitrary and unjust, as it empowered the State or some other group of people to decide when a criminal has been rehabilitated.[358]

It, however, remains an open question whether the distinction between delict and crime is a useful or proper one. But it is not *self-evident*, and indeed libertarians do not accept it as such, that there is a distinction. 'Society' or the State being aggrieved, or the victim of wrongful conduct, is a notion most libertarians would react to with scepticism. In genera there must be an identifiable (rather than abstract) victim in order for the force of law to be legitimately brought to bear upon a dispute. This must be

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rights, not that it must also prosecute and punish. I submit that the restitutionary approach to criminal law still makes sense in the presence of State institutions.

353 Rothbard (footnote 58 above) 85.

354 Rothbard (footnote 58 above) 88.

355 Rothbard (footnote 58 above) 91. Rothbard proceeds to explain why the indignation associated with the idea of retribution is misplaced. He quotes a *Webster* dictionary definition of the word in support of his case, with retribution meaning "the dispensing or receiving of reward or punishment according to the desserts of the individual". See footnote 15 in Rothbard (footnote 58 above) 93.

356 Rothbard (footnote 58 above) 86.

357 Louw L. "Libertarianism and the lessons of common law". (1990). 10 *Legal Notes*. Libertarian Alliance. 1.

358 Rothbard (footnote 58 above) 93-94.

borne in mind as Transformationism, which often deals with abstract groups rather than discernible individuals that have been wronged, is discussed below.

6. CHAPTER CONCLUSION

6.1 Criticism

The above conception of individual liberty and self-determination is not universally accepted as an objective, natural fact, especially as it relates to private property. The next chapter on Transformationism will deal with this in greater detail.

Francois Venter writes that it is distinctively Western thinking that conceives of rights and liberties as self-evident. He writes:

> "The essential inviolability of human liberty and the dangers lurking in government power, threatening the individual and his inalienable right to freedom has indeed achieved the status of the obvious. Western thinking, and not only that of lawyers and philosophers, but especially that of the 'ordinary' citizen, unquestionably accepts the idea that justice is exclusively guaranteed by the upholding of basic rights and liberties."[359]

Reese, on the other hand, states that "unrestricted property rights are by no means natural nor innate", but are a "historic accident". Therefore, Reese argues, "private property seems well open for discussion".[360]

As far as the protection of self-determination is concerned, Malan argues that it is a "misconception that individual rights and the courts are the primary, if not the only, guarantee of constitutionalism and freedom". According to Malan, these things should instead be "cultivated in the sphere of a broadly defined civil society".[361] Elsewhere, Malan writes of the fact that when the superior courts apparently agree with whatever ideological programme government has adopted – in this case, Transformationism – protection for individual and community rights are rendered useless. "Magical" constitutional phrases like the "solemn constitutional agreement", "the rule of law", and

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[359] Venter F. "The Western concept of rights and liberties in the South African constitution". (1986). 19(1) *Comparative and International Law Journal of Southern Africa*. 100.

[360] Reese K. "The need for democratic consent for private property". (1976). 9(1) *Comparative and International Law Journal of Southern Africa*. 83.

[361] Malan (footnote 90 above).

"guaranteed rights" amount to a "constitutional superstition" that has suppressed a realistic understanding of South African political reality. Rather than protecting rights, the courts justify and advance the ideological programmes of government.[362] Self-reliant communities and strong families, writes Malan, provide the protection that the South African Constitution (and so-called supreme constitutions in general) and superior courts cannot.[363]

Malan argues that the fatherland, the *patria*, is "the collective public asset of all citizens of the community", and its physical integrity must be guarded.[364] Government must control immigration in order to "maintain the cultural character" of culturally homogenous communities. To do this, government must control whether and to whom individuals within the community may sell their land. Government must further ensure the "economic well-being" of the community (as it relates to land) and protect the land ecologically. An example of protecting the economic well-being of the community would be to disallow landowners to leave their land unused.

Because the land is in this context regarded as an "indivisible part" of the fatherland, and is thus a *res publicae* (public), which interests the community rather than merely the individual, it is justifiable for the individual's private property rights to be violated. Malan writes that land, in a politocratic dispensation, would not be regarded only as a *res in commercio* – tradeable property – but as a public good and thus *extra commercium*.[365]

Geert de Wet also mentions the problem of public goods. He writes that in a purely capitalist system there are certain goods the market simply cannot provide, and these are goods which the entire community makes use of, that is, use by one person does not decrease the availability of the good to others. The consequence of this is that no individual would be willing to pay for use of the good, since he has access regardless of whether or not he pays.[366]

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362 Malan K. "En op die hof is daar ook nie te vertroue nie". (2017). *Maroela Media.* https://maroelamedia.co.za/debat/meningsvormers/en-op-die-hof-is-daar-ook-nie-te-vertroue-nie/. My liberal translation from the original Afrikaans.
363 Malan (footnote 14 above) 270-271.
364 Malan (footnote 21 above) 293.
365 Malan (footnote 21 above) 294.
366 De Wet (footnote 104 above) 88.

Hoppe, however, disagrees with the notion of public goods. He writes:

> "As a matter of fact, it is almost impossible to find a single contemporary economics textbook that does not stress the vital importance of the distinction between private goods, for which the truth of the economic superiority of a capitalist order of production is generally admitted, and public goods, for which it is generally denied."[367]

Hoppe disagrees with public goods theory *inter alia* on a utilitarian basis, arguing that "to leap from the statement that the public goods are desirable to the statement that they should therefore be provided by the state is anything but conclusive…" He summarises the position, writing:

> "In short, even if one assumed that public goods that can be distinguished clearly from private goods existed, and even if it were granted that a given public good might be useful, public goods would still compete with private goods. And there is only one method for finding out whether or not they are more urgently desired and to what extent, or mutatis mutandis, if, and to what extent, their production would take place at the expense of the nonproduction or reduced production of more urgently needed private goods: by having everything provided by freely competing private enterprises."[368]

Libertarianism also rejects any notion of public goods, including public land, because it conflicts with the libertarian approach to legitimate acquisition of property, which is not unlike the dominant common law methods. If corporeal property is not acquired through original acquisition (or "homesteading") or voluntary transfer, libertarians will not recognise the holder as the owner. The interests of the community or the symbolic connection between land and fatherland are at best irrelevant to libertarians, and at worst a dangerous door left ajar that could lead to oppression.

6.2 Liberty, the legal *status quo*, and reform

As a legal doctrine, it is acknowledged that the doctrine of subjective rights is not a fixed system, but in a constant state of conceptual and practical development. It is consequently not intended to imply that individual self-determination, as a libertarian

[367] Hoppe (footnote 245 above) 5.
[368] Hoppe (footnote 245 above) 14.

ideal, could stand in contrast to subjective rights, for indeed it has been said that the principles of Roman-Dutch common law are "essentially libertarian".[369] But if this chapter's description of the nature and function of law is to be accepted, the notion of the 'Rule of Law' can be rethought to not merely mean that law, as opposed to man, must govern society, but that the law must have a specific content. In other words, if the function of law is the protection of individual self-determination as expressed in the terms of subjective rights, then the 'Rule of Law' means that the protection of individual self-determination is the highest legal ideal. The Rule of Law, then, would be absent where individual self-determination is not recognised and protected.

Indeed, Sartori writes:

> "Today, as yesterday, liberty and legality are bound together, because the only way that we know to construct a political system that is not oppressive is to depersonalize power by placing the law above men. But this bond has never been as precarious and tenuous as it is at present. When the rule of law resolves itself into the rule of legislators, the way is open, at least in principle, to an oppression 'in the name of the law' […]"[370]

There is clearly a tension between the libertarian conceptions of law and rights and those existing in the jurisprudential *status quo*, at least so far as South African (common) law is concerned.

A specific difference between the doctrines relates to the personality right to a good name or reputation recognised in positive law. Whereas according to the personality rights doctrine, one's interest in the "esteem in which he is held by others with whom he is in contact" is protected by law (for instance, by way of the law of defamation),[371] according to libertarian legal thought, it is likely that no such protection could exist. Accordingly, Block writes that one's reputation:

> "[…] is not a possession which may be said to belong to him in the way, for example, his clothes do. In fact, a person's reputation does not 'belong' to him at all. A

369 Wacks R. "Judges and injustice". (1984). 101(2) *South African Law Journal*. 270.
370 Sartori (footnote 1 above) 40.
371 Neethling (footnote 68 above) 27.

person's reputation is *what other people think of him*; it *consists* of the thoughts which *other* people have."

Block, writing from the libertarian perspective, thus concludes a victim of defamation should have no recourse to the law.[372] This is no doubt a radical departure from accepted personality rights doctrine, but an argument could be made in the spirit of harmonisation, at least in various circumstances, that the *de minimis non curat lex* rule applies. Libertarians prize freedom of expression over the justified concerns for personality interests, particularly in light of measures over recent decades to criminalise or otherwise restrict expression to guard people from being offended or emotionally hurt by what others say. The phenomenon of 'micro-aggressions', something which is, for instance today, prohibited at many public universities, serves as an illustrative example.

But this tension between traditional subjective rights and libertarian individual rights is not irreconcilable, for both perspectives basically agree about the essence of what a right is: An institution that delimits the legitimate sphere of free action for an individual, outside of which they require the wilful cooperation of their fellow rights-holders to act.

What interests stand to be protected within the individual's sphere, and whether rights may be overridden in the 'public interest', however, is where subjective rights and libertarian rights appear to diverge.

If the libertarian paradigm is to be accepted as fundamentally correct, the premises underlying the legal *status quo* would require change. The statist notion that legislative interventions can (or should be able to) trump the established, natural or even common law rights of individuals – a mainstay principle in the hierarchy of sources of law – would no longer be operative.[373] Instead, such legislation could only so trump in

372 Block W. *Defending the Undefendable*. (2018). Auburn: Ludwig von Mises Institute. 49.

373 For instance, prior to the constitutional transition of the 1990s, security legislation in South Africa regularly made use of ouster clauses to deny aggrieved individuals the right to approach the courts when government encroached on their liberties. The right to approach a court is a trite common law right, yet both the courts and legal scholars were unanimous in the view that this right can simply be set aside by legislation if that legislation is clear and unequivocal. See Singh A. "A re-evaluation of the common law presumptions of interpretation in the light of the Constitution". (2012). 75 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*. 91. Such would be unacceptable were libertarian presumptions to be taken up into jurisprudence. See also Wintgens LJ. "Legisprudence as a new theory of legislation". (2006). 19(1) *Ratio Juris*. 5: "The legislator is a sovereign actor within political space, and cannot be bound to rules, at least not in the sense a judge is".

specific cases where they hinder the infringement of the individual rights of others. Rights, furthermore, cannot be created, but pre-exist the law's recognition. A libertarian theory of subjective rights would therefore not accept any claim that asserts a right to be cared for by the State, or a right to be treated with respect. Such rights can, indeed, come about within the confines of mutually-agreed-to agreements between parties, but they cannot be generalised and extrapolated onto a non-consenting population.

6.3 Afterword

In this chapter I have discussed the libertarian ideology from both a general philosophical perspective and from a legal-philosophical perspective. In the first respect, I have explained the centrality of the 'self' to the vesting not only of personal liberty but also of private property rights, and the libertarian emphasis on individualism (without derogating from the importance of groups and community). I also discussed the notion of 'aggression' and how it interplays with libertarian thought and theory. Finally, I showed that agreement with libertarian principles does not mean one believes in a free-for-all society without rules. Instead, libertarianism is a legal and political philosophy that concerns the proper use and also the improper abuse of aggressive force in society. One can therefore hold conservative, traditionalist, libertine, or communalist values and practice them, whilst at the same time being a libertarian – all that is required is the absence of aggression: In other words, live and let live.

In the second, jurisprudential respect, I have explained various libertarian approaches to rights and discussed several major aspects of the libertarian approach to law. Libertarians, generally, but not absolutely, subscribe to a natural-rights paradigm that establishes the unalienable and unlimited rights of the individual as the preeminent political and legal imperative in society. Individuals have these rights, according to some conceptions, because of their separateness and biological ability (and necessity) to make decisions and appropriate resources to survive. The rights of the individual pre-exist law and in fact are the *raison d'etre* of law. These rights – alternatively stated, the general right to freedom of action – include the right of the individual to private property, and any law inconsistent with such right is either invalid, or *ipso facto* no law at all. I have shown that libertarianism is not well-disposed toward legislative 'law' and

conceives of a relatively fixed legal doctrine that excludes political innovations. I also briefly considered the libertarian approach to crimes and delicts, with the conclusion that it appears that libertarian theory might not recognise a distinction between the two. Finally, I have shown that libertarian approaches to individual rights, and mainstream (common law) conceptions of subjective rights share the same fundamental logic, are harmonisable, and ought to be harmonised.

Libertarian doctrine as a political philosophy and as a legal philosophy has been comprehensively set out. How it interplays with the legal *status quo*, assumed to be the broad, common law doctrine of subjective rights, has also been briefly considered. I turn now to Transformationism, which offers a challenging affront to libertarian theories of jurisprudence.

CHAPTER 3: TRANSFORMATIONISM

1. CHAPTER INTRODUCTION

This chapter concerns Transformationism within the legal-philosophical context. Since at least 1990, with the publication of Albie Sachs' *Protecting Human Rights in a New South Africa* (discussed below), and certainly since the adoption of the interim Constitution and later the current Constitution, Transformationism – or as it is called in everyday parlance, 'transformation' – has been at the forefront of South African legal discourse. The most common assertion, as will be seen below, is that it is imperative for South African society to transform, and that the Constitution is the main vehicle to achieve this transformation.

The character of the transformation sought for society is different from scholar to scholar. There does, however, appear to be a general left-wing throughline that unites those different perspectives. The most important of these will be considered below.

In my consideration of Transformationism, I take my cue from the jurist Koos Malan, who appears to be the only legal scholar who has correctly identified Transformationism as an ideology unto itself rather than a mere implication of the Constitution.

Malan writes that Transformationism is the master concept of government's ideological project and of the South African political order. Transformationism is the alternative name of the so-called National Democratic Revolution, that requires "all structures of power", the judiciary included, to "be placed under control of the ruling party".[374] It contains "distinctively (leftist) revolutionary ideals" such as the centralisation of power and enforced social equality and homogeneity. Malan argues that there is no difference between Transformationism and socialism, as both are subscribed to the idea that equality is natural, that political or public difference is undesirable.[375]

Malan summarises the goals of Transformationism as follows:

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374 Malan (footnote 14 above) 136-137. See also Malan (footnote 14 above) 200-223 where Malan discusses cases in which the Constitutional Court supported and upheld Transformationism.

375 Malan (footnote 14 above) 194-198.

> "Once the [racial, gender, demographic] representivity principle is fully complied with, the vision of the transformed society will be realised. Then substantive equality will be in place because the economy, in terms of property [etc.] will be spread equally through society and unequal relations of power will be replaced by equality; and once the representivity is fully complied with, all organised spheres in society will be exact replicas of one another and will be reflective of the national population profile".[376]

The word 'transformation', as the term most commonly employed by the ruling political class in South Africa to advocate its programme of social engineering, has as its ordinary meaning "a complete change in the appearance or character of something or someone".[377] This does not reveal the reality of the *type* of change being contemplated, as Malan discusses above, but simply implies that there was something in South Africa's past that persists to this day that is undesirable, and that it must be replaced with something else. Thus, if we are to talk of 'transformation', we could be talking about any kind of desirable change; from authority to liberty, from secrecy to transparency, from hierarchy to equality, etc. It is, therefore, useful to recognise that the contemporary direction of public and legal policy in South Africa has not been one of generic 'change', but instead a conscious and deliberate move away from the structures South Africa inherited, firstly, from Western civilisation,[378] and secondly, from its more recent Apartheid system. However, this movement is not simply *away* from the West and white minority rule, but would also appear to be *toward* a specific future, that is characterised by heavy-handed State interference in what was traditionally considered to be private affairs, and by more or total parity of wealth or prosperity between the races and sexes.

Firstly, I provide the context in which Transformationism must be viewed in South Africa: With reference to the policies and actions of the white minority government that ruled the country up to 1994. This includes a consideration of the political transition of the 1990s and the compromise or conflicted themes in the interim and current constitutions: Liberty and social control. Secondly, I consider the underlying themes

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376 Malan (footnote 14 above) 200.

377 "Transformation". *Cambridge Dictionary*. https://dictionary.cambridge.org/us/dictionary/english/transformation.

378 See for instance Shai I. "The quest for radical transformation and the limits and limitations of law". (2017). LL.D. thesis at the University of Pretoria. 248.

and schools of thoughts of Transformationism, including substantive equality, social engineering, an aversion to (private) property rights, and the influence of the Critical Legal Studies and Critical Race Theory schools. Finally, I hone in on the dominant school of thought that has today been accepted in South Africa – transformative constitutionalism – and discuss its methodological and substantive aspects, before concluding with references to some manifestations of Transformationist thinking in South African legislation and superior court judgments.

2. SETTING THE SCENE: 'TRANSFORMATION' IN SOUTH AFRICA

2.1 Legal-historical context from the Transformationist perspective

The apparent need for social, political, economic, and jurisprudential change in South Africa, specifically in the context of the Apartheid system that was in place roughly between 1948 and 1993 (and arguably long before that) has been well-documented in legal scholarship and is well-known to politically conscious South Africans. It is thus not necessary to repeat all of South Africa's recent history in any great detail in this study. A clear understanding of the context within which the necessity for 'transformation' arose is necessary in order to understand the following discussion of Transformationism. That context will therefore be briefly explored here, and it will be assumed that a change of the policies of the white minority government was necessary and that the legacy of those policies does present a unique challenge today.

The Preamble to the Constitution introduces readers to the apparent need for change from an undesirable past to a better future by stating *inter alia*:

> "We, the people of South Africa,
>
> Recognise the *injustices of our past*; […]
>
> We therefore […] adopt this Constitution as the supreme law of the Republic so as to –
>
>> *Heal the divisions of the past* and establish a society based on democratic values, social justice and fundamental human rights;
>>
>> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. […]"[379]

Prior to the adoption of the 1993 Constitution, the legal-political dispensation in South Africa was characterised by parliamentary sovereignty, a powerful executive branch of government with sweeping security powers, muddled separation of powers, a lack of political accountability to the majority of the population, no constitutionally-entrenched bill of rights, and what Dawid van Wyk refers to as "a racist base".[380] The governing African National Congress, in its 2017 strategy and tactics document, avers that the creation of the South African state in 1910 was "premised on the political and socio-economic exclusion and marginalisation of the Black [sic] majority".[381] David Smith identified the "central pillars of apartheid legislation" as the Reservation of Separate Amenities Act,[382] the Group Areas Acts,[383] the Population Registration Act,[384] and the various Land Acts.[385] The Population Registration Act "classified black and white people according to race, and 'coloureds' according to appearance or general acceptance, as well as according to descent".[386] While it was common practice before 1948 for races to self-segregate in residential areas, the Group Areas Act create a new practice of breaking up existing mixed residential neighbourhoods, irrespective of the fact that the inhabitants of various races had established property rights in those areas.[387] There was a "constitutional entrenchment of white rule" that emphasised State power over rights and brought about the "formal classification and territorial and spatial separation" of racial groups.[388] Legislation of the white minority government *inter alia* "impaired the status of persons who were not white" by restricting

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379 My emphasis.

380 Van Wyk D. "Introduction to the South African Constitution" in Van Wyk *et al.* (footnote 2 above) 132.

381 African National Congress. "The ANC's strategy & tactics 2017". (2018). *Politicsweb*. https://www.politicsweb.co.za/documents/the-ancs-strategy--tactics-2017.

382 Reservation of Separate Amenities Act (49 of 1953).

383 Group Areas Acts 41 of 1950, 77 of 1957, and 36 of 1966.

384 Population Registration Act (30 of 1950).

385 Smith DM. "Redistribution after Apartheid: Who gets what where in the new South Africa". (1992). 24(4) *Area*. 350.

386 Giliomee H and Mbenga B. *Nuwe Geskiedenis van Suid-Afrika*. (2007). Cape Town: Tafelberg. 316. My liberal translation from the original Afrikaans.

387 Giliomee and Mbenga (footnote 386 above) 318.

388 Van Wyk (footnote 380 above) 133.

(or abolishing) their franchise, their ability to own and enjoy property in many parts of the country, and their personal liberty as regards marriage, movement, and self-expression.[389]

In this regard, the classical liberal John Kane-Berman states:

> "Given the nature of the constitution it replaced, it is not surprising that the Constitution of 1996 says in its preamble that the document is designed among other things to 'heal the divisions of the past' and establish a society based on 'social justice'."[390]

The Freedom Charter of 1955 – often cited by Transformationist scholars today as a predecessor of sorts to the Constitution – was adopted by a multi-racial congress and was considered "the most democratic document ever formulated in Africa". The Charter was written by the communist Lionel Bernstein of the white anti-Apartheid Congress of Democrats.[391] Sammy Adelman writes that the Freedom Charter provided "the ideological foundation of the liberation struggle", and summarises its chief provisions as follows:

- The people shall govern;
- All national groups shall have equal human rights and there shall be equality before the law;
- The country's wealth shall be shared by all;
- Land shall be shared by those who work it;
- There shall be equal work and security;
- Educational and cultural opportunities will be open;
- There shall be housing, security and comfort; and
- There shall be peace and friendship.[392]

Khwezi Mabasa summarises the socialist agenda that has guided the South African Communist Party (which maintains a long-standing alliance with the African National Congress) since at least the 1920s:

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389 Van Wyk (footnote 380 above) 134.
390 Kane-Berman J. "Transformation and the Constitutional Court." (2018). AfriForum Report. 4.
391 Giliomee and Mbenga (footnote 386 above) 328.
392 Adelman S. "Some prospects and problems of a post-Apartheid constitution for South Africa". (1989). 8 *Third World Legal Studies*. 135.

> "[…] the first objective was to eradicate race-based oppression, and then proceed to a class struggle for a socialist egalitarian society […] commonly referred to as the two-stage theory."

This is similar to Vladimir Lenin's approach: A struggle for democracy within the capitalist paradigm (the first stage); and once this has been achieved, a socialist revolution (the second stage). Mabasa identifies the Freedom Charter as a commitment to the two-stage approach.[393] Nelson Mandela, on the other hand, claimed that the Freedom Charter was not a blueprint for a socialist state; indeed, that it would enable the flourishing of private enterprises. Ben Turok, the late anti-Apartheid economist and African National Congress (ANC) Member of Parliament agreed with Mabasa's conception. The Freedom Charter formed the basis of the ANC's programme for the ensuing four decades, and remains to this day a great influence on government policy.[394]

Because of the "highly unequal distribution of wealth and life chances in general", David Smith argued that post-Apartheid South Africa "should be positively redistributive" so as "to redress this injustice [by] narrowing the socio-economic gap" between wealthy whites and poor blacks.[395] Geoffrey Schneider later, after the rule of the white minority government had ended, noted that South Africa is at the risk of succumbing to "widespread unrest". This unrest is due to "the continued presence of economic inequality along racial lines". This inequality came about as a result of the previous government's policies, "which amounted to a system of racial capitalism under which black economic activity was severely restricted and black wages were kept artificially low while white workers and white businesses prospered".[396]

The Natives Land Act[397] is described as important "because it was the first major piece of legislation that would later comprise the legal structure of apartheid" that sought – according to various, different sources – *inter alia*:

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393 Mabasa K. "Democratic Marxism and the national question: Race and class in post-Apartheid South Africa" in Satgar V (ed). *Racism After Apartheid: Challenges for Marxism and Anti-Racism.* (2019). Johannesburg: Wits University Press. 175-176.

394 Giliomee and Mbenga (footnote 386 above) 329-330.

395 Smith (footnote 385 above) 350.

396 Schneider GE. "Neoliberalism and economic injustice in South Africa: Revisiting the debate on economic Apartheid". (2003). 61(1) *Review of Social Economy*. 24.

397 Natives Land Act (27 of 1913).

> "[…] to prevent squatting by Africans on white-owned land, to promote agricultural labor, to stop land purchases by Africans, to promote segregation, or to bring about a uniformity of laws (and policy) concerning Africans in the recently formed Union of South Africa."[398]

Black South Africans were confined to so-called scheduled areas, outside of which they may not have acquired land from someone other than other blacks. Similarly, whites were prohibited from purchasing or leasing land from blacks, particularly in the scheduled areas (which would later become the homelands).[399] Giliomee and Mbenga also argue that the Act was one of the reasons blacks moved from their rural homes into the predominantly white urban areas.[400] The Act "threatened essentially every component of the black population's welfare", *inter alia* by ending the black practice of pooling money and purchasing land in so-called "white areas". The Act "was also an attempt to hinder the establishment of independent black small-scale farmers so as to ensure the availability of cheap black labour in rural and urban areas".[401]

Michael Robertson, from a Transformationist perspective, argued in 1988 that the Natives Land Act was one of the first thorough instances in South Africa of extending the law beyond what is considered its traditional functions into the realm of social engineering. Robertson writes:

> "The Act also served to encourage a belief in the primacy of ordering social relations through law. It extended the domain of law to engulf the 'native problem' by signalling that the legal norm was the appropriate way to legitimize control."[402]

He identifies this phenomenon closely with the development of capitalism in South Africa, writing that the Act in fact "reinforced individual rights" and indicated "the extent to which legal hegemony was a vital co-requisite of unfettered capitalist expansion". To Robertson, this "displacement of customary legal practices […] in favour of legal norms emphasizing powers, rights and interests centred on the individual, highlights the function of law in capitalist social formations". This was, apparently, an effort to

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[398] Feinberg HM. "The 1913 Natives Land Act in South Africa: Politics, race, and segregation in the early 20th century". (1993). 26(1) *International Journal of African Historical Studies*. 66.

[399] See Feinberg (footnote 398 above) 68 and Giliomee and Mbenga (footnote 386 above) 233.

[400] Giliomee and Mbenga (footnote 386 above) 205.

[401] Giliomee and Mbenga (footnote 386 above) 233. My liberal translation from the original Afrikaans.

[402] Robertson MK. "Segregation land law: A socio-legal analysis" in Corder (footnote 2 above) 306.

keep individuals contained and ready to serve "the mode of production and, consequently, to the ruling groups". In other words, Robertson identifies individual rights not as conducive to human freedom but, in the vein of the Marxist base and superstructure argument, as part of a legal superstructure that seeks simply to entrench the economic relationships demanded by the base – capitalism – and to ensure that society is thus regimented according to those demands.[403] Robertson concludes:

> "In this way the mechanism of legal control, based upon individuality and private rights, led indirectly to the provision of labour. In short, Roman-Dutch law transposed itself into a domain in which tribal tenure was incompatible with capitalist development."[404]

Earlier, in 1894, the so-called Glen Grey Act in the Cape Colony entrenched white rule *inter alia* by allowing black land ownership and granting blacks representation on their own regional councils. The Act also levied a head tax on younger sons who stand not to inherit their father's lands, so as to encourage them to seek formal employment. The goal of this legislative scheme was to encourage blacks to seek their political fortunes in the native reservations, later the homelands, rather than in the parliament of the whites. This thinking would later form the basis of the National Party's homeland policy.[405]

Lourens du Plessis wrote in the context of the negotiations to end white minority government that the two negotiating camps could be divided into the "libertarians" which, according to Du Plessis, were chiefly white liberals associated with the Democratic Party, but also "newcomers" (those being whites who previously supported authoritarian policies) from the National Party; and the "liberationists", who were chiefly those associated with the ANC.[406] Adelman criticised calls for decentralisation at the time – referring to such ideas as "neo-apartheid" – by organisations like the Democratic Party and the South African Chamber of Business. Adelman's call to

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403 Robertson (footnote 402 above) 306-307. See also Okere BO. "The relationship of law and morality: Dichotomy or complementarity". (2002-2010). 9 *Nigerian Juridical Review*. 2.

404 Robertson (footnote 402 above) 307.

405 Giliomee and Mbenga (footnote 386 above) 187.

406 Du Plessis LM. "The genesis of the chapter on fundamental rights in South Africa's transitional Constitution". (1994). 9(1) *SA Publiekreg/Public Law*. 2-3.

action for the liberationists was to resist such demands and adhere to the Freedom Charter's insistence on a unitary state.[407]

The interim Constitution,[408] adopted in the midst of this negotiating process by the last instance of the Tricameral Parliament,[409] contained various principles in schedule 6 that had to find their way into the current Constitution in order for the latter to be certified. These principles include *inter alia* a commitment to "all universally accepted fundamental rights, freedoms and civil liberties";[410] a prohibition of "racial, gender and all other forms of discrimination" alongside a commitment to "promote racial and gender equality and national unity";[411] that the "legal system shall ensure equality of all before the law" which will include "laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged on the grounds of race, colour, or gender";[412] and freedom of association and collective self-determination.[413]

2.2 Constitution of the Republic of South Africa, 1996

The 'final' or current Constitution of 1996 is often identified as the main vehicle through which Transformationism is to be attained,[414] despite the fact that the word 'transform' or 'transformation' itself nowhere appears in the text of the Constitution. The provisions of the Constitution relevant for my purpose of considering individual self-determination as well as Transformationism will now be briefly considered.

The Constitution accounts for a variety of individual liberties, as manifested in the Founding Provisions[415] and the Bill of Rights.[416] The Constitution also enjoins government to undertake a programme of social engineering, also manifested principally in the Bill of Rights.

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407 Adelman (footnote 392 above) 131-132.
408 Constitution of the Republic of South Africa Act (200 of 1993).
409 The interim Constitution was, however, negotiated and debated during the Convention for a Democratic South Africa (1991-1993) and the Multi-Party Negotiating Process (1993-1994). The Tricameral Parliament consisted of three houses, each reserved for a racial grouping: Indians, whites, and coloureds. It was established under the Constitution of the Republic of South Africa Act (110 of 1983).
410 Principle 2.
411 Principle 3.
412 Principle 5.
413 Principle 7.
414 Davis DM. "Transformation: The constitutional promise and reality". (2010). 26 *South African Journal on Human Rights*. 86.
415 Chapter 1 of the Constitution.
416 Chapter 2 of the Constitution.

2.2.1 Liberty and the Constitution

Section 1 of the Constitution provides *inter alia* that South Africa is founded upon "human dignity" and "the advancement of human rights and freedoms". Section 1 sets out the founding values, and can itself only be amended with a 75% majority of the National Assembly voting in favour. This makes this provision the most-entrenched portion of the Constitution, along with the amendment provision itself in section 74.

Section 7, in the Bill of Rights, *inter alia* again affirms the values of "human dignity" and "freedom".

Section 10 provides that everyone has "inherent dignity" which must be respected.

Section 12 *inter alia* provides that everyone "has the right to freedom and security of the person", which includes the right "not to be deprived of freedom arbitrarily or without cause" and "to be free from all forms of violence from either public or private source". It further provides the right "to security in and control over" one's body.

Section 13 prohibits "slavery, servitude or forced labour", a provision framed without qualification.

Section 14 guarantees a right to privacy, a right of which there are various descriptions and definitions, including those mentioned above.

Section 15 provides for freedom of "conscience, religion, thought, belief and opinion".

Section 16 provides for freedom of expression.

Section 17 provides for the right to assemble, demonstrate, picket, and to petition government.

Section 18 provides for freedom of association.

Section 21 provides for freedom of movement.

Section 22 provides for the right to choose trades and professions.

Section 25(1) protects against arbitrary deprivation of property.

Read together, these provisions, especially the prohibition on slavery, the right to privacy, and the right to freedom of association, appear to recognise and protect self-

determination to a significant extent, making the Constitution and particularly the Bill of Rights available to a strong libertarian interpretation.

2.2.2 Transformationism and the Constitution

However, the Bill of Rights as well as the Founding Provisions, by committing South Africa *inter alia* to the "achievement of equality" in section 1(a), considered in conjunction with the way in which equality is being interpreted by the superior courts, steers South Africa in the direction of denying individual self-determination. This constitutional commitment to equality, indeed, is most often employed to justify somehow abridging the liberty and property rights of ordinary people.

Section 9, on the whole, provides for a notion of so-called substantive equality whereby different "categories of persons" across South Africa must be made equal and discrimination between these categories be made unconstitutional and unlawful. Section 9(2), in full, provides:

> "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the *achievement of equality*, legislative and other measures designed to protect or *advance* persons, or *categories of persons*, disadvantaged by unfair discrimination may be taken."[417]

Arguably this provision goes beyond formal equality by incorporating the so-called "achievement of equality" coupled with the advancement of people and "categories of persons".

Furthermore, section 9(3) provides that the State may not discriminate "unfairly" against anyone based on *inter alia* race, sex, belief, or culture, etc., and section 9(4) prohibits private "unfair" discrimination on those grounds as well.

Currie and De Waal submit that section 9 as a whole, including section 9(1), which on a textual reading appears to only concern itself with formal equality, must be read purposively, and on this reading, it supports the conception of substantive equality.[418] So-called formal and substantive equality are discussed in more detail below.

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[417] My emphasis.
[418] Currie I and De Waal J. *The Bill of Rights Handbook*. (2013). Cape Town: Juta. 214.

A clear tension arises here as regards the right to freedom of association in section 18, which itself is formulated in unqualified language. As discussed above, freedom of association ordinarily includes the right to discriminate against those one could hypothetically associate with.

In addition to the constitutional equality regime, the following provisions in the Constitution may *prima facie* be said to undermine individual self-determination in favour of social engineering:

Section 7(3), one of the first provisions of the Bill of Rights, states that all the listed rights may be limited in terms of section 36 or other internal limitations.

Section 8(2) provides for a horizontal application of the Bill of Rights, binding natural and juristic persons to its enforcement unlike other liberal democracies where rights apply as between the State and society.[419]

Section 16(2)(c) provides that freedom of expression does not extend to "advocacy of hatred […] that constitutes incitement to cause harm", "harm" being a concept that includes psychological and emotional harm.[420]

Section 23 provides for "fair labour practices" and collective bargaining, notions often exercised to the detriment of the self-determination of employers but also of employees, as in the case of minimum wages making entry into the job market for low-skilled workers difficult.

Section 25(2)-(9) relates to limiting private property rights in favour of *inter alia* "the nation's commitment to land reform" and "access to land on an equitable basis". Section 25(1), which purports to protect private property rights, also ostensibly allows for the "deprivation" of property, which according to the Constitutional Court, would not be subject to the same requirements of compensation in section 25(3).[421] Welfare rights such as those in section 26, 27, and 29 further limit property rights.

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419 See also the comprehensive discussion on the horizontal application of the Bill of Rights in the interim Constitution in the minority judgment of Kriegler J in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at 113-150.

420 *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* (EQ01/2012) [2017] ZAEQC 1 at para 52.

421 *Agri South Africa* (footnote 638 below) at paras 67-68

2.2.3 Compromise or contradiction?

The Constitution clearly accounts for some aspects of individual self-determination, yet at the same time also allows for wide-ranging social engineering, which stands in contrast to self-determination. Malan writes that this apparent tension:

> "[…] may therefore seriously disappoint the claimants of rights who might discover through the judgments that their reading of constitutional formulations was offensive to the Constitution and that the meanings which they have attached to the formulations are in fact (vastly) different from those which they had expected them to be".[422]

This is not surprising, given that the constitutional principles contained in the interim Constitution evidently required, for instance, both the entrenchment of individual liberties as well as the amorphous notion of promoting national unity. In other words, the "libertarian" and the "liberationist" themes of the negotiations, as described by Du Plessis, both made their way into South Africa's highest law.

Possibly this should be viewed as laying the basis for a compromise between both a desire to protect individual freedom on the one hand, and a desire for government to redress various apparent social ills. Both these desires are a response to the former white minority government's policies which were often invasive of individual liberty, and which arguably caused widespread poverty among non-white inhabitants of the country. For instance, by at least the 1890s there were calls by the white farming constituency of the Orange Free State for the government to enact measures to "prohibit large-scale grain cultivation by blacks, because white farmers could not compete with them".[423] The libertarian thinkers Leon Louw and Frances Kendall, in a historical study of markets and property rights, noted a similar phenomenon for black farmers and tradesmen mostly in the eastern Cape, who were progressively excluded from the market through government legislation and regulation.[424] The well-known job reservation policies of the white minority government, too, had their origin in demands

422 Malan (footnote 14 above) 177.

423 Giliomee and Mbenga (footnote 386 above) 189, My liberal translation from the original Afrikaans.

424 Louw L and Kendall F. *South Africa: The Solution.* (1986). Bisho: Amagi. 1-17. The authors found that each colony and republic in South Africa at the time had measures aimed at protecting white business and workers from black competition.

by white labourers supporting the Labour Party in the early 1910s to reserve certain mining occupations for whites, exclusive of blacks and coloureds.[425]

Aside from the possible argument that the Constitution acts in recognition of the above-mentioned compromise, it could possibly also be seen as a mere contradiction. It may further be argued that the Constitution *favours* interpretation that emphasises egalitarian redistributionism. Former justice minister Jeff Radebe went so far as to describe the Bill of Rights as having "an *overwhelming* commitment to social justice".[426] Carl Bankston describes the two principles of so-called "social justice" as, firstly, the redistribution of "goods and resources to improve the situations of the disadvantaged" and, secondly, "this redistribution is not presented as a matter of compassion or national interest, but as a matter of rights of the relatively disadvantaged to make claims on the rest of society".[427]

Karl Klare, an American scholar who in a very influential article argued that the Constitution distinctively favours – and enjoins – an active jurisprudential drive toward egalitarianism, and that legislation and adjudication should jointly be enlisted towards the achievement of such egalitarianism. In the South African context, Klare's article is generally viewed as the inception of Transformationism in the constitutional discourse.[428]

3. THEMES AND CURRENTS OF TRANSFORMATIONISM

3.1 The left's approach to freedom

Before analysing particular strands of thought within Transformationism, it is important to understand in what light freedom is seen by advocates of this doctrine. The differences between this approach and the approach taken by libertarians will immediately be evident.

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[425] Giliomee and Mbenga (footnote 386 above) 203,

[426] Radebe J. "Preface by the Minister" in "Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state". (2012). Department of Justice. https://www.politicsweb.co.za/news-and-analysis/govts-discussion-document-on-the-judiciary. My emphasis.

[427] Bankston CL. "Social justice: Cultural origins of a perspective and a theory". (2010). 15(2) *Independent Review*. 165.

[428] The article is referred to as "influential" in the discourse on "formal" as opposed to "substantive" legal reasoning. See footnote 10 in Froneman JC. "Legal reasoning and legal culture: Our 'vision' of law". (2005). 1 *Stellenbosch Law Review*.

Freedom is a very expansive subject that cannot be comprehensively dissected within the space under this heading or in this study. For present purposes I therefore very briefly summarise the left's approach to the concept of freedom utilising a useful article by leftist authors Ben Burgis and Matt McManus.

To the left, "freedom is not exclusively about non-coercion". Non-coercion "is only part of a more complex whole".[429] The other part of this whole, write Burgis and McManus, is people's *capability* to make and pursue choices – freedom in its subjective sense. To the left, a lack of resources "can severely limit freedom by curtailing the number of choices available to an individual". Citing the example of the right to terminate a pregnancy, Burgis and McManus write that this freedom is less meaningful in a society where the woman in question "is unable to raise a child in her financial circumstances". Thus, a society where *both* termination of pregnancy *and* "generously state-subsidized childcare" is available, offers women more freedom than one where the legal right to terminate a pregnancy is all a woman has at her disposal. To Burgis and McManus, coercion itself should also not be given a narrow meaning, but must be seen on a spectrum where zero coercion is ideal. They present this example: If an employer threatens to fire an employee who does not accompany them on an intimate date, at least *some* coercion is present, even though arguably it is not *as* coercive as threatening to physically harm the employee if they resist.[430] The degree of coercion can be "dialed down" in a society where, for instance, trade unions and State healthcare options are available, making this employee less dependent on their employer.[431]

This, too, is the approach of jurists in the Transformationist current in South Africa. As proposals for a new constitution started being tabled by the various ideological factions

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429 Some libertarians, like John Hospers, do see merit in this argument. See Hospers (footnote 32 above) 261.

430 The libertarian thinker Block addresses himself to a similar example. His conclusion – not unexpectedly – relying on certain principles of libertarian thought, is that within a libertarian legal paradigm, it must be lawful for an employer to dismiss their employee "for any reason at all", including a refusal to be intimate with the employer. See Block W. "Toward a libertarian theory of blackmail". (2001). 15(2) *Journal of Libertarian Studies*. 65. On the other hand, another libertarian jurist, Van Dun, agrees that the dismissal must be lawful, but avers that that cannot be the end of the inquiry. Judges must also look at the *naturalia* of the employment agreement. Concluding that no prospective employee agrees to be dismissed at will, Van Dun argues that there might be a remedial claim available to those dismissed purely for refusing to be intimate with their employers. See Van Dun (footnote 33 above) 81.

431 Burgis B and McManus M. "Why everyone values freedom". (2019). *Quillette.* https://quillette.com/2019/04/17/why-everyone-values-freedom/.

in South Africa in the 1980s, for instance, Adelman wrote that “true liberation” could only be achieved in South Africa if:

> “the different races, classes, cultures and ethnic groups […] forge a pluralist society in which all citizens are able to participate fully and equally in political, economic, social and cultural life irrespective of race, color or creed.”[432]

Libertarians do not deny that it is preferable for freedom to be enjoyed in circumstances where basic needs are satisfied. It is undeniable that freedom is better experienced with more resources.[433] Libertarians, however, do not see this as a legal imperative, but perhaps rather as a moral obligation, whereby civil society organisations and members of the community must voluntarily come to the aid of their fellows. In the left’s conception of freedom, having access to resources is regarded as a legal imperative – a prerequisite for freedom – and as a result, government will use the force of law and policy against the so-called haves to elevate the so-called have-nots.

3.2 The imperative of sustained State intervention

Social engineering is to be distinguished from the philosophy of liberty expounded above. Social engineering is premised on the notion that the State[434] may or must engage in the behavioural modification of legal subjects in pursuance of stated or unstated ideological goals.[435] Conversely, individual liberty is premised on the idea that the State must exclusively concern itself with providing the conditions for the

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[432] Adelman (footnote 392 above) 120.

[433] See Sartori (footnote 1 above) 10-13. Sartori pertinently points out that while political freedom (the libertarian conception of liberty: freedom from coercion) is not the only type of freedom, and perhaps not even the most important type, it is the necessary precondition for all other freedoms, particularly the so-called “positive” freedoms of welfare. Without first securing “negative” liberty, no other conception of liberty could materialise.

[434] It is accepted that private, non-State entities may also engage in social engineering. It is trite that commercial enterprises at least attempt to do so through advertising techniques. This is, however regarded as irrelevant, as it is assumed that no involuntariness or coercion is involved in this type of social engineering. Where coercion is involved, it becomes an ordinary matter of law to deal with.

[435] The *Cambridge English Dictionary* defines social engineering as “the artificial controlling or changing of the groups within society, usually according to particular political beliefs” (https://dictionary.cambridge.org/dictionary/english/social-engineering). The *Collins English Dictionary* defines it as “the use of planned measures, for example, measures that affect people’s social or economic position, in order to create a desirable society”. (https://www.collinsdictionary.com/dictionary/english/social-engineering).

individual to pursue their own goals, without regard to the socio-economic or ideological goals of the political class.[436]

Transformationism shares with the Apartheid system it proposes to dismantle and replace the feature that both are fundamentally schemes of social engineering. Indeed, before the Constitution coming into operation, Sachs wrote that rights in a South African bill of rights would need to be addressed "to the question of equal access to resources".[437] It must also provide for affirmative action – indeed it "must be *centred* around affirmative action".[438] This would give the Bill of Rights "the true potential [to be] a major instrument of ensuring a rapid, orderly, and irreversible elimination of the great inequalities and injustices left behind by apartheid". Without provision for affirmative action, according to Sachs, the Bill of Rights would be "meaningless". He describes affirmative action as presupposing "the concertation of diverse forces in an agreed direction, with the State playing an ultimately decisive, though not necessarily exclusive role in the process".[439] Affirmative action, to Sachs, must also extend "to every aspect of South African society – health, education, work, leisure, to mention but a few".[440]

Van der Walt wrote that the ANC was essentially victorious with its insistence on a constitution that would penetrate "all spheres of social life, [and] not only" the relationship between government and the people. This argument is hinged, along with reference to the Preamble, to a great extent on section 8(2) of the Constitution – the horizontality provision – reading as follows:

> "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

Sections 9(3) and 9(4), as discussed above, which prohibit private discrimination, are also of relevance in this respect.

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436 See Chapter 2 above.

437 Sachs A. *Protecting Human Rights in a New South Africa*. (1990). Cape Town: Oxford University Press Southern Africa. 10.

438 Sachs (footnote 437 above) 14. My emphasis.

439 Sachs (footnote 437 above) 12.

440 Sachs (footnote 437 above) 19.

According to Van der Walt, the ANC – correctly, in his view – was concerned that "a typical [classical] liberal constitution [would merely shield] the private sphere from undue government interference [and] would impede the radical transformation of South African society". This would, ostensibly, have led to "a system of private apartheid" persisting long after the legal strictures of Apartheid were abolished.[441]

The former Deputy Chief Justice of South Africa, Dikgang Moseneke, writing after the Constitution's adoption, goes as far as to write that not only government but also private entities are "duty-bound to advance" the legal imperatives of Transformationism.[442] Indeed, referring to a series of Constitutional Court judgments, Moseneke writes that it "is now well beyond contest that our Constitution has set itself the mission to transform society in the public and private spheres".[443]

3.3 Substantive equality and socio-economic rights

Hinting at a tension in the Constitution, the classical liberal Kane-Berman writes that even though section 9 of the Constitution prohibits unfair discrimination and guarantees equal protection of the law, "it also authorises measures to promote 'the achievement of equality'." He argues that whilst the Constitution makes no mention of "affirmative action", "the measures contemplated in Section 9 fit this description".[444]

It has been asserted that the traditional values of freedom and equality, as conceived of within the Roman-Dutch common law tradition, are unhelpful to those who were detrimentally affected by the legislation enacted by the former white minority government.[445] Indeed, Dennis Davis writes that rights can only exist within the context of community, and South Africa had no post-Apartheid national community. Because of this apparent necessity for having a national community, Davis writes that South African society needs to be transformed by means of redressing the legacy left by colonial and Apartheid policies. This transformation could not only entail including

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[441] Van der Walt AJ. *Law and Sacrifice: Towards a Post-Apartheid Theory of Law*. (2014 edition). New York: Routledge. 34. This notion that a libertarian approach to law would simply 'freeze' wealth levels in time is especially relevant elsewhere in the discussion on substantive equality in Chapter 3.3 and Chapter 4.3.

[442] Moseneke D. "Transformative constitutionalism: Its implications for the law of contract". (2009). 20(1) *Stellenbosch Law Review*. 13.

[443] Moseneke (footnote 442 above) 4.

[444] Kane-Berman (footnote 390 above) 4.

[445] Van der Walt AJ. "Tradition on trial: A critical analysis of the civil-law tradition in South African property law". (1995). 11 *South African Journal on Human Rights.* 169.

previously-excluded South Africans within the protections offered by first-generational rights but had to include *inter alia* "aggressive social and economic policies to transform the economy".[446] Without such policies, in essence, to expand access to goods and services that mitigate the effects of poverty, "South Africans can never in reality enjoy rights".[447] Davis, however, argued against the inclusion of socio-economic rights in the Constitution, instead opting for so-called directive principles that recognise such socio-economic interests and guide the courts when applying first-generation rights.[448]

Albie Sachs wrote that conceiving of rights as exclusively first-generation is "out of date", "perverse", and "anachronistic". He argues that for the first-generation right to vote to mean anything, it must enable voters to allocate resources from others to themselves by way of State action.[449] Sachs made the case, before the Bill of Rights had been written, that both the second- and third-generations of rights must be harmonised into such a bill. He, however, made no argument for why either the second- or third generation of rights should, conceptually, be accepted as rights; simply that it had happened elsewhere and must therefore happen in South Africa.[450]

Adelman criticised liberal constitutionalism and the Rule of Law for prioritising formal equality, which "disguises and ignores substantial social inequalities". This, in turn, whilst being a barrier against overt racial discrimination, ultimately forms "the basis for a more subtle form of class domination". This "trick" grants "preeminent protection to private property, and hence to capitalist social relations as a whole".[451]

Klare writes that "the Constitution contains a pervasive and *overriding* commitment to equality, specifically comprehending a substantive (redistributive), not just formal, conception of equality".[452] This assertion goes further: "The Constitution envisages equality *across the existential space of the social world*, not just within the legal process". Klare defines "substantive equality" to mean "equality in lived, social and

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446 Davis DM. "Social power and civil rights: Towards a future jurisprudence for a future South Africa". (1991). 108 *South African Law Journal*. 461.

447 Davis (footnote 446 above) 462. See also Smith (footnote 23 above) 222.

448 Davis DM. "The case against the inclusion of socio-economic demands in a bill of rights except as directive principles". (1992). 8 *South African Journal on Human Rights*. 487.

449 See the discussion on page 172 on "plunder".

450 Sachs (footnote 437 above) 7-8.

451 Adelman (footnote 392 above) 137-138.

452 Klare K. "Legal culture and transformative constitutionalism". (1998). 14 *South African Journal on Human Rights*. 153. My emphasis.

economic circumstances and opportunities needed to experience human self-realization", thus again identifying substantive equality firmly with the left's conception of freedom as set out above.[453]

Pierre de Vos writes:

> "The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution and this means the constitutional order is committed to the transformation of our society from a grossly unequal society to one in which there is equality between men and women and people of all races."[454]

De Vos writes of the Constitutional Court's rejection of "the notion that equality could be premised on the assumption that all South Africans were born free and equal and that all South Africans could therefore demand to be treated in exactly the same manner, regardless of race". He argues that treating people equally before the law would not address "the structural equality produced by past (and ongoing) racial discrimination and racism" and "would *freeze the [racial] status quo*". De Vos interprets section 9 – the right to equality – to mean that government must "take positive steps to eradicate group-based social and economic disadvantage – whether the disadvantage resulted from past or ongoing discrimination based on race, gender, sexual orientation or other characteristics".[455]

Because "the positions and discourses of privilege and dominance that stem from an ideology of 'white' superiority and hegemony are still pervasive", writes De Vos, any State programme aimed at benefiting non-white South Africans (black, coloured, and Indian South Africans, all referred to as "black" in the legal discourse) will always be constitutionally permissible, even if those programmes benefit well-to-do members of this underprivileged group. This is because "racism affects all black South Africans (to some degree or another) regardless of their economic status and social and political power and material success". To De Vos, programmes that do not rely directly on race – as opposed to other potential factors, like economic status – "may run the risk of failing to deal with the effects of the ideology of 'white' superiority and hegemony, and

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453 Klare (footnote 452 above) 154. My emphasis.

454 De Vos P. "The past is unpredictable: Race, redress and remembrance in the South African Constitution". (2012). 129 *South African Law Journal*. 84.

455 De Vos (footnote 454 above) 85-86. My emphasis.

may mask the effects of ongoing racism and racial discrimination and dominance".[456] He however proposes that "a more nuanced" approach be adopted in future, one that alongside race takes other historical factors about a person into account, including their education and the education of their parents, their language, and whether they have rural or urban backgrounds, in order to determine whether someone qualifies for these State programmes.[457]

It must be noted that substantive equality is concerned with equality as a relative concept. Indeed, the notion of "equality" is inherently a relative concept, as it measures two or more fluctuating personal statuses against one another. On the other hand, destitution, which could refer to homelessness, starvation, etc., is an absolute concept, as it deals with a person's means measured not against anyone else, but for instance against a fixed hierarchy of human needs. This does not fluctuate or depend on the levels of wealth of anyone else, and indeed one can escape destitution and live comfortably whilst being *relatively* poor measured against others. In other words, the problem being addressed is the *difference* in material welfare *between* two or more given groups, rather than the material welfare of a single given group or person. For example, Tshepo Madlingozi lambastes the government's Growth, Employment, and Redistribution (GEAR) programme spearheaded by former President Thabo Mbeki, in part for ostensibly worsening "the economic situation inherited from apartheid". What has in fact been worsened? The fact that proportionally, black South Africans have remained poor, and white South Africans have remained wealthy. Madlingozi refers particularly to the "2011 census report [that] shows that white households earned six times more than their black counterparts".[458] It is not *only* that black South Africans are poor, and this situation requires rectification, *but that white South Africans remain wealthy*, which too requires rectification.

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[456] De Vos (footnote 454 above) 90-91.
[457] De Vos (footnote 454 above) 101.
[458] Madlingozi T. "Social movements and the Constitutional Court of South Africa" in Vilhena O, Baxi U, and Viljoen F (eds). *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa*. (2013). Pretoria: Pretoria University Law Press. 535.

3.4 Transformationism, land reform, and private property rights

3.4.1 Restitution and redistribution

Land reform is one of, if not the biggest, motivating component of Transformationism in South Africa.

Prior to the adoption of South Africa's present constitutional arrangement, Sachs cautioned against adopting only a first-generation rights conception of property rights. He wrote that the Apartheid era in South Africa had led to an unjust state of affairs as far as land ownership was concerned, because blacks were removed from their homes and land by operation of the legislation and policies of the previous minority government, and legal title to that property was then bestowed upon whites. How then, asks Sachs, can a legitimate post-Apartheid right to property simply freeze that unjust state of affairs and recognise the title of whites when, in fact, that property should rightly belong to blacks?[459] He writes:

> "Looked at from the perspective of human rights, who has the greater claim to land – the original owners and workers of the land, expelled by guns, torches, and bulldozers from the soil, turned into migrant workers, perpetually on the move with no plot they can call their own; or the present owners, frequently absentee, whose rights are based on titles conferred in terms of the so-called Native Lands Act and the Group Areas Act?"[460]

This is, essentially, an argument for *restitution*. Sachs, however, immediately after stating this argument, calls for the Bill of Rights to make provision for *redistribution* of land.[461] Davis, also during the time before the Bill of Rights was adopted, conflated – intentionally or otherwise – the unrelated notions of restitution and redistribution. The then Law Commission, in its proposals for a bill of rights, cautioned against "naked and arbitrary nationalisation of private property" (in other words, cautioning against redistribution) and proceeded to recommend a strictly entrenched property rights regime. But Davis criticised this position because the Law Commission did not appreciate "the problem of historically legitimate claims of those who were removed

459 Sachs (footnote 437 above) 10-11.
460 Sachs (footnote 437 above) 11.
461 Sachs (footnote 437 above) 12.

from their land as a result of apartheid" – which is a point solely concerned with restitution.[462] Nationalisation of property, which the Law Commission cautioned against, redistribution, and restitution of property, on the face of it, do not describe the same legal phenomenon.[463]

Restitution – vindication or restoration – a feature of the common law of property, simply means that those dispossessed of their property are entitled to reclaim and repossess that property from whoever illegitimately possesses it.[464] This is, as previously noted, an integral element of private property rights, also from a libertarian perspective. When it comes to redistribution, on the other hand, the idea (and perhaps ideal) is that government assists needy persons to acquire property (either obligatory or through the 'willing-buyer willing-seller' principle) or acquires it on their behalf, with the view of those persons becoming the owner.[465] Redistribution is not concerned with the question of whether the current possessor is in fact the legitimate owner of the property, and as such it is a political phenomenon rather than one related to justice. In other words, from the Transformationist perspective, justice is identified with equality of outcome. Where there is no equality of outcome, there is no justice. Finally, nationalisation is the process of (usually forcibly) converting private property into property of the State, usually at the national level.[466]

Regarding the notion of compensation payable to current *bona fide* holders of property that was, in the past, taken involuntarily, South African human rights law scholar Vinodh Jaichand ventures dealing with private law. He compares the common law principle of *restitutio in integrum* to the current debate in South Africa regarding expropriation without compensation. *Restitutio in integrum* "requires that the injured party be restored to the situation which would have prevailed had no injury been

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462 Davis DM. "Liberty, commerce, and prosperity – and a bill of rights" in Licht RA and De Villiers B (eds). *South Africa's Crisis of Constitutional Democracy*. (1994). Washington DC: The AEI Press. 92.

463 See footnote 3 in Gibson JL. "Land redistribution/restitution in South Africa: A model of multiple values, as the past meets the present". (2009). 40(1) *British Journal of Political Science*. 136.

464 See page 50 above. See also for example Kepe T and Hall R. "Land redistribution in South Africa: Commissioned report for High Level Panel on the assessment of key legislation and acceleration of fundamental change, an initiative of the Parliament of South Africa". (2016). 57. https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Land_Redistribution_Kepe_and_Hall.pdf.

465 See Lahiff E. "Land redistribution in South Africa: Progress to date". (2007). Paper presented at the "Land redistribution: Towards a common vision" workshop, University of the Western Cape. 3

466 Kenton W. "Nationalization". (2018). *Investopedia*. https://www.investopedia.com/terms/n/nationalization.asp

sustained". According to Jaichand, "even if the transaction was undertaken in good faith", white South Africans who hold land because of the opportunities provided to them by laws during the Apartheid era, should not be entitled to compensation if the logic of *restitutio in integrum* is to be accepted. This is because the whites, as "the 'injurer'" are making a more vocal claim "than the injured". Jaichand writes:

> "Surely the 'injurer' cannot be expected to be restored to the situation which would have prevailed had no injury been sustained because that is the right of the injured."[467]

In other words, by applying this principle, whites are effectively and collectively made into a single legal subject that can be liable and responsible for "its" past conduct. Therefore, this collective legal subject must render compensation for the damage it has caused and the harm it has done. Whether this legal subject is *mutatis mutandis* entitled to collective rights as well is not addressed by Jaichand or other Transformationists.

In February 2018, the Parliament of South Africa resolved to amend the Constitution to remove or otherwise modify the extant requirement that compensation must be paid upon the expropriation of private property.[468] This will be discussed further below.

3.4.2 Property rights not fundamental

One of the most scathing criticisms of classical liberal or libertarian theories of rights and law by Transformationists are their emphasis on private property rights. Indeed, Anglo-Indian human rights law scholar Upendra Baxi writes that the South African Constitution displays its "post-liberal profile" vividly *inter alia* "in the negotiation of the absolutist libertarian insistence on the sacrosanctity of the rights to private property over the means of production".[469] Adelman goes so far as to call private property "inherently unprogressive".[470] AJ van der Walt, writing in the immediate aftermath of

[467] Jaichand V. "Finding common ground: Rights arising from land reform in South Africa, India and Brazil" in Vilhena *et al*. (footnote 458 above) 462.

[468] "Minutes of Proceedings of National Assembly: Tuesday, 27 February 2018". (2018). 2018(3) *Hansard*. 7-13. http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180320motion.pdf.

[469] Baxi U. "Preliminary notes on transformative constitutionalism" in Vilhena *et al*. (footnote 458 above) 32.

[470] Adelman (footnote 392 above) 134.

the adoption of the new constitutional order of the 1990s, sets out the tension between equality and liberty within the context of property rights as such:

> "[…] justice demands equality, whereas liberty requires room for individuality, thereby precipitating a classic confrontation between claims for the equal distribution of property or the promotion of social interests, on the one hand, and for the protection of individual property, on the other".

To Van der Walt, this means that a justifiable "theory of property must justify the existence of private property without denying the promotion of equality".[471] He highlights the concern that the liberal conception of property rights might lead to "an imbalance [in society] as a result of strong constitutional protection of private property", especially if that society is constitutionally committed to "the realization of social justice and equality". Strong private property rights, writes Van der Walt, could stand in the way of "the need for social restructuring and affirmative action towards greater social equality". Van der Walt asks a loaded question without explicitly attempting an answer: "[W]hether it is possible to justify the constitutional protection of property rights without thereby implicitly granting the individual a superior position against other individuals and society".[472] One wonders why this question is posed, given that Van der Walt himself noted the answer in his brief discussion on property rights in the US Constitution; that is, that constitutionally-guaranteed property rights "forms a guaranteed enclave of individual freedom within which the individual is shielded from the threats posed by [others]".[473] In other words, it is possible, indeed it is the very reason for constitutional protection of property rights, to grant individuals a superior position against other individuals and society as regards that property. It is clear, however, that by posing the question, Van der Walt was levelling a critique against strong private property rights, implying that individuals *ought not* be placed in a superior position *vis-à-vis* others.

Jaichand writes that after South Africa enacted the Constitution, the "near-absolute common law right[s] of property owners" fell away to a regime "providing rights for *all*

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[471] Van der Walt (footnote 2 above) 455.
[472] Van der Walt (footnote 2 above) 462.
[473] Van der Walt (footnote 2 above) 461-462. Citations omitted.

occupiers of property".[474] He describes the notion of "constitutional property" that has been adopted by South Africa's highest court:

> "Had the South African Constitutional Court not signalled a new hierarchy when it knocked off the right of property owners from the common law perch and accommodated the rights of the previously propertyless? Indeed, it had when it applied the new constitutional imperatives and legislation that supported the right to freedom, equality and dignity. While the right to property comprises more than the right to land and housing, the notion of constitutional property was clarified. […] the rights of the vulnerable, that is, the rights of the occupiers, appear to be of paramount importance to the state, especially where evictions were attempted with no provision for alternative accommodation: in *Kyalami Ridge*, the victims of flooding; in *Port Elizabeth Municipality*, the rights of the occupiers; in *Modderklip*, the rights of the occupiers and the land owners; and in both *Olivia Road* and *Machele*, the rights of those evicted."[475]

Davis criticised advocates of free markets who favoured the idea that the Bill of Rights should include strong protection for free enterprise and private property. He contended that their argument (that economic growth would benefit all) was 'crude' and in disregard of South African history. Outcomes in the market are "arbitrary", writes Davis, and thus might reproduce or entrench "unequally distributed opportunities and existing unequal distribution of skills".[476] Schneider, too, writes that "the ideology of the market" helps "to preserve" the inequality created under "the ideology of apartheid".[477] "Such inequality", writes Davis, "threatens the social equilibrium of South African society". Davis also notes that arguments for freedom of choice have little value for the "many citizens [who] face constraints imposed on the free development of their preferences and beliefs".[478]

Davis argues that there are at least two problems with rigidly protecting private property in the South African context, both of which "would thwart attempts to transform South African society away from its racist past". In the first place, it would

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474 Jaichand (footnote 467 above) 448.
475 Jaichand (footnote 467 above) 456.
476 Davis (footnote 462 above) 89.
477 Scheinder (footnote 396 above) 24.
478 Davis (footnote 462 above) 90.

undermine a multitude of government programmes aimed at social and material upliftment, like minimum wages, health and safety regulations, affirmative action plans, and price controls. In the second place, it would "prevent any future government from addressing the skewed pattern of land tenure created by apartheid in general and the removals policy in particular". Davis writes, correctly, that libertarians would not want possessory claims founded on theft to be legally protected.[479] Invoking the work of libertarian philosopher Robert Nozick, Davis writes:

> "Even Robert Nozick, who holds that economic goods arise already encumbered with rightful claims to their ownership, refuses to extend his theory to property that was stolen. Nozick's theory would support the contention that no morality justifies ownership of property that was acquired through the removal policies of South African governments."[480]

This is an apt summary of the libertarian approach. But this is an approach based in restitution exclusively. In other words, it cannot be invoked as supporting Davis' argument that private property rights should not be entrenched in the Bill of Rights. The libertarian insistence on restitution is part and parcel of secure private property. Davis, on the other hand, had in mind an open-ended ability on the part of the post-Apartheid government to infringe upon private property, not simply to restitute dispossessed property, but to socially-engineer society toward material equality.

Ada Verloren van Themaat writes of the view that "private property is important for the freedom and prosperity of wealthy commercial interests but does not benefit the bulk of the public".[481] Those with this view believe that "the political processes" of a particular society should be able to freely "choose the economic policy which should be pursued and to regulate economic activities, while the courts should abstain from interfering and redressing grievances". This is in response to the fear "that property rights will perpetuate the power of property owners over employees and non-owners

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479 Davis (footnote 462 above) 96-97. Davis, however, is implicitly misrepresenting the libertarian position by, perhaps unknowingly, conflating restitution, redistribution, and nationalisation into one idea, when all three are distinct concepts.

480 Davis (footnote 462 above) 99.

481 Verloren van Themaat AV. "Property rights, workers' rights and economic regulation – constitutional protection for property rights in the United States of America and the Federal Republic of Germany: Possible lessons for South Africa". (1990). 23(1) *Comparative and International Law Journal of Southern Africa*. 53.

of property".[482] Verloren van Themaat concludes that it is "untenable" for "unfettered individual control over property" to be protected as a "personal right" and that "society will have a need for intervention to ensure the proper economic development both of the community and of the individual". Without much further ado, Verloren van Themaat argues that questions of property and economics must be dealt with "through the democratic political process", because they "are too complex, recondite or basic to the functioning of society", to be left to the judiciary.[483]

In similar vein, economist Knut Reese argues that the "legitimacy" of the institution of private property must be maintained by "democratic consent".[484] Reese's democratic consent principle essentially entails reforming the regime of private property rights in a way that receives buy-in from the majority of "the citizenry".[485] Reese posits that "private property confers on its owners the power to determine the fate of millions of non-propertied workers".[486] (It is worth noting that Reese does not acknowledge the fact that the institution of government, by its nature, has the power to determine the fate of everyone – propertied and non-propertied alike – under its jurisdiction.) Reese concludes by encouraging property owners to "stop fighting for their absolute rights and rather agree on reform" so as to appease the left, and avoid dooming the institution of private property to complete destruction should they press on.[487] Jaichand, in a similar line of argument to Reese's democratic consent principle, writes of the notion of *uBuntu*, which, according to him, means "the rights of the community are relevant in determining the right of the individual to land […]. This appears to run counter to the individual ownership approach of Western liberal thinking to land".[488]

In other words, both Reese and Jaichand, perhaps representative of Transformationist thinking, approach private property, and probably other rights as well, from a majoritarian perspective, whereby the relevant demographic majority, whatever it may be, must electorally or otherwise "consent" to the exercise of those rights to confirm their legitimacy. This Transformationist approach introduces a wide-ranging change to the nature of rights. No longer would rights serve as specific protection against

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482 Verloren van Themaat (footnote 481 above) 54.
483 Verloren van Themaat (footnote 481 above) 66-67.
484 Reese (footnote 360 above) 81.
485 Reese (footnote 360 above) 87
486 Reese (footnote 360 above) 84.
487 Reese (footnote 360 above) 87-88.
488 Jaichand (footnote 467 above) 457.

uninvited third-party interference, but their effect would rather be determined as an ordinary matter of policy dictated by government's (invariably majoritarian) constituency. This approach enables those who would often be the very 'uninvited third-parties' to bestow on themselves the power to interfere in affairs properly within the domain of individual liberty by electoral means.

Muthucumaraswamy Sornarajah even argues that property rights should not be included in bills of rights because, when governments, in an attempt to implement a land reform programme, would contravene those rights (resulting in the programme being overturned by the court), the very testing power (judicial review) of the courts is threatened. To illustrate this point, Sornarajah refers, *inter alia*, to the Indian Supreme Court case of *Golaknath v State of Punjab*,[489] in which the court effectively held that the fundamental rights in the Indian bill of rights were unamendable as a result of a particular reading of the Constitution.[490] This temporarily hindered the Indian government from implementing a land reform programme that involved infringing on the right to property, until a later Supreme Court judgment reversed *Golaknath*.[491]

This criticism was also expressed in the South African context, with calls to adopt alternatives to strong constitutional protection of private property.

At the beginning of South Africa's constitutional transition in the 1990s, one of South Africa's first Constitutional Court judges, John Didcott, wrote that a bill of rights should not "protect private property with such zeal that it entrenches privilege". Should it do so, and thereby "make the urgent task of social or economic reform impossible or difficult", a "crisis of the first order, endangering the bill of rights as a whole and the survival of constitutional government itself" would be created.[492] Instead, writes John

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489 *Golaknath v State of Punjab* AIR 1967 SC 1643.

490 This reading of the Indian Constitution eventually led to the creation of the so-called "basic structure doctrine", which asserts that there are certain principles so engrained in the nature and fabric of a constitution that it would be outside of the ambit of a legislature's ordinary amendment power; for, a constitution empowers a legislature only to amend or modify the constitution, not destroy its identity and thereby constitute a new constitution. See the discussion in Roznai Y. "Unconstitutional constitutional amendments: A study of the nature and limits of constitutional amendment powers". (2014). Ph.D. thesis at the London School of Economics and Political Science.

491 Sornarajah M. "Bills of rights: The Commonwealth debate". (1976). 9(2) *Comparative and International Law Journal of Southern Africa*. 169-171. The basic structure doctrine has, however, since 1980 become an accepted feature of Indian constitutional law. See Roznai (footnote 490 above) 58.

492 Didcott J. "The practical workings of a bill of rights" in Van der Westhuizen JV and Viljoen HP (eds). *'n Menseregtehandves vir Suid-Afrika*. (1988). Durban: Butterworths. 60. As quoted in Murphy J.

Murphy, a principle of proportionality should be adopted. This principle – far from being an argument for "nationalisation without compensation" – would seek to balance "the rights of individuals" with "the attainment of reasonable social objectives". The proportionality principle "embraces a social democratic concept of property" which asserts that government "has a legitimate responsibility to determine the content and limits of ownership through legislation, and to balance these with the promotion of social interests". This perspective is justified in part by arguing that property rights are not absolute anywhere in the world, and the "balance" approach is therefore "entirely legitimate".[493]

Van der Walt provides an apt summary of the Transformationist objections to the protection of private property rights in the Constitution. Firstly, to Transformationists, 'property' was considered to be amorphous, and because it was unclear how the courts would approach protecting property rights, it would mean government would have a difficult time engaging in "a programme of social or economic restructuring". Secondly, constitutionally guaranteed property rights would entrench the racial imbalances in property ownership and the distribution of wealth.[494]

Van der Walt argued that property rights should be viewed according to their "modern perception", that is, where they leave:

> "[…] room for a wide range of different and contextualized property rights that derive their very nature and content from their actual context, including the social and public aspects of that context. This means that the social, environmental, physical, and other characteristics of property determine the nature, scope, limits, and protection of each right so that both the scope of the property holder's entitlements towards the property and the scope of state powers to interfere with it are inherently determined by the context".[495]

It must be clear from the above discussion that Transformationists tend to regard the 'public' or 'social interests' and private property rights to be at best in a relationship of

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"Property rights in the new constitution: An analytical framework for constitutional review". (1993). 26(2) *Comparative and International Law Journal of Southern Africa*. 214.

493 Murphy (footnote 492 above) 215. Murphy himself was part of the group of jurists mentioned in footnote 2 above who argued in the 1990s that the Constitution should contain no guarantee of private property rights.

494 Van der Walt (footnote 2 above) 479.

495 Van der Walt (footnote 2 above) 489.

tension, and at worst in conflict with one another. This is done by identifying the achievement of (material) equality closely with the public interest. The idea that strong private property rights, or a domain of exclusivity for owners, is itself in the public interest – the libertarian argument – is not explicitly considered in any detail by the sources consulted.

I turn, now, to two philosophical undercurrents of Transformationism – Critical Legal Studies and decolonial constitutionalism – before discussing the dominant school of the ideology, transformative constitutionalism.

3.5 Critical Legal Studies and left-communitarianism

The core of legal Transformationism, I submit, is Critical Legal Studies (CLS). Adherents of CLS focus their attention on delegitimising (or 'trashing') the modern Western, liberal legal order.[496]

3.5.1 Criticism of so-called liberal jurisprudence

Critical Legal Studies traces its history to the American legal realist movement of the earlier part of the twentieth century and its scepticism of so-called formalism. Legal realists are perhaps best known for noting that judges do not arrive at outcomes and judgments through mechanical application of certain and objective legal rules and principles, but that their own, personal convictions and preferences also play a role. The realists, like the CLSers, also emphasised the indeterminacy of law: That legal doctrine is so flexible that in every case it can be used to justify more than one, often contradictory outcome.[497]

A postmodern school within CLS "explores legal indeterminacy and ideology to illustrate the failure of all totalizing rational thought and to show that no objectively correct legal or political results are possible".[498] Chosen ends are inherently arbitrary, subjective, and amount to mere preference.

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496 Van Doren JW. "Critical Legal Studies and South Africa". (1989). 106 *South African Law Journal*. 648. See also Shai (footnote 378 above) 240.

497 Van Blerk A. "Critical Legal Studies in South Africa". (1996). 113 *South African Law Journal*. 88. Libertarian jurists like John Hasnas have also noted the same indeterminacy of law. See generally Hasnas (footnote 8 above).

498 Whitehead JE. "From criticism to critique: Preserving the radical potential of Critical Legal Studies through a re-examination of Frankfurt School Critical Theory". (1999). 26 *Florida State University Law Review*. 708, 720.

This is not an exclusively leftist perspective, however. The Austrian economist and libertarian philosopher Ludwig von Mises, for instance, rejected the notion that there could be an *a priori* (unfalsifiable, independent of experience or testing) ethics, unlike the praxeological logic of action system he had developed for the field of economics.[499] Even the notion that *rights*, conceived of within the classical liberal or libertarian tradition, are indeterminate, is not rejected by all classical liberals. John Gray, a political philosopher in this tradition, also complains of the fact that the so-called 'negative rights' that a limited government is called upon to protect are nebulous concepts with uncertain content. Is there one right to liberty, or multiple, codifiable rights? How are conflicts or competition between people's liberty or rights to be settled? The answers to these questions, argues Gray, are indeterminate, and because they are indeterminate, the State's role is itself indeterminate, which allows its mandate to grow to such an extent where so-called 'positive rights' come about.[500] Finally, Malan, too, writes of indeterminacy, specifically in the context of constitutional interpretation. The belief in the objective meaning of constitutional provisions is due to two factors: The perhaps irrational psychological regard and trust people have for *written text*, and the supremacy formulations found in written constitutions. Both of these factors create a false impression. Instead, argues Malan, there is no "basic certainty, stability, accuracy [or] objectivity of language" in constitutional provisions, *inter alia* because legal interpretation takes place within the confines of a particular legal community with "its own pre-understandings, ideological commitments and objectives", as well as its "own norms and disciplinary precepts for interpretation" and "prejudices and preferred interests".[501] That is why constitutional interpreters do not construe but construct meaning.[502]

CLSers recognise that when State power is used, it somehow inhibits individual liberty, but argue that at the same time the State is required to protect individual liberty. This is regarded as a contradiction inherent in the liberal conception of law that permeates liberal jurisprudence – a "mirror" of contradictions. Stated otherwise, liberal legal doctrine is at once both individualistic and collectivistic, with an individualistic or a

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[499] Hoppe H-H. "The ultimate justification of the private property ethic". (1988). 2(1) *Liberty*. 20.

[500] Gray J. "Limited government: A positive agenda". (1989). *Hobart Paper 113*. Institute of Economic Affairs. 20-21.

[501] Malan (footnote 14 above) 181-182.

[502] Malan (footnote 14 above) 184.

collectivistic principle of law being available as a response to every question of law. To CLSers therefore, the apparent notion in liberal jurisprudence that the law is objective and that there could be one correct answer to such questions, is false. As a result, doctrines such as natural law, law-and-economics, and positivism, are rejected by CLS.[503]

Unlike legal realism, CLS is self-consciously leftist and collectivistic (the term "communitarian" is often employed).[504] Indeed CLS, drawing inspiration from legal realism, is also inspired by the Marxist theory of the base and superstructure.[505] Briefly, according to this theory, a materialistic and finally 'economic base' underlies society, and an idealistic legal, social, cultural, and political superstructure is built upon and supports that base.[506] If the base is capitalist, then the law and politics will seek to safeguard capitalist institutions and relations, and social and cultural phenomena will also entrench capitalism. CLS, then, criticises and deconstructs (or 'trashes' as they would like to call it) the liberal legal order, because while both a collectivist and an individualistic outcome to every question of law is available, CLSers argue that liberalism tends to favour and institutionalise the latter.[507] At the same time, it employs instances of the former to 'legitimise' the order in the eyes of the disadvantaged, thereby creating so-called 'false consciousness'.[508]

Indeed, according to CLSers, law (part of the superstructure), in the dominant liberal-individualist conception thereof, results from the social relations arising out of a capitalist, market economy (the base). To some, the law (*in toto*) simply reflects whatever economic interests the privileged group happens to have, and to others, some aspects of law are free of this bias. The instrument of law – the courts – as agents of "Western capitalism", act as a legitimising feature of the liberal legal order and thus play a central role in generating this false consciousness. The American CLSer John van Doren writes that liberal jurists portray legal outcomes as "neutral and unrelated to keeping class relations and power as they are" because the law inherently

503 Van Doren (footnote 496 above) 649-650.
504 Unger RM. "The Critical Legal Studies movement". (1983). 96 *Harvard Law Review*. 564.
505 But the CLSers are not Marxists. Indeed, many in the CLS tradition have harsh criticisms of traditional Marxism. See Davis DM. "Legality and struggle: Towards a non-instrumentalist view of law" in Corder (footnote 2 above) 67, 75.
506 Davis (footnote 505 above) 66.
507 Van Blerk (footnote 497 above) 91.
508 Van Blerk (footnote 497 above) 95.

demands those results.[509] Thus, for instance, the right of a landowner to evict a squatter is portrayed by the liberal order as an inherent feature of law, and has nothing to do with protecting the owner's exclusivist position of privilege and wealth against having to share it with those around them. A CLSer would argue that there is nothing neutral or inherent about this situation, and that the law, through the courts, is simply entrenching a power relationship that privileges the wealthy landowner over the poor, exploited squatter. Indeed, liberalism, to CLSers, "is corrosive in its antisocial and self-seeking ends".[510]

Corder and Davis place themselves firmly in the CLS camp, regarding "law, the courts, and rights as being unavoidably enmeshed with the socio-economic relations through which they operate. This is qualified to the extent that law is possessed of a relative autonomy which creates space which can be exploited by the dominated classes in order to make real gains in power".[511] They write:

> "With the development of the modern economy, the tasks of allocation and distribution of resources are no longer performed exclusively by the market mechanism. As a result of the increasing role of both central and decentralized public structures in the performance of these 'private' functions, a considerable measure of fusion between the private and public spheres has occurred."[512]

Corder and Davis accurately noted in 1988 that this was the direction in which law and State theory was developing (and in many parts of the world, had already reached completion). But they omit – perhaps in contravention of their own call for reflection and contemplation when considering legal phenomena – passing judgment on whether this *ought* to be the case. Indeed, they write that the (then) dominant positivist mode of legal analysis must be replaced with "a critical and contextualized mode of analysis", although it is clear that the authors place the bulk of their emphasis on "contextualized" rather than "critical" legal analysis when they argue that "time-honoured practices must be challenged, and abandoned if found wanting according to the criteria of social utility and progress towards democracy".[513]

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509 Van Doren (footnote 496 above) 654.
510 Van Blerk (footnote 497 above) 92.
511 Corder and Davis (footnote 2 above) 21.
512 Corder and Davis (footnote 2 above) 23-24.
513 Corder and Davis (footnote 2 above) 24.

Adelman criticises "liberal constitutionalism" and the Rule of Law – which in strikingly Marxist terms he likens to "bourgeois law" – *inter alia* on the grounds that it posits the ostensible neutrality of the State in the "conflicts between classes, interest groups and individuals" and that it ignores "[e]conomic might or claims of privilege". This, to Adelman, shows a preoccupation with form over substance; "privileges individualism at the expense of the collective, and it fetishizes law".[514] Maintaining "capitalist relations as the bedrock of continued white privilege" stood in the way of South Africans attaining "true liberation" in the 1990s transition, according to Adelman.[515]

3.5.2 What do CLSers propose instead?

Critical Legal Studies generally does not present a substantive value-set or programme of action that should be adopted in the place of so-called liberal jurisprudence. CLSers merely engage in critique: Exposing what they consider to be the contradictions and privileged biases inherent in the dominant liberal order.[516] Whereas liberalism upholds such substantive values as "liberty, equality, and justice", CLSers merely critique "from the outside" and "compare the realities of a system with what it purports to be".[517] Adrienne van Blerk, a South African jurist writing about CLS, on the other hand, ascribes to it a positive, ideological CLS agenda, which is practically identical to the programme of transformative constitutionalism later proposed by Karl Klare. Van Blerk writes that CLS "seeks to transform society entirely", indeed "to recreate society".[518] A "far-reaching […] and imaginative application of the law" will be required to redress the harm caused by racial discrimination in South Africa, as far as "distribution of wealth, land and education" are concerned.[519] Critical Legal Studies, then, is substantively committed to:

> "[…] a higher level of altruism in society; a commitment to communal sharing, citizen participation in social decisions and an increased sense of voluntary care and co-operation among people".[520]

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514 Adelman (footnote 392 above) 137
515 Adelman (footnote 392 above) 123.
516 Van Doren (footnote 496 above) 651.
517 Van Doren (footnote 496 above) 655.
518 Van Blerk (footnote 497 above) 87, 107.
519 Van Blerk (footnote 497 above) 87.
520 Van Blerk (footnote 497 above) 82.

The similarities between this value-set and transformative constitutionalism will become apparent in further discussion below.

3.5.3 Some ironies of CLS in South Africa

Van Doren noted in 1989 that there is a danger in applying CLS in South Africa. CLSers ordinarily believe that rights, within the apparent liberal-individualist paradigm, obstruct communitarian initiatives,[521] and amount to "bourgeois obfuscation".[522] But because of this antipathy toward the liberal conception of rights – which includes strong protections for freedom of expression and property rights – applying it in South Africa in its post-Apartheid context could lead to a situation where the freedom of the CLSers to 'trash' the liberal order itself will be ripped from under them. Thus, while in America the kind of critique the CLSers engage in is tolerated by government, the same would not necessarily be the case in South Africa. They could in so doing "[undermine] the very ground they stand on".[523] Van Doren summarises the position with self-conscious irony: "In short, before rights can be trashed they must exist".[524]

This forewarning might have come true in a twisted sense likely not anticipated by Van Doren. In November 2019, the South African Council on Higher Education (CHE) published a report on reforming the Bachelor of Laws (LL.B.) degree. The LL.B. is the basic legal qualification in South Africa which the majority of attorneys, advocates, judges, legal researchers, and other legal practitioners, do, and usually must, possess. It is thus not a mere component of legal education but might be described as its bedrock. In the report, the CHE recommended *inter alia* that so-called transformative constitutionalism be "internalised" not only in the teaching and learning facets of the degree, but also in the "socialisation activities" of students and staff. It further recommends that transformative constitutionalism be internalised not only in the curriculum, but also "in the attitudes and mind-set of staff and students".[525]

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[521] Van Blerk (footnote 497 above) 92.
[522] Van Doren (footnote 496 above) 663.
[523] Van Doren (footnote 496 above) 649.
[524] Van Doren (footnote 496 above) 663.
[525] Mokgatle O, Grant B, Van der Merwe D, Reddi M, and Visser D. "The state of the provision of the Bachelor of Laws (LLB) qualification in South Africa". (2019). Council on Higher Education. https://www.che.ac.za/sites/default/files/publications/CHE_LLB%20National%20Report_2018_DD_REV2-05.pdf. 50, 59.

In other words, Transformationism – in the guise of so-called transformative constitutionalism, if the report is to be accepted by the legal education community (which includes almost all State-funded and State-supported law faculties) – is intended to become a compulsory normative orthodoxy that will permeate every module and "socialisation activity" associated with the LL.B. While the report does not go as far as to say this outright, it is clearly implied that transformative constitutionalism is to be placed above reproach as far as the LL.B. student and law faculty are concerned. There is no reason to suppose that this state of affairs will not accompany the student, if not institutionally, then subconsciously, throughout their postgraduate studies or their careers.

Van Doren writes that "CLS is designed for situations in which a dominant ideology is used to prevent opposing social action through a series of legitimation techniques".[526] Indeed, the question is left open: What happens when a CLS-inspired and -sanctioned ideology – Transformationism, in this case – becomes dominant, and itself prevents opposing social action, too, using legitimation techniques, like presenting transformative constitutionalism as the "foundational principle in modern South African jurisprudence"?[527] If Transformationism, as the South African instance of CLS, should become the entrenched, dominant ideology of legal education, it might inhibit the free-flow of alternative or even contrary jurisprudential perspectives, whether enunciated by faculty or students. While CLSers might find this encouraging, it sets a precedent that could be turned *against* Transformationism just as easily as it led to its entrenchment. In the absence of the academic freedom to question, modify, or outright reject Transformationism, the very ground the CLSers and Transformationists stand on to critique and 'trash' the liberal legal order is being undermined.

Van Doren also writes about the difference between the 'active' and 'passive legitimation' of the dominant legal ideology. The ideology is actively legitimised when the elite claims to be doing what it is doing to the benefit of those who could undermine the interests of the elite. Passive legitimation takes place when those instances where the elite, using instruments like the courts, organised religion, popular culture, and civil society, inculcates approval of the *status quo* through a variety of methods.[528] The

[526] Van Doren (footnote 496 above) 657.
[527] Mokgatle *et al.* (footnote 525 above) 50.
[528] Van Doren (footnote 496 above) 658.

courts could for instance play their role by asserting that a neutral legal outcome has been attained through the dispassionate application of objective legal principles (instead of a result predetermined by the capitalist internal logic of the liberal order), and that that is simply how things are. For instance, the generally Transformationist (and therefore sympathetic to CLS) Constitutional Court in South Africa has 'passively legitimised' Transformationism by ostensibly relying on the Constitution (and not on Transformationism as such or the ideology of the dominant political class) in various ways. As discussed below, it has *inter alia* endorsed the effective expropriation of all mineral rights in South Africa without requiring compensation, by unconvincingly arguing itself out of constitutional protections. The court, in *Glenister v President of South Africa*,[529] also effectively silenced criticism of past government conduct in judicial proceedings, calling it "scandalous, vexatious or irrelevant".[530] As a final example, the court, in *AfriForum v UFS*,[531] regarded the continued use of Afrikaans at the University of the Free State as problematic, despite the Constitution's only requirement for tuition in an official language being reasonable practicability. The court reasoned that reasonable practicability included "cur[ing] the ills of our shameful apartheid past".[532]

Van Doren, obviously, was writing from the perspective of a critique upon the liberal-individualist order, but the same methodology can be applied within the context of transformative constitutionalism. Take, for example, the national minimum wage (NMW) that was adopted in South Africa in early 2019. Advocates of the NMW assert that it was a progressive measure designed for the betterment of low-paid workers: It is part of the agenda of redistributing wealth from the haves to the have-nots.[533] This is, using CLS methodology, the active legitimation of the dominant legal ideology – transformative constitutionalism – in South Africa. It is said to be beneficial to the disadvantaged. But when approached from the liberal or libertarian perspective, it is clearly to their detriment. Libertarian constitutional scholar Richard A Epstein, in an

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[529] *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* 2015 (1) BCLR 1 (CC).

[530] *Glenister* (footnote 529 above) para 30.

[531] *AfriForum and Another v University of the Free State* 2018 (4) BCLR 387 (CC).

[532] *AfriForum v UFS* (footnote 531 above) para 53. See Malan (footnote 14 above) 206-218 for a comprehensive discussion of these and other cases and the influence of Transformationism on the judgments.

[533] National Minimum Wage Panel Report to the Deputy President. "A national minimum wage for South Africa: Recommendations on policy and implementation". (2016). 8.

article warning South Africa against adopting minimum wages from 1993, writes that the restrictions imposed by a minimum wage on wage levels do not benefit the poor, even those who are employed. "At one level", writes Epstein, "it reduces the demand for employment so that some workers, often the poorest, least skilled workers, are excluded from the market altogether". For those employed, "it also induces employers to adopt less efficient terms on other aspects of the employment contract, such as split shifts for workers, so that some of the wage increase is eaten away by alteration in other terms of trade".[534] In other words, minimum wages raise the price of labour, and as ordinary economic theory holds, increasing the price of something reduces demand for that thing.[535] A reduction in the demand for labour in South Africa will, and does, have the result of increased unemployment and consequently destitution. Some claim that the 15,000 domestic workers who lost their employment in the first quarter of 2019 did so at least partly as a result of the NMW.[536] Whether this is true is irrelevant. What is relevant is that the same methods CLS uses to 'trash' what it considered to be the dominant liberal legal order can just as easily be turned back on itself. Therefore, the CLS' apparent commitment, in Van Blerk's words, to more altruism and voluntary care among people,[537] may prove to be at best very disputable, as transformative constitutionalism itself has become a dominant ideology that increases dependence on the State and causes destitution.

3.6 Decolonial thinking around constitutionalism, and so-called Critical Race Theory

The developing jurisprudence of South African authors who take a generally oppositional approach to Western conceptions of constitutionalism, rights, and legal philosophy, owe much inspiration to the largely American legal ideology of so-called

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534 Epstein RA. "Drafting a constitution: A friendly warning to South Africa". (1993). 8 *American University Journal of International Law and Policy*. 569.

535 Phelan J. "5 reasons raising the minimum wage is bad public policy". (2019). Foundation for Economic Education. https://fee.org/articles/5-reasons-raising-the-minimum-wage-is-bad-public-policy/.

536 See for instance Staff Writer. "This is how much South Africans pay their domestic worker in 2019". (2019). *BusinessTech*. https://businesstech.co.za/news/finance/317882/this-is-how-much-south-africans-pay-their-domestic-worker-in-2019/. Proponents of the minimum wage dispute its deleterious effect: Valodia I and Francis D. "National minimum wage can't be blamed for joblessness". (2019). *Business Day*. https://www.businesslive.co.za/bd/opinion/2019-05-30-minimum-wage-kills-prospects-increases-joblessness-and-insults-the-poor/.

537 Van Blerk (footnote 497 above) 92.

Critical Race Theory (CRT). CRT is arguably an offshoot of CLS.[538] This has led to so-called decolonial theories of constitutionalism, particularly in the South African context. In this respect I make use of the works of Joel Modiri and Tshepo Madlingozi, contemporary South African university activists on this emerging decolonial legal theory, as the basis for the following discussion.

3.6.1 White supremacy as the base

According to the co-founders of CRT, Richard Delgado and Jean Stefancic, CRT is an interdisciplinary intellectual movement containing "an activist dimension", with its roots in law. It seeks to transform society, not merely understand or analyse it.[539] In other words, CRT seeks particular social, economic, and political ends in society.

Decolonial theorists, in many ways like CLSers, reject the notion that the law is impartial or objective, and would posit that the law, in the American and South African context at least, "reproduces the structures and practices of racism and racial domination (white supremacy)".[540] In other words, the law, again indeterminate, is politically biased and favours whites, their interests and values, over persons and communities of other[541] races. Critical Race Theory regards "the dominant culture (whiteness)" as of more relevance than the dominant liberal order that CLS challenges.[542]

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538 Delgado R and Stefancic J. *Critical Race Theory: An Introduction*. (2001). New York: New York University Press. 4.

539 Delgado and Stefancic (footnote 538 above) 3.

540 Modiri JM. "Towards a '(post-)apartheid' critical race jurisprudence: 'Divining our racial themes'." (2012). 27 *Southern African Public Law*. 230. See for instance Mogoeng CJ in *AfriForum v UFS* (footnote 531 above) at para 62 where he comments that white supremacy would be "kept alive" should the law treat Afrikaans and English equally. Unequal treatment, in other words, was necessary to achieve the ideological goals of Transformationism, in this case with a significant influence from Critical Race Theory.

541 It is interesting to note that, according to Critical Race Theory thinking, my use of the word "other" here in the context of an LL.M. study would be seen as a manifestation of the inherent racism of jurisprudence. This 'othering' would be considered as an example where people who are not white are defined in relation to whiteness, making whiteness a domineering legal standard. Sociologically, it might be considered a 'micro-aggression'. See Halloun A-L. "'No, you're just half' – The impact of everyday racism on mixed-race identity development in Belgium". (2017). M.A. thesis at the University of Liège. 1, 12, 14.
Modiri might consider my use of this word, if not this entire study, as an instance of "white backlash politics": A "legal strateg[y], rhetorical discours[e]" that seeks "to preserve [whites'] interests and privileged status and justify the disproportionate disadvantage suffered by Blacks [sic]." Modiri (footnote 540 above) 252.
See also footnote 569.

542 Modiri (footnote 540 above) 231.

Critical Race Theory, according to Modiri, "carries out the progressive groundwork for a radical politics of anti-subordination and social justice". It seeks to emphasise race in legal thinking and reasoning, and view "racial issues" from the perspective of what proponents of CRT consider to be marginalised racial groups. The destination of this change in legal thinking and reasoning is to achieve greater racial justice, equality, and freedom.[543]

Critical Race Theory *inter alia* maintains that racism has been normalised in that it is an everyday affair that permeates most if not everything in society, at least in its originator country the United States, and certainly, they will claim, in South Africa. Critical Race Theory further maintains that there is "white ascendancy" in a psychic and material sense.

What is described as 'intersectionality' is also a feature of CRT. Briefly, intersectionality, described alongside anti-essentialism, is the idea that no individual "has a single, easily stated, unitary identity", but that everyone "has potentially conflicting, overlapping identities, loyalties, and allegiances".[544] When disadvantaged identities "intersect", the individual in question is presumed to be (more) competent to speak on matters of discrimination or bigotry relating to those identities. The discrimination suffered by that individual based on one of their identities (for instance, poverty) cannot, according to CRT, be read in isolation from the discrimination they suffer at the same time based on another identity (for instance, race, in particular when the victim is black).[545]

A theme of CRT, and certainly of decolonial constitutionalism, is historical revisionism, whereby history, in the form of "comforting" interpretations that benefit the dominant, white group, is re-examined from the perspective of disadvantaged groups.[546]

Perhaps above all, in its rejection of legal liberalism, CRT rejects colour-blindness. If the law, as it is according to liberal legal scholars, is considered to be colour-blind, people disadvantaged because of colour will remain disadvantaged. Critical Race

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543 Modiri (footnote 540 above) 230-231.
544 Delgado and Stefancic (footnote 538 above) 7-9.
545 See Altman A. "Discrimination". (2015). Stanford Encyclopedia of Philosophy. https://plato.stanford.edu/entries/discrimination/#Int and Delgado and Stefancic (footnote 538 above) 9.
546 Delgado and Stefancic (footnote 538 above) 20.

Theory, then, proposes “aggressive, color-conscious efforts to change the ways things are” to “ameliorate misery”. One such strategy endorsed by CRT is racial affirmative action.[547]

Critical Race Theory, like CLS, is also critical of the notion of rights, which CRT activists assert do far less good than is ascribed to rights by liberal theorists. Rights are criticised for not entailing material or substantive benefits, such as housing or education, and for usually being merely procedural. Rights, CRT activists argue, also tend to be construed in favour of the dominant group. Delgado and Stefancic take the example of freedom of expression, where in the United States hate speech that is directed at disadvantaged groups is regarded as legally protected speech, but offensive speech directed at members of the dominant (advantaged) group is regarded as unprotected, sanctionable speech. Thus, racially belittling a black person might be protected expression, but falsely advertising a product (to the mostly-white middle and upper classes) or defaming someone who is capable of pursuing legal action (mostly-white middle and upper classes) would not be permitted. Another problem with rights, according to CRT, is that they are alienating, in that rights by their nature erect barriers between people.[548] Critical Race Theory can therefore be seen as part of the CLS brand of left-communitarianism.

3.6.2 South Africa’s façade transition

Proponents of CRT and decolonial activists criticise “CLS for its generally tangential treatment of race (figured in CLS as either a by-product of the capitalist class structure, as a relic of the legal past, or as an individual aberration made up of ideas and behaviours)”.[549] Indeed, Modiri writes that white supremacy has continued in South Africa despite the formal end of Apartheid in 1994 and the creation of a new constitutional order. This is evident from the “racial inequality” that persists between whites and blacks and the “horrific material conditions” under which blacks live. To Modiri, the “legal, social, economic, political, cultural, affective, symbolic, psychic and aesthetic structures of” South Africa’s white supremacist past are still ever-present.[550]

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[547] Delgado and Stefancic (footnote 538 above) 22-23. See also the discussion on Sachs (page 117 above) where he writes that the Bill of Rights must be centred around affirmative action.

[548] Delgado and Stefancic (footnote 538 above) 23-24.

[549] Modiri JM. “The jurisprudence of Steve Biko: A study in race, law and power in the ‘afterlife’ of colonial-Apartheid”. (2017). Ph.D. thesis at the University of Pretoria. 348. Citations omitted.

[550] Modiri (footnote 549 above) 20-21.

Proponents of decolonial legal theory reject the logic of transformative constitutionalism. In the words of Madlingozi, the objective of transformative constitutionalism is “to be a changed society, or alternatively a permanently changing society, based, finally, on what I argue are the fundamental elements of social justice in South Africa”. These elements are “recognition, incorporation and distribution” or “an assimilationist logic that perpetuates an anti-black bifurcated society”. This assimilationist social justice logic, according to Madlingozi, “ultimately functions precisely to confine the racially oppressed and socially excluded in an interregnum, a time of neo-apartheid”. This logic seduces the “historical victims” of racism “into teleological whiteness – the idea that being white and the attainment of whiteness are the highest ideals of emancipation and human progress”.[551] Even the “human” in the notion of human rights, as a central aspect of social justice, is said to be effectively referring to white people, or the likeness of whites. Madlingozi writes:

> “It follows that demands for human rights and their presumed enabling of justice-in-society often end up being a claim to be like the white man, or less subtly, to live like the white man.”[552]

In other words, the Constitution and its supposed transformative mission are seen to be part of the superstructure that ultimately supports the base of white supremacy, and are therefore rejected.

While important changes were made during South Africa’s constitutional transition, this change did not cut through to “where it really matters most”, that is, the “actual arrangements of economic power, land and property ownership, spatial segregation, epistemic violence, Western imperialism, psychic trauma and labour exploitation”.[553] Transformative constitutionalism has benefited only a small black elite and incorporated them into a “white world”.[554] Political scientist William Gumede, writes that opportunists such as “tenderpreneurs and black economic empowerment political

[551] Madlingozi T. “Social justice in a time of neo-Apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution”. (2017). 1 *Stellenbosch Law Review*. 128-129. Citations omitted. It is evident that if not explicitly so, there is at least a latent anti-white sentiment that permeates Critical Race Theory thinking, as “white” here is associated with something detrimental to the psyche of black people. This collectivist association of certain traits with so-called “whiteness” can be seen throughout the preceding and following paragraphs.

[552] Madlingozi (footnote 551 above) 137.

[553] Modiri (footnote 549 above) 22.

[554] Madlingozi (footnote 551 above) 133.

capitalists" use "black poverty, black identity and culture" as means to enrich themselves.[555]

Modiri criticises the liberal legal approach to jurisprudence. He writes that this school of thought "presumes the legitimacy of a state in which we are all guaranteed equal protection before the law, and in which rights are said to facilitate individual freedom". To liberal legal theorists, colonialism and Apartheid were simply deprivations "of basic civil and political rights and a violation of Black [sic] people's claims to equality and liberty". Law must be colour-blind and non-racial, and should it not be, it would fall foul of "the canonical principle of individual autonomy and harm individual dignity".[556] This is inadequate, argues Modiri, because liberalism's focus on formal equality cannot produce "substantive equality and freedom". Further, the liberal claim that identity is voluntary is false, as "members of socially marked groups experience their membership as largely involuntary" and that such involuntary group identities have material consequences for such members.[557]

Elsewhere Modiri criticises colour-blindness in law as being both "conservative" *and* "liberal" as well as "formalist", and that it undercuts liberals':

> "[…] own 'non-racist' goals by ignoring the racial dynamics that shape society thereby also maintaining established privileges and denying the complex differences between people. [Those who advocate colour-blindness] also fail to properly understand the structural effects of racialisation and thus often rely on non-racial explanations to explain even apparent racial disparities."[558]

It is incorrect, according to Modiri, to suppose that "the absorption of Blacks into already created legal, political, economic and socio-cultural systems, institutions and practices" are akin to "freedom or justice". "And it is an even greater error", reasons Modiri, "to reduce liberation to the constitutional recognition of socio-economic rights and access to basic services".[559]

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[555] Gumede W. "Black poverty appropriate for self-enrichment". (2020). *Sunday Times*. https://www.pressreader.com/south-africa/sunday-times-1107/20200105/281951724744869.
[556] Modiri (footnote 549 above) 42-44.
[557] Modiri (footnote 549 above) 46-47.
[558] Modiri (footnote 540 above) 243.
[559] Modiri (footnote 549 above) 362.

Modiri, relying on Steve Biko's work, posits that it is "not class or totalitarianism that is the source of the fundamental problematic of South Africa", but rather race, particularly white supremacy.[560] Black Economic Empowerment, demographic representivity, "poverty alleviation and even transformation" are "individualist neoliberal schemes" that contrast with Biko's project that "entailed changing the very structure and order of things in society".[561] The liberal emphasis on "human rights, reconciliation and democratisation" retains and reproduces the "social and economic structure and symbolic order" that benefits whites at the expense of blacks.[562]

For Modiri, South Africa turned to "a global neoliberal capitalist, market fundamentalist, free-enterprise economy that relies heavily on foreign investment" after the end of white minority government, and this "resulted in the negation of the need for reparations, substantive redress and extensive redistribution of land and resources".[563] Modiri criticises the focus on constitutionalism among legal scholars in light of the "overwhelming evidence of the inertia of apartheid inequalities and colonial power relations" which the Constitution and law reform have totally failed to redress. To these scholars, "the Constitution assumes a deity-like status" in which it is "intrinsically just, good and progressive". But to Modiri, this amounts to "self-deception in the face of the obvious realities of entrenched racial hierarchies in South Africa", and:

> "It also invisibilises black suffering and renders racial injustice and subordination illegible and it epistemically usurps the power to name and define the South African reality from a white point of view that completely negates Black people's own experiences and understandings of these problems. [The deification and scholarly dedication to the Constitution] is, in the end, a theodicy that rationalizes anti-black racism."[564]

Madlingozi also criticises the "deification" of the Constitution, given that "the Constitution is part of the counter-decolonisation project of masking white hegemony

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560 Modiri (footnote 549 above) 359.
561 Modiri (footnote 549 above) 364.
562 Modiri (footnote 549 above) 366
563 Modiri (footnote 549 above) 52. Van Blerk, too, writes that the post-Apartheid legal order in South Africa is characterised by "limited government and liberal democratic ideals". See Van Blerk (footnote 497 above) 87.
564 Modiri (footnote 549 above) 64-66.

and historical conquest through the economy of recognition-incorporation-distribution".[565]

Modiri writes that "the Constitution and its liberal legal framework" and "the social order it inaugurates" are "a continuation of colonial power relations and an impediment to the authentic liberation of Black people". South Africa's "self-authorizing and sovereign" law, then, "is fundamentally flawed" because "of its Eurocentricity and undemocratic imposition on the indigenous people of South Africa" as well as it being a pact "between Black and white political elites" that keep blacks subordinated and conceals and legitimises the injustices of the past.[566] The Constitution does not only represent "a practically false promise of an equal and liberated South Africa", but "also, and more importantly, represents an unjust and unethical vision of social life which perpetuates colonial power relations and knowledges".[567]

Modiri argues that law and jurisprudence cannot be abstractly or theoretically understood in the absence of recognising that these are reproductions of "racial hierarchy and the perpetuation of colonial-apartheid values".[568] In contrast to the libertarian approaches to rights as set out above, Modiri would likely respond by arguing the picture I have painted is false, for I did not locate libertarian jurisprudence particularly within the context of a Eurocentric philosophy that has been intellectually developed almost exclusively by white men with social and economic privilege.[569] Saying the law's function is to protect individual rights, chiefly property rights, would therefore to Modiri and other decolonial activists be a clear instance of a white jurist employing abstract legal reasoning to perpetuate and further entrench existing, unequal power and property relations between blacks and whites, especially in South Africa, thus entrenching white supremacy and black subordination.

565 Madlingozi (footnote 551 above) 139.
566 Modiri (footnote 549 above) 78.
567 Modiri (footnote 549 above) 80.
568 Modiri (footnote 549 above) 285.
569 Indeed, elsewhere Modiri criticises other "progressive legal scholars" for failing to make greater use of "critical race or Africana philosophical scholarship written by Black [sic] scholars", instead relying on the works of usually foreign, white intellectuals. There is thus, according to Modiri, "an unexamined whiteness in the political and social judgements of South African legal scholars". To Modiri, this is problematic. Modiri (footnote 549 above) 345-346. See also footnote 541.

3.6.3 What do decolonial activists propose instead?

Modiri proposes what he calls a "critical political or leftist approach to race and law", which itself begins with a critique of the liberal approach just outlined. In this approach, there must be "a radical socio-economic, political and cultural re-structuring of society" and a confrontation, transformation, democratisation, and decolonisation of "the social powers that produce inequality". Central to this approach is the realisation that racism is not merely "an interpersonal encounter between individuals" but rather "a structural and institutional […] socio-political system that generates and normalises deep-rooted racial hierarchies". Law, as a result, must "follow a race-conscious approach to racism, and to address the specific reality of racial inequality and black suffering rather than to begin from the premise of an ideal or abstract notion of equality".[570]

Colonial racism is "integral and foundational […] to the present legal system" and as such the law, rights, and constitutionalism are not well placed to truly "redress a reality and condition of subordination, inequality and degradation". Instead, "new forms of politics and theory are needed".[571]

Echoing Mogobe Ramose, in the place of "democratisation", Madlingozi proposes "decolonisation", and in the place of "social justice", he proposes "liberation".[572] The "Africanists" who opposed the former in favour of the latter sought "a future society based on anti-racism, Africanism, socialism, and restored sovereignties and return of dispossessed lands".[573] Ramose wrote that "the restoration of title to territory and sovereignty over it" is central to the "quest for justice" and that this is what the revolutionary decolonial legal dispensation seeks. By this he was referring mostly to dispossessed land. Democratic constitutionalism, on the other hand, by way of the theory of extinctive prescription, recognises "the conqueror's claims" to the territory and land, thereby eliminating black South Africans' claims.[574] Madlingozi writes of the African nationalist demand, by the likes of the Pan Africanist Congress, that "the

570 Modiri (footnote 549 above) 45-47.
571 Modiri (footnote 549 above) 281.
572 Madlingozi (footnote 551 above) 130.
573 Madlingozi (footnote 551 above) 133.
574 Ramose MB. "Justice and restitution in African political thought" in Coetzee PH and Roux APJ (eds). (1998). *The African Philosophy Reader.* London: Routledge. 569-570.

settler-state" be dissolved and "the sovereignties of subjugated [African] kingdoms" be returned alongside dispossessed land.[575]

Revealing perhaps a latent libertarian streak in decolonial constitutionalism, Modiri cites the example of the Black Community Programmes that operated during the tenure of the white minority government. These programmes sought "practical self-determination and independence" which "reflected alternative notions of political subjectivity and political community that do not rely on law and constitutions". He continued, "By decentering statist institutions and overcoming dependence on dominant institutional structures, the Black Consciousness Movement discloses examples for other ways of living – perhaps not under, but with – the law".[576] The values and those of the Abahlali (another example by Modiri) appear to concern personal and communal responsibility, as opposed to coercion and entitlement.[577]

It is worth noting that the treatment of race within the context of CRT and decolonial constitutionalism can likely be applied *mutatis mutandis* to sex, gender, and other immutable characteristics. Thus, whereas CRT reflects critically on the inappropriate power relations between whites (as the undeservedly dominant race) and blacks (as a subjugated and exploited race), critical feminist (or so-called third-wave feminism) and other so-called 'critical' schools of thought regard the inappropriate power relations between men and women, and hetero- and homosexual persons as problematic. Modiri, for instance, notes that CRT draws heavily on "the broad field of feminist theory – and specifically the sophisticated, complex and rich treatment of sexism, misogyny and patriarchy as distinct but interconnected political systems and also as practices of oppression, subordination and power".[578]

4. TRANSFORMATIVE CONSTITUTIONALISM

4.1 The Constitution as a transformative instrument

In an early instance of what could be considered Transformationist legal thinking, Corder and Davis criticised the South African legal community for its "preoccupation" with the Western roots of the South African common law system. This "preoccupation"

575 Madlingozi (footnote 551 above) 132.
576 Modiri (footnote 549 above) 335.
577 Modiri (footnote 549 above) 337-338.
578 Modiri (footnote 540 above) 244.

appeared from, for instance, the debate about Roman-Dutch law ‘purism’, English law ‘pragmatism’, and the systematisation of law according to positivist German ‘legal science’. Instead of this preoccupation, Corder and Davis thought it would be more appropriate for jurists to “focus attention on how this body of rules, whatever their parentage, is appropriate to local conditions or how it ought to be tailored to meet urgent needs locally”.[579] They argue that the emphasis of the legal community “should shift to an understanding of the reasons for the development of the form and content of the legal system, and to the way in which it could be adapted to serve the needs of a changed political environment”.[580]

In an early manifestation of Transformationism in South Africa, Adelman wrote in 1990 that legally abolishing the white minority government’s Apartheid programme was necessary but not sufficient to achieve socio-economic transformation in the relationship between the dominant and underprivileged racial groups. “Progressive legislation” would “play a key role in the country’s future”, and the most important statute to be considered would be the new Constitution.[581] Adelman regards capitalism – the economic ideology underlying libertarianism – as akin to Apartheid, and rejects it as the basis for a just legal-constitutional scheme. Had South Africa adopted a free market without racially discriminatory laws after the white minority government was ousted, Adelman believes “neo-apartheid” would have come about. Instead, there must be a socialist form of “genuinely pluralist and participatory democracy”.[582] This is a substantive notion of transformation which would later become associated with the work of Karl Klare.

On the other hand, like former Chief Justice Pius Langa did years later in the name of so-called transformative constitutionalism, Corder and Davis argued, I submit not unconvincingly, that the premises, histories, and underlying philosophies of legal systems, rules, and principles should not be uncritically adopted as given imperatives.[583] This is an analytic or methodological notion of legal transformation, and which finds clear resonance with CLS as a critical methodological jurisprudence which

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579 Corder and Davis (footnote 2 above) 4.
580 Corder and Davis (footnote 2 above) 6.
581 Adelman (footnote 392 above) 119-120. This article is cited as having been published in 1989 by its publisher, but past-tense references to “February 1990” etc. indicate that it was likely written sometime in 1990.
582 Adelman (footnote 392 above) 148.
583 See Corder and Davis (footnote 2 above) generally.

is said to be devoid of substantive content. Transformationism in its substantive sense is, however, what this chapter is chiefly concerned with.

This so-called transformative constitutionalism, a "deradicalised"[584] form of Transformationism, has become the contemporary dominant school of Transformationism which is deeply associated with the Constitution.[585]

To Moseneke, "the Constitution harbours a transformative mission with an altruistic rather than individualistic hue". This means that liberty is not the only desirable end the Constitution sought to attain in the wake of Apartheid, "but also the achievement of equal worth and social justice". According to Moseneke, the idea of social justice comprehends *inter alia* "substantive equality, [and] fair access to vital socio-economic goods and services, [and] fairness in the workplace". Therefore, on this construction, the Constitution does contemplate State interference in private affairs, particularly "when private power approximates public power or has a wide and public impact".[586]

To Theunis Roux, in contrast with theories "premised on some sort of visceral hatred of Western liberalism" – such as the decolonial legal thinking discussed above – transformative constitutionalism accepts that:

> "[…] oppressed peoples might be able to make a distinction between the harm that was done to them by the colonising power and the potentially beneficial uses to which ideas and institutions taken over from the West might be put".[587]

Roux further writes that the South African tradition of "struggling" against political oppression fed off the "liberal tradition in international political culture", and that the latter in turn develops on the back of the former as well.[588]

In Roux's view, the "project of transformative constitutionalism" must be understood against the background of a dynamic liberal constitutionalism, that is, a way of thinking that confers "presumptive authority" on institutions "only to the extent that [they] conform to the best available evidence of the institutional preconditions for human freedom". Dynamic liberalism – as opposed to classical liberalism – is regarded by

584 See footnote 36 in Shai (footnote 378 above) 15.
585 Shai (footnote 378 above) 44.
586 Moseneke (footnote 442 above) 12.
587 Roux T. "A brief response to Professor Baxi" in Vilhena *et al.* (footnote 458 above) 49.
588 Roux (footnote 587 above) 50.

Roux not as “the polite face of capitalist exploitation”, but “a repository for our ever-developing understanding of the circumstances of social and economic justice”. Roux writes that transformative constitutionalism must be understood bearing three things in mind. Firstly, that transformative constitutionalism is a liberal enterprise in the sense that liberal institutions – such as universal franchise, multi-party democracy, an independent judiciary, and the Rule of Law – are maintained. Secondly, transformative constitutionalism is not conservative, in that all other institutions “are susceptible to redefinition through the democratic process”. Thirdly, transformative constitutionalism rejects “any grand theorising about the historical destiny of the masses, and instead concentrates on finding pragmatic solutions to social problems through an appropriate blend of technical expertise and democratic deliberation”.[589]

Transformative constitutionalism, in other words, might be said to use the legal *status quo* as a starting point (in other words, its premises are accepted), whereas radical decolonial legal theory rejects it offhand. Nonetheless, it may prove useful to think of transformative constitutionalism as a jurisprudential revolution, in the same way Langa described Transformationism generally as “a social and an economic revolution”.[590]

Langa accepted as a point of departure that there is no monolithic conception of what transformative constitutionalism means in South Africa, other than that the Constitution is a fundamentally transformative instrument that obliges South Africa “to heal the wounds of the past and guide us to a better future”.[591] This being the case, the core ideas of the notion of transformative constitutionalism are nevertheless described here in some detail.

4.2 Karl Klare and the substance of transformative constitutionalism[592]

Klare defines “transformative constitutionalism” as “a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to *transforming a country’s political and social institutions and power relationships in a*

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[589] Roux (footnote 587 above) 50-51.
[590] Langa P. “Transformative constitutionalism”. (2006). 3 *Stellenbosch Law Review.* 352.
[591] Langa (footnote 590 above) 351.
[592] Given the centrality of Klare’s work to the whole idea of transformative constitutionalism, references to Klare will be scattered throughout this chapter and not confined to this precursory section.

democratic, participatory, and egalitarian direction". This endeavour to effect "large-scale social change" will happen "through nonviolent political processes grounded in law".[593] Klare's substantive transformative constitutionalism therefore seeks "to achieve a new kind of society in which people actually have the social resources they need meaningfully to exercise their rights".[594] This evidently situates transformative constitutionalism within the leftist paradigm briefly discussed above, where liberty is not considered merely a freedom of action from interference, but a 'freedom' that includes the provision of material welfare and comfort. In other words, there is a focus on freedom in its subjective, not objective, sense. Indeed, Klare notes that unlike classical liberal constitutions, the South African Constitution (considered from a transformative-constitutionalist perspective) "does more than place negative restraints on governmental interference with liberty", but "imposes positive or affirmative duties on the state to combat poverty and promote social welfare".[595]

This transformative constitutionalism is a "somewhat more politicized, understanding of the rule of law and adjudication" that Klare argues advances the values of egalitarianism, compassion, multiculturalism, in both the public and private spheres.[596] Similarly, researchers from the Human Sciences Research Council and the University of Fort Hare write the following, taking their cue from Langa's work discussed above:

> "[…] the establishment of an equal society and access to basic [socio-economic rights] are a necessary part of legal transformation in its broadest sense, and includes the ability of the judicial system to continuously transform itself and contribute in a positive way to the transformation of society."[597]

Characterising the South African Constitution as "postliberal", Klare writes that the Constitution "intends a not full departure from liberalism […] toward an 'empowered' model of democracy" that, unlike its libertarian counterpart in the United States, "is *social, redistributive, caring, positive,* at least partly *horizontal*, *participatory,*

593 Klare (footnote 452 above) 150. My emphasis.
594 Klare (footnote 452 above) 153.
595 Klare (footnote 452 above) 154.
596 Klare (footnote 452 above) 150.
597 Bohler-Muller N and Mireku O *et al.* "Assessment of the impact of decisions of the Constitutional Court and Supreme Court of Appeal on the transformation of society: Final report". (2015). Human Sciences Research Council. 39. https://cisp.cachefly.net/assets/articles/attachments/71742_2017-cjpreport-nov2015.pdf.

multicultural, and *self-conscious*".[598] Klare also added that the "Constitution espouses an advanced cultural politics" that *inter alia* promotes "ubuntu" and "gender justice".[599]

This postliberal reading of the Constitution, Klare admits, is not "the *only* possible reading of the Constitution", but one he considers to be "the best".[600]

Klare, too, however, at least rhetorically, endorses a (qualified) analytic transformative constitutionalism.[601] He writes that the "Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning", with the proviso that it is "consistent with [the Constitution's ostensible] transformative goals". This analytic transformative constitutionalism is regarded almost as a secondary paradigm gleaned from the Constitution; indeed it is "another, less obvious, innovation". [602]

About Klare's work, Theunis Roux writes that it "sets out a coherent vision of what a transformative constitutionalist project might look like, and what would be required to initiate it".[603] Roux summarises Klare's argument as follows:

> "[Transformative constitutionalism is] a particular interpretive method, one typically associated with the methodology and political commitments of the Critical Legal Studies movement ('CLS') in the United States, [and] is required in order to realise the full transformative potential of the Constitution."[604]

4.3 Pertinent manifestations of transformative constitutionalism

I now proceed to demonstrate the practical manifestations of Transformationism with reference to legislative measures and judicial decisions cast in the mould of this ideology. Three aspects are particularly pertinent:

- Affirmative action, so-called employment equity, and general manifestations of transformative constitutionalism;

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598 Klare (footnote 452 above) 152-153. Klare's emphasis, citations omitted.

599 Klare (footnote 452 above) 155.

600 Klare (footnote 452 above) 156. Klare's emphasis. The discussion on the Council on Higher Education's 2019 report on the Bachelor of Laws curriculum, however, appears to suggest at least an implicit if not overt idea that the transformative-constitutionalist reading of the Constitution is the only legitimate way to interpret, construe, and regard the Constitution.

601 Langa (footnote 590 above) 356.

602 Klare (footnote 452 above) 156.

603 Roux (footnote 587 above) 49.

604 Roux T. "Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?" (2009). *Stellenbosch Law Review*. 259.

- The control of expression; and
- State control and planning of the economy, pertinently including land reform.

At two junctures below I discuss previous versions of proposed bills that have been shelved. This is done because of its relevance to the methodology of how the goals of Transformationism are achieved. The ruling party, as well as the intellectual supporters of Transformationism, subscribe to a tactical doctrine whereby the so-called "balance of forces", both internationally and domestically, are assessed and responded to.[605] The theory of this doctrine is simple: In its advancement of Transformationist goals, government must bear in mind the opposition that it will face for any specific measure. Where the opposition, either domestically or internationally, is too great, government must compromise for the time being. Roger Southall, writing about expropriation of property, for instance, sets the position out as follows:

> "It follows, therefore, that given a domestic and international balance of forces resistant to state abrogation of corporate possessions, the [socialist, post-Apartheid government] would need to prioritise the sectors of the economy over which it intended to extend collective control, acknowledging explicitly that, at least initially, this would not necessarily imply full or even partial nationalisation."[606]

I submit that the more radical versions of the bills discussed below were shelved and replaced with more moderate versions because the balance of forces at the time was unfavourable to their enactment. Various civil society organisations, for instance, opposed the first version of the Hate Speech Bill – with total submissions numbering 75,854[607] – with freedom of expression concerns. The bill was moderated thereafter.[608] The more radical manifestations of these bills are likely to resurface in the future if the balance of forces shifts in favour of the ruling party and its allies.

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605 See, for instance, African National Congress (footnote 381 above) and Jim I. "Mines, banks, land etc. must all be nationalised". (2012). *Politicsweb*. https://www.politicsweb.co.za/replies/mines-banks-land-etc-must-all-be-nationalised--irv.

606 Southall RJ. "Post-Apartheid South Africa: Constraints on socialism". (1987). 25(2) *Journal of Modern African Studies*. 357.

607 Igual R. "So what's the status of South Africa's Hate Crimes Bill?" (2018). *Mamba Online*. https://www.mambaonline.com/2018/07/17/so-whats-the-status-of-south-africas-hate-crimes-bill/.

608 Staff Writer. "New major changes to 'hate speech' bill – here's what it means for you". (2018). *BusinessTech*. https://businesstech.co.za/news/government/238049/new-major-changes-to-hate-speech-bill-heres-what-it-means-for-you/.

4.3.1 Affirmative action, employment equity, and general manifestations

The achievement of demographic representivity – whether in terms of race or gender – has become a principle "for organising the South African public order" in the name of achieving Transformationism. Malan defines it as such:

> "Representivity is the norm in terms of which institutions and organised spheres of people are required to be composed in such a manner that they reflect the national population profile, particularly the racial profile of the national population".[609]

The Constitution requires no demographic representivity except in the public administration and the judiciary.[610] Demographic representivity is however only one factor. Section 174(1), for instance, requires additionally that judges be qualified, fit and proper for the role. And the public administration must also be composed based on "ability, objectivity, fairness". Indeed, an outside and uninitiated observer of the South African constitutional dispensation might look to section 1(b) of the Constitution, which purports to entrench non-racialism as a founding value of South Africa's legal order, and conclude that racialised treatment at the hands of government is proscribed by the Constitution.[611] In other words, affirmative action and so-called employment equity are mainly legislative phenomena, although the courts and government have looked to the Constitution in attempting to justify such phenomena. If the Constitution *does*, in fact, require demographic representivity in the private sphere, the question arises why it does not explicitly say so, like it does regarding the public administration and the judiciary, and furthermore why justification for such interventions is to be found in transformative-constitutionalist *interpretations* (as opposed to textually-obvious manifestations) of section 9(2).

Section 2(b) of the Employment Equity Act[612] provides that the purpose of the Act is to ensure the "equitable representation" of "designated groups" in "all occupational categories and levels in the workforce". The designated groups defined in section 1 of

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609 Malan K. "Observations on representivity, democracy and homogenisation". (2010). 3 *Journal of South African Law*. 427.

610 See sections 174(2), 186(2)(b), 193(2), and 195(1)(i) of the Constitution.

611 Pertinently, Malan argues that section 1(b)'s entrenchment of non-racialism might amount to "still-born law", as non-racialism has not formed part of constitutional practice in South Africa since the Constitution's adoption. This despite the fact that non-racialism was (supposed to be) the "cornerstone of the dispensation imported by the Constitutions of 1993 and 1996", setting it apart from the Constitution's pre-1994 predecessor. See Malan (footnote 14 above) 112-113.

612 Employment Equity Act (55 of 1998).

the Act are "black people, women and people with disabilities", and "black people" means "Africans, Coloureds and Indians". Section 2 of the Broad-Based Black Economic Empowerment Act[613] *inter alia* provides that the law must promote "economic transformation", "change in the racial composition of ownership and management structures", and "the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises".

This principle of demographic representivity has found explicit sanction in Constitutional Court jurisprudence. In *Solidarity v Department of Correctional Services*, Zondo J, in a majority judgment, said that "transformation of the workplace entails, in my view, that the workforce of an employer should be broadly representative of the people of South Africa".[614] To the court, "[i]t would be unacceptable" for the upper management of a company not to reflect the racial composition of the population.[615]

In *Minister of Finance v Van Heerden*, Moseneke J, delivering a majority judgment, said that, "[r]emedial measures are not a derogation from, but a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole".[616] The Constitutional Court concluded that discriminatory measures taken by government to advance the disadvantaged, cannot be presumed unfair and thus applied a different standard in affirmative action policy cases than in other discrimination cases. In other words, where a measure by the State is *intended* to give effect to the obligation in section 9(2) "to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination", the court's review of that measure will not take account of fairness or unfairness.[617] In section 9(5), on the other hand, the Constitution provides that discrimination is presumed unfair if it is based on one of the grounds listed in section 9(3), which includes race, colour, and ethnic or social origin. The court applied the opposite principle, namely that the discrimination will be presumed fair if it is intended to give effect to section

613 Broad-Based Black Economic Empowerment Act (53 of 2003).

614 *Solidarity and Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC) at para 40.

615 *Solidarity* (footnote 614 above) 41.

616 *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at para 32. The *Van Heerden* principle was confirmed by the Constitutional Court in *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at paras 36-37.

617 *Van Heerden* (footnote 616 above) at paras 36-37.

9(2), whether it is based on a prohibited ground or not. The court's reasoning for this finding is unconvincing. Moseneke said he could not accept that the Constitution "at once authorises measures aimed at redress […] but also labels them as presumptively unfair".[618] However, this is exactly what the Constitution provides, whether the court accepts it or not. This is clearly an instance where a particular provision of the Constitution is being interpreted in a manner that changes how its provisions, if read textually, would apply.

In the case of *Rustenburg Platinum Mine v Bester*, Theron J, in a majority judgment, invoked what could be referred to as the historical revisionist theme of Critical Race Theory. The court levelled criticism at the Labour Appeal Court's point of departure that the Afrikaans words "*swart man*" (black man), is of neutral content. Theron warns that if the Labour Appeal Court's approach is adopted South Africa runs "the danger that the dominant, racist view of the past – of what is neutral, normal and acceptable – might be used as a starting point […] without recognising that the root of this view skews [an objective inquiry]". The court proceeds as follows:

> "[…] the Labour Appeal Court's decision sanitised the context in which the phrase 'swart man' was used, assuming that it would be neutral without considering how, as a starting point, one may consider the use of racial descriptors in a post-apartheid South Africa."[619]

The Constitutional Court evidently adopted an underlying theme of Transformationism, by rejecting the assumption that words and terms which *prima facie* appear innocuous – as for instance "non-white", "*swart man*", or the act of complementing a black person's command of the English language – could in post-Apartheid South Africa be attached a neutral meaning. According to the court such words, terms, and actions should be viewed through the lens of so-called Critical Race Theory. This activist mode of thinking, as we have seen, considers underlying power structures and power relationships, especially but not exclusively, within the context of race.[620]

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618 *Van Heerden* (footnote 616 above) at para 33.

619 *Rustenburg Platinum Mine v SAEWA obo Bester and Others* 2018 (5) SA 78 (CC) at para 48.

620 This is not to say Theron J's conclusion was necessarily incorrect insofar as contemporary legal theory is concerned. These examples serve only to illustrate how the theory of Transformationism has been taken up into the jurisprudence of South Africa's superior courts, public policy, and legislation.

In the public sector, certain instances of employment equity do not only involve racial or gender representivity, but also ideological conformity. Malan notes that the Judicial Service Commission "is bent on promoting the appointment of *transformation candidates*, namely judges who share with the rest of the dominant political elite […] the same transformationist ideological convictions and objectives".[621] Magistrates, too, are required to demonstrate a "commitment to transformation and development".[622]

Section 3(1)(a) of the Higher Education Amendment Act[623] bestows upon government the obligation to "determine policy on higher education, [which includes] transformation goals and oversight mechanisms for these goals". Private higher education institutions would also be bound by these transformation goals.

4.3.2 Control over expression

Section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act[624] prohibits the publishing, propagation, advocacy or communication of expression "based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be hurtful; be harmful or to incite harm; promote or propagate hatred", subject to certain exceptions in section 12.[625] In applying section 10(1) of the Equality Act, the Equality Court found displays of the old South African flag to be instances of hate speech. *Nelson Mandela Foundation v AfriForum* concerned the "gratuitous" display of the old flag, which Mojapelo DJP regarded as any display that is not covered by the exceptions in section 12 of the Act.[626] This was because there can "be no other decent intentions behind waving" the flag "other than to cause a recall of painful memories […] under the apartheid rule".[627] Such displays are "equally unacceptably offensive" in "private

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621 Malan (footnote 14 above) 185. Malan's emphasis.

622 Judges Matter. "How magistrates are selected and appointed in South Africa". (2019). *Judges Matter*. https://www.judgesmatter.co.za/opinions/how-magistrates-are-selected-and-appointed-in-south-africa/. See also Malan (footnote 14 above) 137.

623 Higher Education Amendment Act (9 of 2016).

624 Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000) (hereinafter "the Equality Act").

625 Section 10 of the Equality Act has been declared unconstitutional by the Supreme Court of Appeal in the case of *Qwelane v South African Human Rights Commission and Another* 2020 (2) SA 124 (SCA) for non-compliance with section 16 of the Constitution. At the conclusion of this study, the Constitutional Court's confirmation or rejection of this declaration of unconstitutionality was still being awaited.

626 *Nelson Mandela Foundation Trust and Another v AfriForum NPC and Others* (EQ02/2018) [2019] ZAEQC 2 at para 56.

627 *Nelson Mandela Foundation* (footnote 626 above) at para 183.

spaces".[628] When the Equality Court in a separate judgment thereafter found that Ernst Roets, a well-known activist for minority rights and Head of Policy and Action at AfriForum, did not commit hate speech when he tweeted a question about the flag, the jurist Omphemetse Sibanda criticised the judgment for missing "the opportunity to display transformative decision-making when it mattered most". The judgment, to Sibanda, was too originalist and textualist, instead of transformative and progressive.[629]

Clause 4(1) of the first (2016) version of the Prevention and Combating of Hate Crimes and Hate Speech Bill,[630] sought to criminalise vast swathes of previously lawful expression by declaring such expression hate speech. "Hate speech" is defined as follows in this clause:

> "4. (1) (a) Any person who intentionally, by means of *any communication whatsoever*, communicates to one or more persons in a manner that –
>
> > (i) advocates hatred towards any other person or group of persons; or
> >
> > (ii) is threatening, abusive or *insulting* towards any other person or group of persons,
>
> and which demonstrates a clear intention, having regard to all the circumstances, to –
>
> > (aa) incite others to harm any person or group of persons, whether or not such person or group of persons is harmed; or
> >
> > (bb) stir up violence against, or *bring into contempt or ridicule*, any person or group of persons,
>
> based on race, gender, sex, which includes intersex, ethnic or social origin, colour, sexual orientation, religion, belief, culture, language, birth, disability, HIV status,

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628 *Nelson Mandela Foundation* (footnote 626 above) at para 186.

629 Sibanda OS. "The Ernst Roets judgment demonstrates why transformative justice is sorely needed". (2019). *Daily Maverick*. https://www.dailymaverick.co.za/opinionista/2019-09-18-the-ernst-roets-judgment-demonstrates-why-transformative-justice-is-sorely-needed/.

630 Footnote 12 above (hereinafter "the Hate Speech Bill").

nationality, gender identity, albinism or occupation or trade, is guilty of the offence of hate speech." (my emphases)

The Hate Speech Bill would have criminalised any communication that is intentionally insulting with the purpose of ridiculing or bringing someone into contempt, based on *inter alia* their race, profession, culture, or beliefs. This crime would be subject to no defences or exceptions.

This Bill was replaced in 2018 with a new version. This new version of the Hate Speech Bill[631] was less strict. Clause 4(1) of this Bill prohibits communication that is intended to "be harmful or to incite harm; or promote or propagate hatred" based on a prohibited ground, now excluding occupation and belief, but still including such grounds as race, HIV status, language culture, and religion, etc. This offence is subject to certain exceptions in clause 4(2).

The Constitution, on the other hand and unlike all three the aforementioned regimes and proposed regimes (the Equality Act and the two versions of the Hate Speech Bill) for controls on expression, provides only, in section 16(2)(c), that Parliament may prohibit the "[a]dvocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".

Again, it is evident that the Transformationist agenda, as Malan notes, goes beyond what the text of the Constitution provides. The Equality Act and government's overtures to enact hate speech legislation does not elevate the protection of human dignity to the status of a legally protected interest, which the common law has in any event been done for centuries, but it protects petulance and hypersensitivity, to the detriment of freedom of expression. Government seems to be making radical moves away from the *de minimis non curat lex* rule.

4.3.3 Economic (and particularly land) planning

Economic control (usually in the form of central planning) has been a mainstay of socialism – which I submit is a core feature of the Transformationist ideology – since time immemorial. In South Africa's context, land takes up a very prominent position in

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631 Prevention and Combating of Hate Crimes and Hate Speech Bill (B9-2018).

this paradigm of economic control. I proceed to discuss concisely notable instances of economic and land planning since the adoption of the Constitution.

When the Independent Communications Authority grants or rejects broadcasting and electronic communications licences to firms, it must, according to section 5(9)(b) of the Electronic Communications Act,[632] ensure that it is promoting "the empowerment of historically disadvantaged persons including women and the youth and people with disabilities". Section 9(2)(b) of the Act mandates the Authority to prescribe, in the administration of the granting or rejection of licence applications:

> "[…] the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such higher percentage as may be prescribed."

Section 13(3)(a) of the Act empowers the Authority to "set a limit on, or restrict, the ownership or control of an individual licence, in order to promote the ownership and control of electronic communications services by historically disadvantaged groups".

The Competition Amendment Act[633] changed section 8(4) of the principal Act to *inter alia* prohibit dominant firms[634] "directly or indirectly" from requiring of smaller firms owned by "historically disadvantaged persons", "unfair trading conditions". Those dominant firms may not refuse or avoid purchasing goods or services from such smaller firms if that avoidance is "to circumvent the operation" of this prohibition. Section 6 of the Amendment Act also prohibits dominant firms from doing anything which "is likely to have the effect of impeding the ability of [smaller firms] owned by historically disadvantaged persons, to participate effectively [in the market]". Furthermore, according to section 9, when considering whether a merger is justified on "public interest grounds", the Amendment Act requires the Competition Commission to consider "the promotion of a greater spread of ownership, in particular to increase levels of ownership by historically disadvantaged persons and workers in firms in the market".

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632 Electronic Communications Act (36 of 2005).
633 Competition Amendment Act (18 of 2018).
634 Defined in section 7 of the Competition Act (89 of 1998) as a firm with "at least 45% of that market", "at least 35%, but less than 45%, of that market, unless it can show that it does not have market power", or "less than 35% of that market, but has market power".

The case of *Agri South Africa v Minister for Minerals and Energy* is worth considering in greater detail than some of the other interventions.

In this case, the Constitutional Court was called upon to decide whether compensation was payable after the Mineral and Petroleum Resources Development Act (MPRDA)[635] dispossessed former owners of those minerals, and vested them in the State as the "custodian" of that property. Section 3(1) of the MPRDA provides that the "Mineral and petroleum resources are the common heritage of all the people of South Africa and *the State is the custodian thereof* for the benefit of all South Africans."[636] Section 3(2) granted government extraordinary powers over the administration, control, and management of these resources, much of which used to be held in private ownership.

Despite the bulk of academic opinion having been against the eventual majority judgment's conclusion,[637] the Constitutional Court held that there had been no expropriation in light of the ostensible fact that the State did not become the owner (but the custodian) and therefore mere deprivation as contemplated in section 25(1) had taken place.[638] Because it was mere deprivation, section 25(2), which regulates expropriation, was not invoked, and as a result, government was not required to pay compensation which would be required in cases of expropriation. The court reasoned that government had not acquired the resources for its own benefit as an owner, but for the benefit of others as a trustee or custodian.

In this case, Pieter Badenhorst, whose views, according to my research represent a virtual consensus among scholars, noted that the court's finding that no expropriation had taken place was a defiance of "legal reality and logic". This conclusion followed from the fact that entitlements must be linked with a right (such as ownership), and rights must vest in someone or something with legal personality. The State's behaviour, to Badenhorst, clearly indicated that it had adopted the role of owner. The Constitutional Court's judgment, Badenhorst opines, damaged security of property

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635 Mineral and Petroleum Resources Development Act (28 of 2002).

636 My emphasis.

637 See, for instance, Leon P. "Creeping expropriation of mining investments: An African perspective". (2009). 27(4) *Journal of Energy & Natural Resources Law*. 630, Van der Vyver JD. "Nationalisation of mineral rights in South Africa". (2012). 45 *De Jure*. 132, and Badenhorst PJ. "A tale of two expropriations: Newcrestia and Agrizania". (2014). 47 *De Jure*. 279-280.

638 *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at para 68.

rights in South Africa, despite the requirement of section 25 of the Constitution that payment of compensation was due.[639]

Also commenting on *Agri SA*, the classical liberal John Kane-Berman writes that despite the court's lauding remarks[640] of how the MPRDA seeks to transform mineral rights along socially-equitable lines, unemployment in the industry has risen in the years since the judgment was handed down. Kane-Berman attributes this partly to "the imposition down the years of various 'transformation' requirements" that are present in mining charters. "The economic thinking behind the main judgment", writes Kane-Berman, "has had the opposite effect to the one intended", because it discounted the importance of property rights to development.[641]

The custodianship principle set by the majority judgment was criticised by Froneman J in his minority judgment. Froneman said that the principle could have the consequence that the "private ownership of any, or all, property" could be abolished by government by simply using clever legislative wording, without the necessity of paying compensation for such expropriation.[642] The Economic Freedom Fighters, the third-largest political party in South Africa's Parliament has, for instance, now adopted the custodianship principle in its electoral manifesto, whereby it seeks the nationalisation of all land without compensation.[643]

In 2013, the proposed replacement of the Subdivision of Agricultural Land Act,[644] the Preservation and Development of Agricultural Land Framework Bill,[645] was introduced. Clause 3(1) of the Bill entrenches the custodianship principle for agricultural land, declaring that the State is "the custodian" of agricultural land "for the benefit of all

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639 Badenhorst (footnote 637 above) 279-280.

640 See, for instance, Mogoeng CJ's remark that "but for" the MPRDA, most people "were previously excluded" from benefiting from South Africa's mineral resources, at para 22; the remark (which is not a quote from the Act) about how the MPRDA "is not only about the promotion of equitable access, but also about job creation, the advancement of the social and economic welfare of all our people, the promotion of economic growth and the development of our mineral and petroleum resources for the common good of all South Africans" at para 61; and the remark where Parliament was said to have "painstakingly done everything possible to help the holders comply with the requirements so as to preserve their rights" by means of the MPRDA at para 66.

641 Kane-Berman (footnote 390 above) 8.

642 *Agri SA* (footnote 638 above) at para 105.

643 Economic Freedom Fighters. "Our land and jobs now!: Peoples' manifesto and a plan of action". (2019). 28. https://www.dailymaverick.co.za/wp-content/uploads/2019-EFF-MANIFESTO-FINAL.pdf.

644 Subdivision of Agricultural Land Act (70 of 1970).

645 Preservation and Development of Agricultural Land Framework Bill (2013).

South Africans". And being the custodian, the State may, according to clause 3(2), "approve, reject, control, administer and manage any rezoning or subdivision of agricultural land". More broadly, according to clause 3(3), the State:

> "[…] must ensure the sustainable development and preservation of South Africa's agricultural land within a framework of national agricultural policy, norms and standards while promoting economic and social development and food policy."

Clause 3(3) effectively abolishes private decision-making authority over agricultural property, since policies, norms and standards are adopted by government ministers and officials, and there is no clear limit on what such policies could impose in their pursuit of "sustainable development and preservation".[646] The remainder of the bill contemplates various other controls of agriculture, including the "optimal agricultural use of agricultural land" according to clause 54. If government considers a farmer's use of their land to be suboptimal, it "may consider the agricultural land concerned for expropriation", according to clause 54(3).

In 2016, the form, but not the substance, of the Bill was changed.[647] Explicit references to the custodianship principle were removed, but the State's power to effectively control private agricultural property remains intact.

It is apt to conclude this section with a discussion on government's plan to amend the Constitution to provide for expropriation of private property without the burden of having to comply with the current requirement to pay compensation. It demonstrates both the balance of forces assessment as well as the greatest inroad into private property rights by the South African government since 1994.

In 1994, Badenhorst and others predicted that minerals would not be nationalised in South Africa *inter alia* because the compensation that would be required for such an expropriation would be inordinately high.[648] However, a decade later, the mineral resources of South Africa were nationalised by the aforementioned Mineral and Petroleum Resources Development Act, and years after that, the *de facto* if not *de jure*

646 For instance, part of the definition of "sustainable agriculture" in clause 1 of the bill is that farming practices must be "socially acceptable" – an amorphous and vague notion open to abuse.
647 Preservation and Development of Agricultural Land Framework Bill (2016).
648 Badenhorst PJ, Van den Vyver E, and Van Heerden CN. "Proposed nationalisation of mineral rights in South Africa". (1994). 12(3) *Journal of Energy and Natural Resources Law*. 297.

expropriation without compensation was endorsed by the Constitutional Court in the *Agri SA* case.

Similarly, in 1993, Richard Levin and Daniel Weiner wrote that the balance of forces at the time of the transition precluded expropriation as a major component of land reform. Because of this, “a *status quo* resolution” was likely to take place.[649]

In February 2018, however, Parliament adopted a resolution that commits it to the principle of amending section 25 of the Constitution to provide for expropriation (“of land”) without compensation. According to Parliament, “current policy instruments, including the willing buyer willing seller policy, *and other provisions of section 25 of the Constitution* may be hindering effective land reform.”[650]

In May 2019, the President’s Advisory Panel of Land Reform and Agriculture submitted its final report. It concluded that section 25 is currently “compensation-centric and focused”, which is burdensome because the way expropriation is understood today was “imported from foreign and international law that does not separate compensation from expropriation”. As a result, the Panel recommended that Parliament amend section 25 “in order to make provision for zero compensation in certain instances”.[651] Some of these instances, the Panel believes, should include “hopelessly indebted land”, “land held purely for speculative purposes”, “land already occupied and used by labour tenants and former labour tenants”, “informal settlement areas”, “land donations”, and “farm equity schemes”.[652] At the time of writing, a parliamentary committee has proposed a draft amendment to the Constitution that would allow Parliament to define, in legislation, circumstances related to land reform under which no compensation would be necessary. It has also been mooted that the executive, not the courts, would be empowered to decide in specific cases whether compensation is payable under the legislative scheme which called for in the amendment.[653] This is another indication of the centralising component of Transformationist thinking, and

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[649] Levin R and Weiner D. “The agrarian question and politics in the ‘new’ South Africa”. (1993). 57 *Review of African Political Economy*. 31.

[650] Minutes of the National Assembly (footnote 468 above). My emphasis.

[651] Mahlati V. “Foreword” in Mahlati *et al*. “Final report of the Presidential Advisory Panel on Land Reform and Agriculture”. (2019). vi.

[652] Mahlati *et al*. (footnote 651 above) 80

[653] Staff Writer. “Major change in plans for land expropriation in South Africa: report”. (2020). *BusinessTech*. https://businesstech.co.za/news/government/368178/major-change-in-plans-for-land-expropriation-in-south-africa-report/.

how regulating economic processes and relationships is deemed necessary to achieve the equalising aspirations of this ideology.

5. CHAPTER CONCLUSION

In this chapter, I have shown that Transformationism, as a legal, political, social, and economic ideology, is being perused, allegedly to compensate for the protracted damage – inequalities and discrimination – caused by colonisation and Apartheid and that the Constitution is in fact the primary instrument to be utilised in the achievement of Transformationism. This claim is made despite the fact that the Constitution itself does not explicitly require any such ideology to be implemented. Malan writes that Transformationism has marginalised the Constitution, and particularly the section 1 commitment to non-racialism.[654] This is because the ruling political class, which includes the superior courts, adopts an interpretation of the Constitution that promotes "the dominant elite's ideological commitments," which obviously serves to realise the aims of Transformationism.[655] In other words, whether the Constitution itself is aimed at those ends which the ideology of Transformationism is aimed at (which may or may not be) is irrelevant, because the judiciary is interpreting and applying the provisions of the Constitution to attain those ends regardless. In this regard Malan contends that the supposed supremacy of the Constitution has been replaced with the supremacy of Transformationist principles.[656] The implication is that the urging of Klare and other Transformationists that the courts, through Transformationist interpretation, have to promote Transformationism, has indeed been satisfied to a considerable extent.

I have further considered the themes of Transformationism, particularly its approach to freedom, equality, and property, and identified it as being self-consciously leftist. This included a discussion on the Critical Legal Studies and Critical Race Theory schools of thought, which underlie Transformationism. Finally, I have discussed transformative constitutionalism with reference to the popular works of Pius Langa and Klare, and identified some illustrative examples of Transformationism in current South African law.

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654 Malan (footnote 14 above) 113.
655 Malan (footnote 14 above) 178.
656 Malan (footnote 654 above). My liberal translation from the original Afrikaans. See also generally Malan K. "Die versweë verandering van die Suid-Afrikaanse Konstitusie". (2018). 58(2) *Tydskrif vir Geesteswetenskappe*.

CHAPTER 4: LIBERTARIAN RESPONSES TO TRANSFORMATIONISM

1. CHAPTER INTRODUCTION

In the previous chapter, Transformationism was considered against the background of its own logic and purposes. This chapter takes the form of a dialogue between Transformationism and libertarianism, which was considered in Chapter 2. Firstly, I consider the status that individual liberty occupies (or does not occupy) in Transformationist thinking. Secondly, I discuss the Transformationist conception of equality, and how libertarianism has and would respond to that conception. Finally, the tenuous relationship between State constitutionalism (as a classical liberal idea) and Transformationism is considered. The responses to Transformationism within the legal field are not necessarily *by libertarians*, but responses that themselves have at least an underlying libertarian characteristic. Otherwise stated, some of the authors herein cited are not themselves libertarians, but the work cited did contain an element useful for dissecting Transformationism from a libertarian perspective.

Libertarianism and classical liberalism have been consistently subjected to 'straw-manning' by opposing legal scholars. Strawmanning, or the strawman fallacy, occurs when a point of view is misrepresented or distorted, that is, incorrectly restated either explicitly or by implication, to render it easier to refute or attack.[657] It might also be that opposing legal scholars have inadequate understandings of libertarian thought, as is evident to my mind, from Moseneke's criticism of a "classical neo-liberal" position.[658] Something cannot be both "classical" and "new" at the same time. Moseneke's observations in this regard are indicative of his misunderstanding of the conceptual difference between classical liberalism and so-called neoliberalism. The theme of how classical liberal jurisprudence has been misrepresented and misunderstood is important for the context of this chapter and this theme will enjoy frequent reference below.

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[657] Hansen H. "Fallacies". (2015). Stanford Encyclopedia of Philosophy. https://plato.stanford.edu/entries/fallacies/.

[658] Moseneke (footnote 442 above) 11.

2. TRANSFORMATIONIST AVERSION TO INDIVIDUAL LIBERTY

2.1 Individual rights

2.1.1 The generations of rights

Moseneke contends that, according to classical liberal thought, only the State, and not private parties, can infringe on individual rights.[659] In so doing, he deals with sections 8(1) and (2) of the Constitution, from which it is clear that he regards the fact that rights can be vindicated by ordinary private persons and firms *inter se*, as a novel development. He also provides no source for this assertion. I submit that it is a self-evidently false representation of classical liberalism. This should be evident from the fact that most rights traditionally recognised at common law in the field of private and criminal law (largely similar to those featuring in bills of rights) came into existence precisely to protect individuals from law-breaching acts by other individuals. Libertarians and classical liberals, indeed, argue that it is the very purpose of the State to enforce these rights. If, however, Moseneke was instead referring not to rights, but to State policy goals like redistribution of wealth and social engineering to attain an ideologically-preferred ideal society, which I submit he was, it is correct to say that classical liberal or libertarian thought does not endorse such an imposition on private parties.

Max Hocutt writes that modern conceptions of rights have gone far beyond how John Locke conceived of them as protecting life, liberty, and property. Today, "there is now a widespread belief that one has a right to whatever one wants, needs, or takes a fancy to"; indeed, "[r]ights lists have become wish lists".[660] The banner of "human rights" itself has contemporarily been used to sanction violations of liberty. Malan explains that originally, human rights were conceived of as protecting individual freedom against State interference. It has now come to pass that human rights are "providing the intruding state with constitutional weaponry against the values of freedom; these rights are now posing a threat to the domains of freedom and social and civil activity".[661] Nigel Ashford, arguing similarly, avers that anyone with a goal can nowadays label that goal as a human right. Ashford notes that this modern conception

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659 Moseneke (footnote 442 above) 5.
660 Hocutt (footnote 298 above) 51.
661 Malan (footnote 21 above) 225.

of human rights – the three waves of rights: first-generation liberty rights, second-generation socio-economic rights, and third-generation cultural rights – “has nothing to do with real human rights”, and that only the so-called first-generation rights are “genuinely human rights”. This misunderstanding of rights has to some extent obstructed respect for human rights. Ashford gives three interrelated reasons for this. Firstly, by having an endless wish list of rights, “the moral force of the claim [to a human right]” is reduced. Secondly, “it enables those governments who systematically fail to respect human rights to claim that while they have a poor record in some areas, they have a better record in others”. For instance, the government of Nazi Germany could conceivably have claimed that whilst they had a poor record in protecting the right to life of Jewish citizens, they have done well as far as the right to employment is concerned. In other words, it’s an equivocation. Thirdly, the multitude of ‘rights’ that people lay claim to “distracts attention from the denial of [real] human rights”. In the South African context, this could be illustrated by government denying the right to private property (a so-called first-generation right) whilst enforcing the so-called right not to be evicted (a so-called second-generation right).[662]

Hocutt argues that the concept of rights “has lost identifiable shape” today, because “[n]eeds and wishes are limitless, and claims are easy to make”. Hocutt states that “if every need, wish, or claim constitutes a right, the concept no longer has definable meaning”.[663]

Sartori argues that even if one believes in welfare ‘rights’ as necessary for freedom, such belief cannot eliminate the necessity of respecting individual rights as libertarians conceive of them. He writes that rights are “a preliminary condition, the *sine qua non* for all other liberties”. He asks how so-called “positive liberties” can be “adequate if they cannot materialise”. In other words, what is the use of the ostensible ‘freedom’ that State benefits like housing and welfare bestows, if people who have these benefits may not exercise independent (from the State) action? He writes:

> “It seems to me, therefore, that when we assert that negative liberty is not sufficient[,] we are stating an obvious platitude, while we are not stating what is

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662 Ashford (footnote 206 above) 1. Ashford gives a fourth reason: It distorts the priorities of international organisations.

663 Hocutt (footnote 298 above) 54.

most important of all; that we need freedom *from* in order to be able to achieve freedom *to*."[664]

The second- and third-generation of rights cannot be enjoyed without first-generation rights, for if "we forget for one instant the requirement of not being restrained, our entire edifice of liberties is worthless".[665]

In the South African context, a similar response might be made to government's campaign against hateful expression. According to the first version of the controversial Hate Speech Bill as discussed above, one could be imprisoned for up to five years (for a first offence) and up to a decade (for subsequent offences) if one was found guilty of the crime of "hate speech". Under the Bill's definition of hate speech,[666] if one expressed a hatred (an *insult*) of, say, racists (a *belief*) or politicians (an *occupation or trade*), with the intention of bringing racists or politicians into *contempt* or *ridiculing* them, one could spend several years in prison.[667] By allegedly giving effect *inter alia* to the nebulous right to dignity, the first-generation, liberty right to freedom of expression is effectively 'balanced' out of existence. Sartori's comment is apt in this context. He writes:

> "For it is freedom *from* and not freedom *to* that marks the boundary between political freedom and political oppression. When we define liberty as "power *to*", then the power *to* be free (of the citizens) and the power *to* coerce (of the State) are easily intermingled. And this is because so-called positive liberty can be used in all directions and for any goal whatsoever."[668]

James Harrigan and Ryan Yonk, too, note that "a regime cannot be based on notions of both positive and negative liberty because the former undermines the latter in every instance."[669] Tara Smith, in turn, argues that rights are not meant to protect people "from unfortunate circumstances", but "only from other persons' potential intrusions". Rights are exclusively concerned with "the issue of a person's legitimate freedom of

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664 Sartori (footnote 1 above) 11-12.
665 Sartori (footnote 1 above) 13.
666 As opposed to the constitutional definition of hate speech, which is narrower.
667 See above the full definition of hate speech in the Bill, which would criminalise *insults* on the basis of *inter alia belief*, *occupation or trade*, which are intended to *ridicule* someone or *bring them into contempt*.
668 Sartori (footnote 1 above) 41. Sartori's emphasis.
669 Harrigan JR and Yonk RM. "From equality and the Rule of Law to the collapse of egalitarianism". (2017). 22(1) *Independent Review*. 35.

action".[670] Smith notes that various factors may influence the abilities of individuals to exercise their rights, including their intelligence, their looks, their aptitudes, their location of birth, etc., and that simply because a person is incapable of doing something they would like to do because of such factors – their freedom in the subjective sense – it does not follow that their freedom, in its objective sense, has been infringed upon. Indeed, freedom does not mean one has "unlimited abilities to use one's freedom to satisfy all of one's desires", but simply that no other person will thwart their attempt to do so.[671]

Smith's problem with the notion that rights only exist if conditions conducive to their exercise exist, is that such a notion means people would have the entitlement to

> "[…] have the rest of the world be exactly as they'd like it to be, supplying the desired products, schools, jobs, etc. Only in this way could a rightholder be assured that she could always exercise her rights to suit whatever preferences she had."

Such a state of affairs would undermine the inherent purpose of rights – protecting freedom of action – and replace it with the notion that people must be bound to one another's desires.[672]

Conceivably, if government is successful with Transformationist interventions like the Hate Speech Bill, all South Africans could end up having their 'dignity' formally protected, without anybody truly having the freedom to enjoy this dignified existence. To enjoy the right to dignity, individuals should have the freedom to act.

2.1.2 Plunder

To Christian Michel – speaking from the libertarian anarchist perspective – politics exists "to create exceptions to rights, so that rights are no longer shared identically by all members of society". These exceptions come in two forms: Exempting *everyone* from respecting rights under *certain* circumstances (such as the right to kill someone in private defence as recognised by common law); and exempting *someone* from

670 Smith (footnote 23 above) 221-222.
671 Smith (footnote 23 above) 224-225.
672 Smith (footnote 23 above) 225.

respecting rights under *all* circumstances (such as governments having the right to tax, and pass new legislation allowing it to invade rights in any manner of ways).[673]

Bastiat wrote about how one can identify an instance of the law being perverted in service of what he called “plunder”. What is relevant for this question is that one must inquire into whether the rule concerned “takes from some persons that which belongs to them, to give to others what does not belong to them”, or “whether the law performs, for the profit of one citizen, and, to the injury of others, an act that this citizen cannot perform without committing a crime”. In other words, if the law empowers the State to do something that would, in the absence of an enabling measure, be considered criminal among persons *inter se*, such law constitutes plunder. “Abolish this law without delay”, for “it is not merely an iniquity” but “a fertile source of iniquities” that “invites reprisals”. This cycle of plunder and reprisal will then “extend, multiply, and become systematic”, and the beneficiaries of this new perverted system of law “will exclaim loudly; he will assert his acquired rights”. The function of perverted law “is to enrich all classes at the expense of each other; it is to generalize plunder under the pretense of organizing it”. As examples of legalised plunder, Bastiat mentions tariffs, protectionism, perquisites, gratuities, encouragements, progressive taxation, free public education, rights to work, profit, wages, assistance, instruments of labour, gratuity of credit, and so forth. This system of legalised plunder, argues Bastiat, “takes the name of socialism”.[674]

This legalised plunder disguises itself “cleverly from others, even from itself, under the seductive names of fraternity, solidarity, organization, association”. Bastiat criticised these terms for hiding their underlying violence, for example, with “solidarity” not meaning “providential solidarity, but “artificial solidarity, which is only an unjust displacement of responsibility”.[675] In South Africa, one can add to this list “human rights”, “social solidarity”,[676] “transformation”, “spatial planning”,[677] and “social justice”.[678]

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673 Michel (footnote 117 above) 213.
674 Bastiat (footnote 60 above) 14.
675 Bastiat (footnote 60 above) 22.
676 See for instance sections 1 and 49(2)(a) of the National Health Insurance Bill (B11-2019).
677 See for instance the Spatial Planning and Land Use Management Act (16 of 2013).
678 See for instance the Preamble of the Constitution.

2.2 Property rights

2.2.1 The pre-eminence of property rights

Bastiat warned that when property rights are not regarded as a sacrosanct, natural institution, the law might be utilised by those who control law-making either into generating wealth for themselves, if they have evil intentions; or if they have good intentions, into trying "to equalize the standard of living, and, […] assuring everyone a legal claim to an equal share in whatever is produced". It is this latter case where Transformationism fits in. Indeed, Bastiat questioned whether, under conditions of trying politically to guarantee to all a share in one another's wealth, the economy would produce anything at all. Citing a contemporary example, Bastiat referred to a member of the post-1848 French Revolution government who insisted that all wages and profits in the economy be equal, regardless of the talent or skill of workers or of the quality of products offered. Regardless of what the law of Providence or nature demand – respect for (particularly property) rights – government seeks to "suppress self-interest by decree".[679]

Bastiat hastens to add that most of this happens in the name of some benevolent goal with invariably good intentions. This is not the problem, however. He writes that "what is vicious is the principle itself". Whereas do-gooder legislators intend to "equalize prosperity" when they make law contrary to natural property rights, the reality is that they end up equalising poverty. He goes further, adding that these initiatives condemn the poor to "sickness and starvation".[680] Using "the law for the equalization of wealth, which is communism" was to Bastiat unjustifiable, and an offence against right, justice, public order, and property.[681]

2.2.2 Land reform and restitution

Vinodh Jaichand, as discussed above,[682] writes of the agents of the former white minority government and of contemporary white South Africans as if they were the

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679 Bastiat (footnote 62 above) 105-107.

680 Bastiat (footnote 62 above) 108.

681 Bastiat (footnote 62 above) 111-112. It was an offence against public order, according to Bastiat's Association for Free Trade, because employing the law for purposes other than protection has the result that different interest groups start seeking their success in the oppression of other interest groups, by using the law and the government.

682 Page 124 above.

same individuals. He goes so far as to brand current white landowners who may have been born after 1994 and furthermore may have purchased their land from black South Africans, as "injurer[s]". Langa implied a similar state of affairs when he wrote that social reconciliation, presumably as an element of transformative constitutionalism, "recognise[s] and require[s] [that] beneficiaries [of Apartheid] take responsibility for ensuring that reconciliation is possible". He argued that the so-called beneficiaries "cannot stand on the sidelines as having no role to play" or that "they do not need to forgive or be forgiven".[683] Arguments like this are today employed to justify interventions like expropriation without compensation.

Rothbard and libertarians generally also subscribe to restitution[684] without compensation from the libertarian perspective. However, Rothbard adds the condition that if the current possessor's title is *just* and the property *truly* belongs to them – that is, it was not taken from others through force in years past – they must be let alone. Rothbard writes:

> "If the landlord's title is just, then any land reform applied to such land is an unjust and criminal confiscation of his property; but, on the other hand, if his title is unjust, then the reform is picayune[685] and fails to reach the heart of the question. For then the only proper solution is an immediate vacating of the title and its transfer to the peasants, with certainly no compensation to the aggressors who had wrongly seized control of the land."[686]

Earlier in *The Ethics of Liberty,* however, Rothbard does provide a proviso to the general principle that property must be restituted without compensation to the aggressor. If the current possessor of the "stolen" property holds the property in good faith, they are entitled to claim compensation from the *robber*, not the true owner. The true owner is under no obligation to provide compensation due to being faultless.[687] The good faith possessor, presumably, also does not have the right to hold onto the

683 Langa (footnote 590 above) 359. Langa does, however, correctly note that, "Reconciliation and forgiveness are beyond the power of the law" and that reconciliation and forgiveness cannot be legislated or coerced." Langa (footnote 590 above) 358.

684 But not redistribution. Restitution is to return land taken from an individual or their ancestors involuntarily, whereas redistribution is an ideological programme aimed at government purposes, such as addressed skewed patterns of property ownership or awarding friends of the State. See the discussion on page 123 above.

685 An old Spanish coin of little value.

686 Rothbard (footnote 58 above) 72.

687 Rothbard (footnote 58 above) 59.

property, as the true owner is a victim, and such withholding would be targeted at the victim and not the robber of the property.

To Baker, libertarian jurisprudence has not yet developed a universal, one-size-fits-all answer to the problem of restitution. He cites the example of a horse that is stolen and sold to an innocent third party. The original owner of the horse then claims it back from the latter. In other words, everyone involved here is innocent of any crime, since the thief is already long gone. To Baker, "Perfect justice is in most instances impossible", and the libertarian jurist likely does not have a perfect answer to this problem. He writes, "some innocent person, either the thief's original victim or the buyer of the horse, is going to suffer an unrectifiable injustice". Baker notes that different legal traditions, in this case the English common law and the European civil law ones, give contradicting answers to which of these two parties would lose out, without necessarily contradicting fundamental libertarian principles.[688]

Leon Louw, a South African thinker, noted similarly, that simply because libertarians have identified and developed a coherent central principle of human interaction – that is, the non-aggression principle – does not mean that all conceivable legal problems have been solved. He provides the example of letting toxic gas into the air on one's property, or shining an increasingly-bright light from one's property, with this having harmful consequences for other people in the area. The libertarian answer to such a problem is not obvious. But, argues Louw, libertarianism does not need to provide an answer to every problem, as jurisprudence has developed various tools over the centuries to respond to any number of eventualities, such as the "reasonable man" test.[689] In South Africa, one can point to the law of delict and neighbour law as examples of existing law that attempts to solve this problem.[690] As a result, argues Louw, the enterprise of some libertarian scholars of trying to develop a clear-cut

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688 Baker (footnote 212 above) 2. American law, for instance, recognises virtually no protection for *bona fide* holders of the dispossessed property of legitimate owners, whereas European law does.

689 Louw (footnote 357 above) 1-2.

690 See for instance Milton JRL. "The law of neighbours in South Africa". (1969). 123 *Acta Juridica*. 130. Milton roughly classifies unlawful interferences in the property rights of one's neighbor into six categories: Annoyances, actual damages, removal of lateral support of neighboring land, interference in the natural flow of water, intrusion of objects over the boundary separating the properties, and malicious use of rights.

libertarian response to every problem is unnecessary, and that the usefulness of (existing) law must be appreciated.[691]

Baker theorises that the problem of restitution is not insurmountable simply because different theories or approaches to jurisprudence have provided contradicting but equally-valid answers from a libertarian perspective, because the free market – another imperative of the libertarian philosophy – would likely go a long way to providing equitable outcomes for all innocent parties involved. If the original owner of the stolen horse is successful and receives his property back, "title insurance companies" would insure clients "against buying stolen property", thus providing relief for the innocent buyer, and if the innocent buyer wins out, "theft insurance companies" would provide relief for the original owner.[692] It is thus also true that legal theory cannot be seen as totally divorced from economic reality: Innovative legal solutions borne of economic necessity and self-interest, like insurance contracts, would arise in a peaceful and equitable fashion.

But as mentioned, the trite principles of private law having developed ever since classical Roman law (and in the common law tradition) provide detailed answers to many if not all problems of this nature, for instance, in terms of unjustified enrichment and delictual remedies. In the law of unjustified enrichment, for instance, when someone is enriched or benefited in an unfounded or (legally) unjustified manner, the party at whose expense this has occurred may claim restitution to correct the imbalance. Thus, unfounded transfers of wealth or patrimony are extinguished by operation of the law.[693]

The similarities between the stolen-horse problem and South Africa's history of property (particularly land) dispossession are obvious. However, it is worth noting that the State has perpetual succession, at least in South Africa. This means that the thief, unlike in Baker's stolen-horse example, is not long gone, but remains ever-present in the form of the South African government. Thus, while ordinary theft and robbery within libertarian jurisprudence might still leave unanswered questions, expropriation and

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[691] Louw (footnote 357 above) 4.

[692] Baker (footnote 212 above) 2.

[693] Sonnekus JC (translated by Rhoodie JE). *Unjustified Enrichment in South African Law*. (2008). Durban: LexisNexis. 3.

dispossession by the State do not, as the State will be required to make good any innocent party whose individual or property rights have been violated by itself.

3. SOCIAL JUSTICE AND THE ACHIEVEMENT OF EQUALITY

3.1 Discrimination

One of Transformationism's key policy goals is the elimination of discrimination, particularly racial discrimination. However, this goal is often only directed at eliminating discrimination by the perceived advantaged class against the perceived disadvantaged class, and rarely the other way around.[694] Libertarianism, on the other hand, jealously guards free choice, and free choice inherently includes the ability to discriminate. Malan, not a libertarian, notes aptly:

> "When the right to equality and against unfair discrimination is applied horizontally, it can bring about a situation where individuals' freedom of choice to exercise even the most private and intimate of choices in respect of their association with other individuals are rendered nugatory."[695]

Walter Block writes of the "law of association" – a right taken up in an unqualified fashion in the South African Constitution – which means "that all interaction between […] individuals should be voluntary and on the basis of mutual consent". This includes commercial activities as well as personal activities. This implies that libertarian jurisprudence would recognise no notion of 'public accommodation'.[696] Individuals should, therefore, be allowed to discriminate on whatever basis they wish. Accordingly, Block defines discrimination as the ability "to ignore, avoid, evade, [and/or] have nothing to do with, another person [or group of persons]." This does not include the ability "to lynch or beat up or enslave or commit assault and battery upon someone

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694 Block (footnote 27 above) 245.

695 Malan (footnote 21 above) 224.

696 The term "public accommodation" is based on the wording of Title II of the Civil Rights Act of 1964 in the United States, which prohibits discrimination in places of so-called public accommodation. Public accommodation does not, however, refer to "public" in the sense of "public property", but rather to places open to (and purporting to serve) the general public. The English common law recognised and continues to recognise a similar principle. Avins A. "What is a place of 'public' accommodation?" (1968). 52(1) *Marquette Law Review*. 1-2.

from a despised group". As long as people do not infringe upon the individual and property rights of others, they may discriminate.[697]

Block rejects public accommodation theory based on its arbitrariness. He writes that there "is no logical reason why an offer to commercially interact with some people should be interpreted as an offer to do business" with all people, especially in light of the fact that *some* discriminations are also arbitrarily allowed, such as discrimination based on age, wealth, health, common interests, etc. Block also points to the universal phenomenon of discrimination based on national origin, with such discriminations as favouring local producers over foreign ones with tariffs and expecting foreign university applicants to pay more for their studies than local applicants. Yet, those who argue in favour of public accommodation theory are "muted" on such discrimination.[698]

Libertarians do reject State discrimination. To Block, the "right to discrimination" accrues only to individuals and associations of individuals. Because the State is (coercively) funded by everyone, it is "unfair and improper" for the State to be capable of discriminating against some section of the population, like with affirmative action programmes or the racist, historical Jim Crow laws of the American South.[699]

It is often stated explicitly or implicitly that libertarians believe when there is no State coercion, society would become a utopia where market forces solve every conceivable problem, and everyone is happy and prosperous. Nahid Sorooshyari, for instance, contends that libertarians believe a politically and economically "ideal society" would result when individuals are allowed to make their own choices and act freely. Sorooshyari further contends that libertarians would regard a starving woman "as free from *all* constraints" simply because the State is not restricting her choices,[700] and that the "very idea that patriarchy exists today is at odds with libertarianism".[701] Finally, Sorooshyari argues that, according to libertarians, "the free market, small government system removes discrimination, in all forms, against all individuals, regardless of race, class, or gender".[702]

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697 Block (footnote 27 above) 241.
698 Block (footnote 27 above) 242-243.
699 Block (footnote 27 above) 255-256.
700 Sorooshyari N. "The tensions between feminism and libertarianism: A focus on prostitution". (2010). 3(1) *Jurisprudence Review*. 177. Sorooshyari's emphasis.
701 Sorooshyari (footnote 700 above) 180.
702 Sorooshyari (footnote 700 above) 182.

These are, however, not libertarian positions.

The existence or not of patriarchy is irrelevant to libertarians *qua* libertarians. Some people might be libertarian and feminist at the same time, and therefore might regard patriarchy as existent and contemptible. They would demand that coercion not be employed to end patriarchy, but, because of libertarianism's fundamental dedication to non-aggression. But Sorooshyari even notes that within feminism there are different conceptions of what 'patriarchy' means.[703] Thus, it is incorrect to say that it "is at odds" with libertarianism to argue that patriarchy exists. Libertarianism is indifferent to this question in the absence of aggression, particularly State aggression. If patriarchy, however, inherently entails aggression, then libertarianism inherently stands against patriarchy. This is to say that Sorooshyari's assertion depends entirely upon how patriarchy is defined.[704]

It is certainly incorrect to contend that libertarians think "all forms" of discrimination would be eliminated in a free society. This is, in fact, a grave misrepresentation of libertarianism. Libertarianism holds the individual's liberty as the highest public policy value. This means that in a society that subscribes broadly to libertarian principles, individuals alone or individuals in common like firms or clubs, would be allowed to discriminate against one another for practically any reason whatsoever. This does not mean that libertarians encourage or support such discrimination, but rather that they regard it as outside of government's scope to use the coercive force of law to regiment individuals according to its own ideology or social value system or that of its constituency.

Moseneke's argument against what he incorrectly describes as classical liberal-inspired law of contract reveals another strawman. He writes that "contractual autonomy […] flows from classical liberal notions of liberty and [free markets]", and, according to this worldview, contractual "relations are considered to arise by free volition between private parties with equal bargaining power".[705] Moseneke provides no authority for this statement. No principle of classical liberalism posits that the

703 See footnote 48 in Sorooshyari (footnote 700 above) 172.
704 This study does not concern feminism *per se* or the concept of the patriarchy. This example was, however, apt to illustrate some of the differences and tensions between Transformationist thinking and libertarianism.
705 Moseneke (footnote 442 above) 9.

bargaining power between parties to contracts is equal. Indeed, the power to bargain does not feature at all in classical liberal thought. The classical liberal argument, however, is that individuals, not government, possess the most relevant and the most up-to-date information about themselves and their interests and, whether equal to the party with whom they are negotiating a contract or not, they are best placed to decide whether to enter into that agreement. They might well be at a disadvantage in the negotiation, but their decision to enter into the agreement nonetheless demonstrates conclusively that they regard entering into the agreement as more beneficial to them than not doing so. The classical liberal response to this situation is not that the weaker party must be exploited as is often claimed, but rather that this party must be afforded the respect of not having their decisions set aside should outsiders deem those decisions reckless or irresponsible.

3.2 'Social justice' in the Constitution?

3.2.1 Substantive equality undermines liberty

The following passage from the Preamble to the Constitution is regularly quoted by Transformationists to justify Transformationist policies and the accompanying invasive State interference in private affairs:[706]

> "[The Constitution is adopted to h]eal the divisions of the past and establish a society based on democratic values, *social justice* and fundamental human rights;"[707]

The editors of *Making the Road by Walking* write that the Preamble "constitutes the prelude to a manifesto for social justice" – the Bill of Rights.[708]

Social justice is also usually mentioned alongside section 1(a) of the Constitution, which commits South Africa to not only equality, but arguably its activist formulation, namely "the achievement of equality".

Recall, too, Klare's assertion that the Constitution is *overridingly* committed to "substantive (redistributive), not just formal […] equality" and the Constitution

[706] See for instance Radebe (footnote 426 above).
[707] My emphasis.
[708] Bohler-Muller N, Cosser M, and Pienaar G. *Making the Road by Walking: The Evolution of the South African Constitution*. (2018). Pretoria: Pretoria University Law Press. 9.

ostensibly requires this equality to exist "across the existential space of the social world" rather than merely in law.[709]

Von Hayek lambasted such contemporary notions of equality, which are subscribed to by Transformationists in South Africa. He wrote that "social justice" simply amounts to having government "controlling all conditions relevant to a particular individual's prospects and so adjust them to his capacities" so that this individual and everyone else ends up having the same prospects. This is "the opposite of freedom", according to Von Hayek. The "social justice" label, he argues, is nothing more than a "respectable garment" meant to disguise the true insidiousness of this way of thinking.[710] Equality before the law was "the great aim of the struggle for liberty", because this is "the only [type of] equality conducive to liberty and the only equality which we can secure without destroying liberty". Adopting today's notion of substantive equality, Von Hayek would no doubt have argued, would lead to the negation of freedom, in part because liberty itself produces the very kind of inequality which social justice (or the substantive equality conception) hopes to combat.[711]

British constitutional jurist Trevor Allan summarises (albeit critically) Von Hayek's problem with contemporary social justice approaches to law. Allan writes of Von Hayek's position:

> "Since discrimination between persons or groups was necessarily entailed by governmental activity on behalf of favoured social and economic ends, Hayek stigmatized the pursuit of 'social justice' as an intrinsic violation of the rule of law. Public or governmental purposes that could not be achieved by the enactment of general rules, but were dependent on discriminatory executive action that responded to an ever-changing pattern of economic existence, were therefore illegitimate."

As an alternative, Von Hayek regarded the free market as "an impartial system of distributive justice, enabling each person to pursue his own ends in co-operation with others for their mutual advantage". To Von Hayek, "equality before the law demanded only the impartial application of general rules" – what is referred to in South African

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[709] Klare (footnote 452 above) 153-154.
[710] Von Hayek (footnote 50 above) 155.
[711] Von Hayek (footnote 50 above) 148.

legal scholarship as 'formal equality' – but "substantive or material equality could be attained only by the exercise by officials of arbitrary – discriminatory – powers of discretion".[712]

3.2.2 Inequality and the force of law

Additionally, Klare does not explain why substantive equality is an *overriding* commitment in the Constitution, especially considering that equality is mentioned alongside freedom and dignity as a trilateral set of co-equal values in the founding provision (section 1), the first provision of the Bill of Rights (section 7), the limitations provision (section 36), as well as the Bill of Rights' interpretation provision (section 39). Section 9(2) of the Constitution, in fact, on a classical-liberal reading, would seem to ground the right to equality firmly within the paradigm of formal equality by clarifying that equality "includes the full and equal enjoyment of all *rights and freedoms*". Klare also provides no authority, nor argument, for his assertion that the Constitution requires equality to exist in all social spaces. This is to say that Klare's (or even the judiciary's) assertion that the notion of equality in the Constitution simply amounts to an overriding value which is moreover grounded in the idea of substantive equality, is not necessarily true without further elaboration. Drawing upon section 8(2) of the Constitution, which provides for the horizontal application of the rights in the Bill of Rights as the sole ground for this assertion, is insufficient. That provision merely states that rights, depending on their nature, also apply between persons *inter se*. This is something that has all along been absolutely trite in private law, which relates, for example, to ownership as an absolute real right enforceable and the law of delict, which are enforceable among individuals and against the State. The kind of rights recognised in private law, such as property rights, personality rights as well as personal rights have equivalents in the Bill of Rights. One cannot extrapolate this trite reality of law onto any element of section 9 and say that it necessarily means equality must be recognised as the predominant value and right trumping all other both in the public and the private sphere.

It is, moreover, curious why, during the political transition of the 1990s, commentators like Dennis Davis and Albie Sachs, whilst advocating for the inclusion in some way or another of welfare claims in the Constitution, made no argument favouring the view

[712] Allan (footnote 325 above) 15.

that welfare claims should, legal-philosophically, be considered *rights*. The point was made that European constitutions contain such rights and that certain international treaties recognised such welfare-related claims as rights, but this in itself was and is not sufficient reason for South Africa to blindly follow suit.

To overcome the retort that first-generation rights are negative and impose no costs on the State and therefore on taxpayers, in contrast to second- and third-generation rights, Davis while agreeing that second- and third-generation rights do entail costs on the State and the taxpayers, points out that the first-generation right to a fair trial also imposes a cost on the State. This, to Davis, was enough to conclude that "[e]conomic affordability and the problem of competing claims for scarce resources cannot be considered adequate justifications for the exclusion of social and economic rights" and proposed 'new' rights must be considered separately within the context of the particular reasons for seeking to adopt a constitution and a bill of rights.[713] Libertarians might respond, however, that expenses incurred to exercise the right to a fair trial are justified because it is the State – and not the legal subject, or general circumstances – that prosecutes a suspected offender. It initiates the process, and must therefore bear the cost of the process. But libertarians would argue that in the case of socio-economic rights, the State has no mandate whatsoever. Therefore Davis' comparison cannot succeed. However, he does recommend that welfare 'rights' rather be adopted as directives principles of State policy (similar to the provisions in the Indian and Irish constitutions) instead of entrenched rights.[714]

Harrigan and Yonk, writing about the American constitutional tradition – which I submit is not dissimilar from libertarian conceptions of rights and law – describe how the value of equality functions within a libertarian legal paradigm:

> "Equality that precedes law necessitates an understanding that the law must apply to all equally, and if all are equal before the law, they must also be equal in their liberty. Liberty thus understood necessitates a regime that is comfortable with and even features unequal outcomes."[715]

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713 Davis (footnote 462 above) 92-93.
714 Davis (footnote 462 above) 101.
715 Harrigan and Yonk (footnote 669 above) 30.

Leonard Read sets out the basic libertarian position: If someone is living peacefully and not initiating force (being violent) against others, nobody – including government – has the right to use force against them. Even extreme poverty does not morally or legally bestow a person or a group of people with the right to aggress against the liberty or property of others.[716] Bastiat, however, did not blame the poor and disenfranchised for the law being used for something other than securing rights. Indeed, he writes that the "suffering classes" make the inappropriate second- and third-generation rights demands of the law because the "disastrous principle" that the law may be used "to take from some to give to others" had *already* been accepted by the "landowners and capitalists". He told the landowners and capitalists of his time, "do not complain, then, if people less fortunate than you are" claiming the benefits of law just as they themselves had done. Instead of complaining, he encouraged the wealthy to renounce the privileges law has bestowed upon them, and to "let the law return to its proper sphere, and restrict the legislator to his proper role".[717]

3.2.3 Politicising the private and civil spheres

There are many parallels between law in South Africa (from before and after 1994) and the law Bastiat condemned in France in the 1850s. Bastiat wrote that the law had been employed to fulfil a role contrary to its inherent function – "it has destroyed its own object […] annihilating that justice which it ought to have established" – by putting law at the service of people "who wish to traffic without risk and without scruple, in the persons, the liberty, and the property of others", and in so doing "converted plunder into a right" and at the same time outlawing resistance to plunder.[718] One might in this regard point to the recent statement by labour minister, Thulas Nxesi, that "harsh measures" – no doubt referring to some compulsory State sanction – would be employed to enforce transformation in private workplaces.[719] The law in this example, is being utilised to pursue an end directly contrary to its proper function, by forcefully replacing the decisions made by the owners (be they shareholders or individual

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716 Read (footnote 119 above) 35.
717 Bastiat (footnote 62 above) 114-115.
718 Bastiat (footnote 60 above) 4.
719 Staff Writer. "Government to introduce 'harsh measures' to enforce transformation in South Africa". (2019). *BusinessTech*. https://businesstech.co.za/news/business/337209/government-to-introduce-harsh-measures-to-enforce-transformation-in-south-africa/.

persons) of businesses (being private property) with the decisions of unrelated third parties, being, for example, the labour minister. In this regard Malan writes:

> "Horizontal application causes the state to encroach on the private and civil domain, in which the integrity of individual choices and civil activities should be protected. This results in the destruction of individual freedom and civil interaction."[720]

Bastiat attempted to answer why, in many cases, the law ends up being used in this way. He noted that the victims of plunder revolt against their oppression, not necessarily to re-establish justice, but to – "by peaceful or revolutionary means" – instead "enter in some way into the manufacturing of laws". While they might put an end to the plunder, it also often happens that the former victims, now in charge, perpetuate it for their own ends.[721] "As soon as the injured classes have recovered their political rights," wrote Bastiat, "their first thought is not to abolish plunder […] but to organize against the other classes". Then there is organised "a system of reprisals" that is detrimental not only to the former plunderers, but also to the now-former-victims-turned-oppressors.[722] This, then, is the libertarian response to the usual Transformationist assertion that redistribution and redress had to be effected through law, in contrast to organic market processes.

Corder and Davis, after making the case that jurists must analyse the underlying premises, philosophies, and histories of legal rules and doctrines, offhandedly submit that South African private law must be developed so as to become conceptually congruent with the economically-interventionist environment the State has created. Their argument for this is reduced to simply citing other authors.[723] They then go on to criticise jurists who at least implicitly lent "justification and approval to the steadily unfolding political apartheid of the period, through the development of an intellectual imprimatur for government initiatives".[724] Libertarians would regard this as ironic, if not hypocritical, as Corder and Davis are pleading for private law to be developed in line with authoritarian statism whilst criticising past jurists for doing exactly the same thing. Both Corder and Davis' approval of developing private law within the context of

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720 Malan (footnote 21 above) 224
721 Bastiat (footnote 60 above) 4.
722 Bastiat (footnote 60 above) 7.
723 Corder and Davis (footnote 2 above) 15.
724 Corder and Davis (footnote 2 above) 17.

economic interventionism, and the positivistic if implicit endorsement of existing State policy by Apartheid-era jurists, from the libertarian perspective, amount to giving the stamp of approval to government to engage in infringement upon individual and property rights.

Other proponents of Transformationism, such as Sachs, in the run-up to South Africa's transition from minority to majority rule, argued that there was a perception that a bill of first-generation or liberty rights would serve only to entrench existing privileges.[725] It is curious, however, that having experienced decades, if not centuries, of State repression, that those same proponents then wished to vest the institution of the State with significant powers of redistribution, knowing the injustices that this power had already brought about. It is unsurprising, then, that the present government has abused the awesome powers bestowed upon it during the transition.[726] That government has done this would not be surprising to libertarians, who would argue today, as they did then, that government power must always be strictly limited, regardless of the desirable outcomes one might wish society should attain.

Libertarians reject the premise of so-called socio-economic, or second- and third-generation rights, not because libertarians take issue with material prosperity, but because they regard this reconceptualisation of rights to contradict the very purpose and nature of rights. Indeed, Pilon goes as far as to argue that:

> "[…] rights are intended precisely to stand athwart the utilitarian calculus, to break the democratic engine: they allow for unpopular behavior of all kinds, for experimentation in life, for the various pursuit that will inevitably arise from the manifold world of individual values".[727]

Criticising the rise of American progressivism – the rough equivalent of Transformationism in South Africa – Pilon writes elsewhere that the "unprecedented liberty and prosperity" that Americans achieved by relying on its classical liberal legal heritage was faced with a "frontal assault, grounded in the idea that government

[725] Sachs (footnote 437 above) 6-7.
[726] For instance, President Jacob Zuma infamously repeatedly hired and fired finance ministers during his tenure, sometimes in very close succession, doing untold damage to the economy. This unrestrained power is bestowed upon the office of the President of South Africa in section 91(2) of the Constitution.
[727] Pilon (footnote 128 above) 1175.

planners could better order human affairs than could individuals pursuing their own ends".[728]

Bastiat also made a telling point about how the perversion of law exaggerates the importance of politics in everyday affairs. He cited the example of universal suffrage, writing that it is only because the law is being employed in service of plunder – that is, the redistribution of resources from some to others – that there has been agitation for everyone to participate in the electoral-political process. Had the law, however, been confined to its proper and fixed role – the protection of people and their property from aggression – then suffrage would not have been so controversial (as it was during Bastiat's time and certainly in South Africa before 1994) because greater or lesser suffrage would not be of material benefit either to the so-called excluded classes or the privileged classes. Bastiat asks: "Is there any need to prove that this odious perversion of law is a perpetual source of hatred and discord, that it even tends to social disorganization?"[729] One can apply this principle to perhaps any contemporary point of disagreement in public policy discourse. If there were no such thing as State control of employment – if it was inconceivable, like regulating how much oxygen one may breathe – for instance, the labour union movement would not have exercised as much influence as it does over politics in South Africa today.

Sartori stresses that democracy must not too readily be identified with liberty. While most liberal democracies have high degrees of individual liberty, these concepts are distinct, and that liberty "is an acquisition of democracy, not a product of it". Freedom, argues Sartori, is not necessarily secured democratically, but are secured "by a notion of legality that constitutes a *limit* and a *restriction* on pure and simple democratic principles".[730]

3.2.4 Freezing the status quo

The principle of substantive equality in Transformationist literature recurs alongside the theme of 'freezing the *status quo*.'[731] The idea is fundamentally that without

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[728] Pilon (footnote 42 above) 256.
[729] Bastiat (footnote 60 above) 9-12.
[730] Sartori (footnote 1 above) 18.
[731] See, for instance, De Vos (footnote 454 above) 85.

positive government intervention to uplift poor, mostly black South Africans, existing socio-racial classes would persist – be frozen – in their current form *ad infinitum*.

This claim is dubious from a historical as well as an economic perspective. Milton Friedman explained how the global Jewish population, despite having been consistently discriminated against both socially and legally, nevertheless succeeded in being one of the world's most wealthy population groups without State assistance. Friedman attributed this to the fact that the Jews took advantage of those areas of business and commerce where free enterprise reigned, like banking and entertainment. In particular, he noted that "Jews have flourished most in those countries in which competitive capitalism had the greatest scope" like 16th-17th century Netherlands, the United Kingdom, and the United States in the 19th and 20th centuries, and 19th-early 20th century Germany.[732]

I submit, therefore, that the claim by Transformationist advocates that the *status quo* would simply be "frozen" when the law is not enlisted for social engineering, is a manifestation of the fixed pie fallacy; the idea that all wealth is fixed and must, therefore, be distributed to achieve justice. The reality is that wealth is not fixed, but *created*. Chelsea Follett explains this phenomenon as follows:

> "A simple logical error underlies [the American democratic socialist, Bernie] Sanders' belief. If we assume that wealth is a fixed pie, then the more slices the rich get, the fewer are left over for the poor. In other words, people can only better themselves at the expense of others. In the world of the fixed pie, if we observe the rich becoming richer, then it must be because other people are becoming poorer. Fortunately, in the real world, the pie is not fixed."[733]

There is also a recurring assumption that treating people equally at law – formal equality – represents some social injustice if they are not also equal in terms of wealth. This is an error in thinking, as it represents an unsubstantiated assumption that people must suffer legally, in order to become materially equal. This is simply another manifestation of the fixed pie fallacy.

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732 Friedman MD. "Capitalism and the Jews". (1988). Foundation for Economic Education. https://fee.org/articles/capitalism-and-the-jews/.

733 Follett C. "Beware of the fixed pie fallacy: Everyone can get ahead". (2015). *HumanProgress*. https://humanprogress.org/article.php?p=80.

3.2.5 The knowledge problem and the inappropriateness of using law to achieve social justice

Anton Kok considers nine interrelated and overlapping reasons why the law is not an effective tool for social engineering, with which libertarians would generally agree. Some of those reasons include the complexity of society that mitigates against one-size-fits-all legal intervention, by extension the comparative ignorance of law-makers, the potential for unintended detrimental consequences, and the difficulty in showing the causal link between legal changes and changes in the behaviour of society.[734]

Kok's points can be united under the heading of the knowledge problem, which has been extensively elaborated upon in the Austrian school of economics, the dominant school of economics among libertarians. Simply, this is the insight that central planners, of whatever kind, do not have at their disposal the relevant or up-to-date information necessary to make efficient and effective decisions about the resources over which they exercise control. The relevant knowledge is dispersed over time and in small quantities across all individual members of society. In a free market such knowledge is coordinated through the price mechanism of supply and demand for goods and services.[735] Breadwinners in small families, for example, usually do have all or most of the relevant and timely information concerning their families at their immediate disposal, and they can act on that information immediately and effectively. Moving away from the family unit into broader communities, locales, territories, and countries, one finds that the information available to those entrusted with making decisions regarding the allocation of resources are usually fundamentally incorrect and inadequate, so that by the time they are ready to make a decision, the information might have become outdated or irrelevant in some parts of the concerned society. This phenomenon is the so-called knowledge problem.

The knowledge problem applies in both law and economics. Von Hayek, for instance, regarded the common law – as applied by judges – as superior to any legislative whim, because:

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734 Kok A. "Is law able to transform society?" (2010). 127(1) *South African Law Journal*. 61-79.

735 See in general Kirzner IM. "Economic planning and the knowledge problem". (1984). 4(2) *Cato Journal*.

"[…] judges deciding concrete disputes based on their detailed, albeit often intuitive tacit and local knowledge, yielded a better institutional foundation than legislators trying to anticipate all future circumstances prospectively according to detailed rules."[736]

Of Von Hayek's work and the knowledge problem in law, Todd Zywicki and Edward Stringham write:

"Indeed, although legislation superficially appears more predictable and certain than common law because of the greater verbal precision of legislative pronouncements, Hayek argues that in reality the common law provides greater predictability because its decisions derive from widely-shared notions of what is just, making it easier for most people to conform their behavior to the expectations of the law rather than having to seek technical legal advice to know whether a proposed action is permissible."[737]

Malan might have noted another reason why the judicial sphere appears or in fact is superior to the legislative sphere. The rules of natural justice – *nemo judex in sua causa* and *audi alteram partem* – are strictly applied and enforced in the courtroom. No one may be a judge in their own case, and those whose interests are in jeopardy must be allowed to present their case, and such representations must be considered by the impartial adjudicator without fear, favour, or prejudice. Malan states that there is no good reason to limit the application of these rules of natural justice to the judicial sphere, for indeed, "[t]hese principles are so fundamental that they belong to the common conscience of mankind rather than to juridical science". We insist on these rules in the courtroom out of a concern for fairness, justice, and predictability, and fairness, justice, and predictability are *ceteris paribus* what we receive. Malan, then argues persuasively, but implicitly, that the rules of natural justice should be applied in the legislative sphere as well.[738]

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736 Stringham E and Zywicki TJ. "Hayekian anarchism". (2011). George Mason Law & Economics Research Paper 11-06. 8

737 Stringham and Zywicki (footnote 736 above) 15.

738 Malan K. "Faction rule, (natural) justice and democracy". (2006) 21(1) *SA Publiekreg/Public Law*. 154-157.

4. CONSTITUTIONALISM SUBVERTED

Klare writes that on his reading, “the Constitution suggests not only the desirability, but the legal necessity, of a transformative conception of adjudicative process and method”. By this he means the “judicial mindset and methodology” must be conscripted in service of the transformative-constitutionalist goals of promoting equality, democracy in both the public and private spheres, and the other values often referred to and discussed above. He goes as far as to assert that the drafters of the Constitution *could not* “have intended dramatically to alter substantive constitutional foundations and assumptions, yet to have left these new rights and duties to be interpreted through the lens of classical legalist methods”.[739] It is unclear why (and Klare does not suggest any possible reason why) the drafters could not conceivably have intended an orthodox approach to constitutional interpretation and adjudication, especially given the fact that South Africa’s courts and common law were largely revered for their dedication, not to Apartheid ideology, but to civil liberties.[740]

Langa later identified an apparent value-based justification – an element of procedural justice – as being central to his conception of transformative constitutionalism: “It no longer suffices for judges to rely [only] on the say-so of [P]arliament or technical readings of legislation […] [but also] by reference to ideas and values”. The right and ability to contest established “ways of being” is important too, so that the direction in which society will develop “is unpredictable but the idea of change is constant”. This value of contestability is identified as “perhaps the ultimate vision of a transformative, rather than a transitional Constitution”.[741]

He argues that part and parcel of transformative constitutionalism is to abandon excessive formalism in favour of more substantive legal reasoning. In other words, the legal community (and arguably legal subjects generally) must not blindly accept the law simply because it appears from the sources of positive law to be the law, but rather engage critically with the law. “At the heart of a transformative Constitution”, writes

739 Klare (footnote 452 above) 156.
740 Wacks (footnote 369 above) 270.
741 Langa (footnote 590 above) 353-354.

Langa, "is a commitment to substantive reasoning, to examining the underlying principles that inform laws themselves and judicial reaction to those laws".[742]

Langa appears to contradict himself, however, by implying that the constitutional values *themselves* must be uncritically accepted,[743] which is merely positivism of a different flavour. Langa regarded these values as "a social and economic revolution" that involves both "the fulfilment of socio-economic rights" and "the provision of greater access to education and opportunities through various mechanisms, including affirmative action measures".[744]

It has been noted that the word "transformation" does not appear once in the South African Constitution. Yet the Constitutional Court has made Transformationism a guiding light in its interpretation and application of South Africa's highest law.[745] Indeed, De Vos writes that "we need is judges whose assumptions are closely aligned with the transformative vision of the Constitution – not judges who are classically liberal".[746] Malan explains this feature of Transformationism:

> "Such vision demands that everyone who is engaged in constitutional [and] legal interpretation in general to interpret the law and the Constitution with a view to accomplishing a transformed society. […] The Constitution is not the supreme instrument for safeguarding continuity and stability of existing interests and rights. It is the direct opposite: the supreme weapon for guaranteeing the radical change of the existing political, economic, social, cultural and intellectual transformation; an instrument for an encompassing legally organised revolution. Accordingly, the Constitution must also be interpreted with a view to bring about such encompassing and far reaching change."[747]

Furthermore, the notion of demographic representivity as discussed above is also nowhere required by the Constitution in the private sector; only in the public administration and administration of justice. Yet it, too, has become an accepted part

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742 Langa (footnote 590 above) 356-357
743 Langa (footnote 590 above) 357.
744 Langa (footnote 590 above) 352-353.
745 Kane-Berman (footnote 390 above) 4. See also Malan (footnote 14 above) 200-223 for a general discussion of cases wherein the Constitutional Court adopted Transformationist considerations as its lodestar.
746 De Vos P. "About judge Lewis's unwise remarks". (2008). *Constitutionally Speaking*. https://constitutionallyspeaking.co.za/714/.
747 Malan (footnote 14 above) 194.

of the legal-political discourse. This despite the fact that, as libertarians would argue, contrary to De Vos, limited government and the recognition and protection of individual liberty lies at the heart of constitutionalism itself. That the Constitution itself attempts to entrench non-racialism to no avail in section 1(b) is a further indication of this fact. Indeed, Malan writes that the attainment of Transformationism, considered to be a political imperative, is done by the concentration of all centres of power – private as well as public, including companies, the professions and the judiciary – under the control of the South African government and moreover the ruling party.[748] The ruling party itself has regularly re-committed itself to this apparent political imperative.[749]

Sartori writes of the two approaches to law as a guarantor of liberty: Rule by legislators and Rule of Law. The former is written law that is consciously created, and the latter is law discovered by judges. Rule by legislators means law is "the product of sheer will", whereas under the Rule of Law "it is the product of theoretical inquiry and debate". This does not necessarily mean that the Rule of Law perfectly safeguards liberty or that rule by legislators necessarily violates it. Thus, "liberal constitutionalism" balances these two approaches by taking the advantages of both and erecting impediments to their disadvantages. He writes that even though constitutional systems differ, their *raison d'etre* has remained relatively constant: Combining "pros and [obviating] the cons of both the rule-of-law and rule-of-legislators techniques". To Sartori, (State) constitutionalism is inherently liberal in the classical sense.[750] But in recent years, bemoans Sartori, constitutionalism has become misunderstood. He writes that "after a relatively short time had elapsed [since liberal constitutionalism was manifested], constitutionalism changed […] from a system based on the rule of law to a system centered on the rule of legislators". When this happened, "the nature and concept of law" was, in practice, changed. About this transformation, he writes:

> "For when law is reduced to State lawmaking, a 'will conception' or a 'command theory' of law gradually replaces the common-law idea of law, i.e., the idea of a free lawmaking process derived from custom and defined by judicial decisions."[751]

[748] Malan (footnote 14 above) 136-137.
[749] Kane-Berman (footnote 390 above) 6.
[750] Sartori (footnote 1 above) 15-17.
[751] Sartori (footnote 1 above) 37.

This legislative conception of law has three consequences. Firstly, the perpetual increase in the amount of legislation with which legal subjects must comply "discredits the law". This is not only because the amount is excessive, but also because legislators, who have replaced jurists and jurisprudence, "are poor lawmakers" and often draft subpar legislation. Secondly, the legislative conception undermines the intentions of the originators of constitutionalism, that is, "a relatively stable and spontaneous law of the land, common to all, and based on rules of general application". This is because there is no longer any real legal certainty, as each day can bring new laws. Thirdly, "the legislative conception of law accustoms those to whom the norms are addressed to accept any and all commands of the State", and this facilitates the quiet and almost unnoticeable "passage from liberty to slavery".[752]

The result, which I submit can be readily observed in South Africa today, is, according to Sartori, that "our conception of law" no longer protects legal subjects from tyranny. In other words, our understanding of law has progressed to a point where it is seen as normal, often appropriate – especially within the Transformationist paradigm – for government to enact legislation that infringes upon individual and property rights. Now that our conception of law proves useless to protecting liberty, legal subjects can rely only on "the devices of 'juridical defense'"; that is, legal subjects must rely on the technical provisions of constitutional instruments, like the Bill of Rights, to remain free.[753]

In 1976, Sartori questioned calls "for the democratization of constitutions", which, in my view, is a characterising feature of so-called transformative constitutionalism. Sartori writes:

> "The ideal of these reformers is to transform law into outright legislation, and legislation into a rule of legislators freed from the fetters of a system of checks and balances. In short, their ideal is constitutions that are so democratic that they are no longer, properly speaking, constitutions."[754]

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752 Sartori (footnote 1 above) 38-39.
753 Sartori (footnote 1 above) 39.
754 Sartori (footnote 1 above) 39.

As a result, people are "subject to laws so easily changed that they [become] laws unable to assure the protection of the law".[755]

Lysander Spooner took a radical view of constitutional doctrine that contemplates the violation of natural rights. He wrote, in the context of arguing against the American institution of slavery:

> "[…] if the majority, however large, of the people of a country, enter into a contract of government, called a constitution, by which they agree to aid, abet or accomplish any kind of injustice, or to destroy or invade the natural rights of any person or persons whatsoever, whether such persons be parties to the compact or not, this contract of government is unlawful and void – and for the same reason that […] a contract of the same nature between two individuals, is unlawful and void. Such a contract of government has no moral sanction. It confers no rightful authority upon those appointed to administer it. It confers no legal or moral rights, and imposes no legal or moral obligation upon the people who are parties to it. The only duties, which anyone can owe to it, or to the government established under color of its authority, are disobedience, resistance, destruction."[756]

Spooner would therefore likely have had something similar to say in the contemporary South African context if it were put to him that rights in the Bill of Rights must be 'balanced' in favour of a Transformationist agenda, that could mean making inroads into individual and property rights. Indeed, as if he were replying directly to Klare's article on transformative constitutionalism, Spooner wrote:

> "Judicial tribunals, sitting under the authority of this unlawful contract or constitution, are bound, equally with other men, to declare it, and all unjust enactments passed by the government in pursuance of it, unlawful and void. These judicial tribunals cannot, by accepting office under a government, rid themselves of that paramount obligation, that all men are under, to declare, if they declare anything, that justice is law; that government can have no lawful powers, except those with which it has

[755] Sartori (footnote 1 above) 40.
[756] Spooner (footnote 61 above) 9.

been invested by lawful contract; and that an unlawful contract for the establishment of government, is as unlawful and void as any other contract to do injustice."[757]

Spooner argues that the only valid parts of a constitution are those that are consistent with natural rights. Courts are required, on this construction, to declare any provisions, even in constitutions, which are inconsistent with natural rights, "void and not law".[758]

Malan echoes a similar sentiment. Building upon work done by *inter alia* Ronald Dworkin and Etienne Mureinik, Malan writes that constitutional systems that have the appearance of democracy but nonetheless "establish systems of domination" are themselves not capable of being considered either just or democratic. Simply holding elections and having civil control of political processes are but part of a substantive democracy. True democracy would be characterised by limited governance, in that power is distributed equitably among all the sectors of society, rather than centralised in any one or a few places.[759]

5. CHAPTER CONCLUSION

Whereas libertarianism places the individual, and particularly the individual's liberties and property rights at the forefront of not only policy, but legal analysis, Transformationism seeks to fundamentally change society, indeed by force without regard for the individual's liberties and property rights, largely in the (ostensible) favour of disadvantaged groups.[760]

Harrigan and Yonk regard it as unlikely that the support for the notion of equal outcomes (so-called substantive equality) can be reversed back to formal, legal equality of rights. This is because substantive equality "by definition appeals to a majoritarian impulse". Only economic considerations, like government's ability to tax more or less, limits this impulse.[761] This sentiment was shared by Bastiat who noted that when the law is perverted beyond its inherent function, the oppressors and the oppressed in society start engaging in a tug of war, not necessarily for one side to

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[757] Spooner (footnote 61 above) 9.
[758] Spooner (footnote 61 above) 14.
[759] Malan (footnote 738 above) 148.
[760] I have noted throughout that this commitment of Transformationism in favour of the poor, and particularly the black poor, is often merely rhetorical. The practical outcomes of Transformationist interventions and philosophy, I submit as I have done before has been largely to the disadvantage of the poor.
[761] Harrigan and Yonk (footnote 669 above) 33.

return the law to its proper role, but rather to use the law, just as the other side has, to plunder for their own ends.

This chapter has set out libertarian responses (relying on the theory set out in Chapter 2) to Transformationist phenomena (as set out in Chapter 3) as follows:

Firstly, it was shown that Transformationism undermines individual and property rights, if it considers such rights important at all. Indeed, Malan writes that both individual liberty and the ability of cultural communities to express themselves and associate freely, is being smothered by Transformationism. This has led to a decline in healthy inter-group relationships between South Africa's (presumably racial) communities.[762] Secondly, the role that the doctrine of so-called social justice plays in South African constitutional law was considered alongside a long tradition of libertarian criticism. Finally, it was shown how Transformationism might undermine constitutionalism itself, if the premise that constitutionalism is dedicated to the limitation of government power, is to be accepted.

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[762] Malan (footnote 14 above) 121.

CHAPTER 5: LIBERTY OR SOCIAL ENGINEERING?

1. CONCLUSIONS OF THE STUDY

This study was primarily concerned with regard to individual liberty, understood to encompass both personal freedoms and the right to own and enjoy private property, that exists today in South African law. This was done by setting out a comprehensive picture of libertarian approaches to rights and law in Chapter 2, outlining Transformationism as South African law's ideological direction in Chapter 3, and stating libertarian responses to Transformationism in Chapter 4.

It was concluded that South African law – under Transformationist influences – is departing from what libertarians consider to be the inherent function of law: The protection of liberty. It is Sartori's view that we should be alarmed about the state of law. "Whereas law, as it was formerly understood, effectively served as a solid dam against arbitrary power," writes Sartori, "legislation, as it is now understood, may be, or may become, no guarantee at all".[763]

Bastiat wrote of how society will only respect the law if the law is respectable. "When law and morality are in contradiction to each other," argued Bastiat, "the citizen finds himself in the cruel alternative of either losing his moral sense, or of losing his respect for the law—two evils of equal magnitude, between which it would be difficult to choose". But law and justice have become so entwined "in the minds of the masses", that to most people, "they are one and the same". As a result, most people have "a strong disposition to regard what is lawful as legitimate, so much so that many falsely derive all justice from law". When the law is used in ways that contravene its inherent purpose to protect rights – to "sanction plunder" – many people are deluded into believing this perversion of law is "just and sacred".[764]

Ashford, in turn, laments, quite graphically, how rights have become misconceived in the modern era:

> "A clear understanding of the concept of human rights is vital for their protection and promotion, especially for all those who are denied them daily. Not all that is

[763] Sartori (footnote 1 above) 40

[764] Bastiat (footnote 60 above) 7-8.

desirable is a right. Not all rights are human rights. It is an obscenity to equate torture — such as giving electric shocks through a person's genitals — with not having a paid holiday. We must not let them – states and their conscious and unconscious ideological allies – get away with it."[765]

In Chapter 2, it was shown that historically, restitution, rather than punishment, was the primary characteristic of "criminal" law. In Africa particularly, shame and restitution (as opposed to guilt and punishment) were the dominant animators of this area of law.[766] Hence, there was, if only but a figment, of emphasis on property rights or proprietary interests embedded in the law, that focused on justice between tangible people and property, rather than an ideological dedication to social engineering of some kind. David Johnson, Steve Pete and Max du Plessis note *inter alia* some of the other features of pre-colonial African legal thought:

- An opposition to autocracy. Leaders must promote the interests of the community.
- Issue-based (as opposed to entrenched, systematised) political systems, which resounds with libertarian decentralisation.
- No political decisions were made if they had not come about from "consensus reached by negotiation rather than voting".[767]

Transformationism, on the other hand, as we have seen, emphasises State power and negates choices that contradict those of the political class. Transformationism also encourages a politicisation of private affairs, with politics destined to becoming all-encompassing as opposed to limited and issue-based. Simple majorities in Parliament, as opposed to a negotiated consensus, are further considered to be enough for material legal changes that affect any number of private, individual, or proprietary affairs to be legitimate.

It is ironic, then, that libertarian jurisprudence and indigenous African jurisprudence have more in common with each other than the latter with Transformationism.

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765 Ashford (footnote 206 above) 2.

766 Johnson D, Pete S, and Du Plessis M. *Jurisprudence: A South African Perspective*. (2001). Durban: LexisNexis Butterworths. 205.

767 Johnson *et al*. (footnote 766 above) 204-205.

Bastiat wrote in 1848 that he feared "for the future of [his] country when [he thinks] of the seriousness of the financial difficulties" that the principle of politics-over-property rights has caused and will further cause. He pointed to the deficit between tax revenue and government spending, and as a result, increasing State debt. There were continuous political promises that government would redistribute wealth and provide social services, yet these were unaffordable. The result was that capitalists', workers', and the State's interests were all placed in jeopardy, for there would be capital flight and a lack of investment due to uncertainty and arbitrariness, resulting in no wages for workers, and no taxes for government.[768] He wrote this in the context of discussing how the institution of law had been perverted to give effect to redistributionist goals. Indeed, the similarities between Bastiat's own context amid the 1848 February Revolution in France, and South Africa's 2019/2020 context are striking, with increasing calls in South Africa for redistribution, while the economy crumbles, from the haves to the have-nots. Indeed, after the 2018 resolution by Parliament that it would pursue a policy of expropriation without compensation, demand for affordable homes plummeted by 40% because ordinary South Africans believed government would expropriate others' property and redistribute it to them. This harmed the affordable housing market.[769] This is not all. Most commercial farmers ceased investing in the expansion and development of their infrastructure and businesses as a result of the prospect of expropriation without compensation.[770] Agriculture was among the worst-hit sectors of the economy in the first quarter of 2019 when a 13.2% contraction was experienced in that sector. Government spending was where most of the growth for that quarter took place.[771] Finally, it is now trite that South Africa's investment ratings have been consistently downgraded. Moreover, local investors, too, are taking their money out of the country – with property companies having

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768 Bastiat (footnote 62 above) 108-109.

769 Staff Writer. "People have stopped buying cheaper homes and paying rent – because they expect to get free land: report". (2018). *BusinessTech*. https://businesstech.co.za/news/property/267963/people-have-stopped-buying-cheaper-homes-and-paying-rent-because-they-expect-to-get-free-land-report/.

770 Mkentane L. "Land reform uncertainty stalls investment in agricultural industry". (2018). *Business Report*. https://www.iol.co.za/business-report/markets/land-reform-uncertainty-stalls-investment-in-agricultural-industry-17759122.

771 Wasserman H. "SA's economy is shrinking at an alarming rate – and only oranges and interest rates are offering hope". (2019). *Business Insider*. https://www.businessinsider.co.za/economic-growth-first-quarter-of-2019-2019-6.

offshored almost half of their risk.[772] The detrimental, long-term consequences of the COVID-19 lockdown have yet to make themselves completely clear, but they will no doubt add to this malaise.

This reality illustrates that Transformationism has not merely been an academic exercise. Not only has it led to a jurisprudential rejection of the notion of formal equality – the bedrock principle of the Rule of Law that supposedly exists at the core of South Africa's constitutional order – and property rights, but it has also undermined the very substantive equality it seeks to achieve, by causing economic ruin. In other words, whilst this study has been concerned with freedom in the objective sense, Transformationism undermines freedom in the subjective sense just as much. As discussed in Chapter 1, freedom in the subjective sense is the *ability* of specific people to do what they want: Whether one *can*, for instance, physically or financially, do something. Freedom in the objective sense denotes the state of freedom that exists between all people: The *allowability* of each individual (rather than specific people in their own circumstances) to do as they please.

Bastiat was also frustrated by the French political class' constant rhetorical commitment to the notion of *liberty* when they constantly took action to undermine it.[773] South Africa is in a similar situation, with the Constitution affirming a commitment to the "advancement of human rights and freedoms" and to *freedom* as a trilateral value alongside equality and human dignity.[774]

Interestingly, Bastiat was not a reactionary French royalist. On the contrary, he was a leftist in the most original sense of the word, himself having been a member of the French legislature, seated on the left-wing of the chamber with the republicans.[775] He went as far as to criticise French landowners and capitalists for having tried to use the

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772 Naidoo S. "Capital flight: SA property companies invest billions more offshore". (2019). *Moneyweb*. https://www.moneyweb.co.za/news/companies-and-deals/capital-flight-sa-property-companies-invest-billions-more-offshore/.

773 Bastiat (footnote 62 above) 110.

774 This is not a recent phenomenon nor is it limited to the Transformationist era. Indeed, the Preamble to the Tricameral Constitution (footnote 409 above) stated that it was a "national goal" to "respect and to protect the human dignity, life, *liberty and property* of all in our midst" (my emphasis) when Acts of Parliament like the Natives Land Act (27 of 1913) and group areas legislation (1950-1991) remained in force and are constitutionally valid.

775 Richman S. "Libertarianism: Left or right?" (2007). Future of Freedom Foundation. https://www.fff.org/explore-freedom/article/libertarianism-left/.

law to benefit themselves commercially, “to the detriment of the working classes”.[776] For Bastiat, the landowners started the process of undermining property rights, at least in France, because they sought to use “the law to give an artificial value to their lands and their products” by instituting a protectionist system – the forerunner of communism.[777]

Strydom wrote that the legal community must resist phenomena “which tends to deprive the law of its juridical sense and reduce it to an instrument for the advancement of a particular ideology”. He wrote this in response to jurisprudential trends in the era of white minority rule in South Africa. He continued, cautioning those “who are concerned with the law in all its different facets must be careful that they don’t become blind executors of the will of the state, because then criticism of future regimes which may show little respect for the law will be out of place”.[778] Strydom’s caution has sadly not been taken seriously.

Some might say that this is ironic, for I am quoting Strydom in the same breath as I am advocating for the law to be an instrument for libertarian ideological goals. This criticism is at a glance correct. However, upon proper appreciation of the nature of libertarian philosophy, it becomes less relevant. Libertarianism, and by extension its jurisprudential expression, does not seek to enforce anything upon anyone. Quite the contrary: It seeks, simply, to allow freely-interacting individuals – whether alone or in association with bigger groups, enterprises, or communities – to decide for themselves.

Critics will also continue their argument that libertarian jurisprudence is detached from the social reality, not only of South Africa, but of every society with few or no exceptions. Dogmatic individualism is unknown everywhere. This, I have argued, is a misunderstanding at best and misrepresentation at worst, of libertarianism and its legal implications. Libertarian jurisprudence does not demand, nor encourage, that societies disintegrate or that individuals retreat into solitude. It makes simple observations about the logic and nature of law and rights, and from those observations comes to a simple and unassuming conclusion: If people want to be left alone, leave them alone; and if

[776] Bastiat (footnote 62 above) 112.
[777] Bastiat (footnote 62 above) 114.
[778] Strydom (footnote 332 above) 142.

they do not want to be left alone, you do not have to leave them alone. Simply, live together with others observing the centrality of consent and cooperation, with a healthy aversion to coercion.

Flanigan notes pertinently that the less well-to-do are the most vulnerable to State infringement of their rights. Restricting the State's power, even if that means restricting the State's power to pursue Transformationist goals, will therefore have the result of benefiting the poor and vulnerable.[779] An example of this in the contemporary South African context is that of expropriation without compensation. If the Constitution is amended to allow for expropriation of private property without compensation, which by all accounts amounts to a weakening of the right to private property, it does not mean the wealthy lose their access to the courts, where they may still challenge expropriations on due process grounds. Indeed, Elmien du Plessis writes in part in defence of expropriation without compensation, that even if the Constitution is amended and compensation is no longer necessary in all circumstances, government must still observe the requirements of due process and administrative justice when it expropriates. Decisions to expropriate will therefore still be challengeable in court on various grounds.[780] What this means, in practice, is that the wealthy, even if their properties are expropriated without compensation, will be able to delay or frustrate government in court. On the other hand, the poor, who cannot easily afford the swift and effective justice provided by private attorneys and advocates, will more than likely have to accept their property being expropriated without compensation without much hope of recourse. But if private property rights were effectively protected, even against Transformationist goals like redistributionary (as opposed to restitutionary) land reform, the poor would not suffer this injustice as easily. It must logically therefore be proper, even from a moderate Transformationist perspective, to protect individual rights like the right to own private property effectively, even if that means sacrificing some social engineering goal.

The conclusions of this study should not be interpreted as a rejection of the Constitution nor of the rich tradition of South African law built up over centuries, but

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[779] Flanigan (footnote 78 above) 472.

[780] Du Plessis E. "Why a constitutional amendment won't give the State permission to 'grab' land". (2018). *News24*. https://www.news24.com/Columnists/GuestColumn/why-a-constitutional-amendment-wont-give-the-state-permission-to-grab-land-20180810.

rather a call for the interpretations that have dominated the jurisprudence of the superior courts and particularly the Constitutional Court, to be modified to prefer an approach *in favorem libertatis* rather than so-called transformative constitutionalism. Indeed, as is clear from a reading of the Constitution itself and of the work of Transformationist advocates, it is sufficiently evident that the apparent transformative aspirations of the Constitution have been gleaned almost exclusively from the judgments of the courts, rather than from the text of the Constitution itself.[781]

If the libertarian thesis that State constitutionalism as such is inherently liberal – that is, aimed at restraining the power and scope of the State so as to secure the reasonable maximum amount of liberty for legal subjects – is to be accepted, then any constitutional device should be interpreted with this reality foremost in mind. Indeed, Spooner put this perhaps most lucidly and concisely, when he argued that because no rule of law that infringes upon natural rights can be considered as law, but acknowledging that such rules did in his (and do in our) present reality exist, the most important rule of constitutional and statutory interpretation is "the one that all language must be construed '*strictly*' in favor of natural right".[782] I submit that transformative constitutionalism, as a facet of Transformationist jurisprudence, relegates this reality at best to a background consideration, and at worst no consideration at all. As such, so-called transformative constitutionalism could perhaps be considered a misnomer, and that it is not a type of constitutionalism in the first place.

This is not to say those transformative imperatives that are clear from a textual reading of the Constitution must be ignored. Indeed, the Constitution's recognition that property rights were disrespected and deprived in South Africa's past, based on racial considerations, and that this state of affairs must be set right by way of restitution, is eminently compatible, indeed required, by an interpretation *in favorem libertatis*. The interpretation that these provisions sanction authoritarian redistribution, that is, taking property from those to whom it truly belongs,[783] however, do not pass muster, and because such an interpretation ascribes to a constitutional device an authoritarian (that is, contra-constitutional) purpose, it must be set aside in favour of an

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781 See for instance De Vos (footnote 454 above) 82 and generally for the emphasis on how the Constitution is interpreted, as opposed to what its text says.

782 Spooner (footnote 61 above) 17-18. Spooner's emphasis.

783 As opposed to those who 'own' property that was in the past expropriated by the State in furtherance of its social engineering policies.

interpretation *in favorem libertatis*. I submit that it is unreasonable and inappropriate to interpret the Constitution as inconsistent with the overarching and fundamental purpose of law, or the Bill of Rights as inconsistent with the overarching and fundamental purpose of rights.

2. AFTERWORD

Karl Klare was partly correct when he noted in 1998 that South Africa's judges would be judged by future generations on how they approach *inter alia* "achieving equality [and] advancing social justice".[784] Contrary to Klare, however, I submit that the courts, *because they adopted the Transformationist approach*, have done more harm than good to the idea of law as a rights-protective institution, to the idea of constitutionalism as an institution of limitation upon State power, and, as a result, to the prosperity of all, but mainly the poor. It is no surprise that mining companies today are engaged in widespread retrenchments and divestments.[785] The nationalisation of minerals in 2004 and further threats today to expropriate private property without compensation did and does obviously not inspire confidence in South Africa's legal system. The superior courts sanctioned, I submit with flimsy reasoning,[786] the Mineral and Petroleum Resources Development Act's no-compensation expropriation of minerals, all in the name of Transformationism, and South Africans regardless of race or class today suffer for it.[787] While the wealthy can insulate themselves from these consequences, the poor cannot. Transformationism, as most State initiatives that go beyond the protection of liberty and property, had unintended consequences that proved detrimental to those it was intended to help.

I submit that law's inherent and legitimate function remains to safeguard the innate rights (and see to the enforcement of their correlative obligations) of all individuals. Transformationist approaches have not remained faithful to this function. Arguments that society has changed and therefore the *raison d'etre* of law must also change, are unconvincing from the libertarian perspective. A change in society can never, for instance, remove from a key its inherent role to open a lock, from a television screen

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784 Klare (footnote 452 above) 171-172.

785 Kane-Berman J. "Mining and people: The impact of mining on the South African economy and living standards". (2018). 37 *@Liberty*. 33

786 See for instance Van der Vyver (footnote 637 above) 131.

787 See for instance Badenhorst PJ. "New order rights to minerals in South Africa: Ten years after mayday". (2018). 26(3) *African Journal of International and Comparative Law*. 388.

its inherent role to project images, from a calculator its inherent role to compute, from a mouth its inherent role to articulate and consume, or from the brain its inherent role to think and coordinate. Like these things, the law has an inherent function that it can only be robbed of through perversion and misrepresentation. This is not an argument against legal pluralism or in favour of libertarian legal imperialism, but simply one against coercing individuals into arrangements to which they do not consent. This means that people can choose to live according to the fundamental dictates of Sharia law or under the various unconscionably suppressed legal systems and cultures of colonised societies. Indeed, the law's various branches and contexts allow a multiplicity of legal arrangements, but at its core the law demands that the individual not be compelled to do that which they themselves have not agreed to.

South African law, like all law, must develop *in favorem libertatis*. This alone can represent an authentic *transformation* from an authoritarian past – and present – to a free future.

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