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REVIEW SYMPOSIUM

Does Dagan's liberal theory of property provide for compensation at nil compensation in the South African context?

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1 Introduction

Being asked to write a few words on a book entitled *A Liberal Theory of Property* stirred conflicting emotions in me. While reading the book, I often had to ask myself: 'Oh dear, does this mean I am a *liberal*?' Upon self-reflection, I concluded that this is probably due to my limited understanding of the various traditions within liberalism. Liberalism has of late become an insult on both the Left and the Right. Believe in equality? *Libtard*,[1] would be the retort from the Right. Believe in a market economy and private property (in all its complexity)? *Neoliberal*, would be the retort from the Left.

I had to lay down my preconceived ideas of liberalism when I read the book, and I am glad I did. This note will engage with only a few of its ideas, most notably framing the failed 18th Amendment Bill to the South African Constitution that sought to amend the country's 'property clause', as well as Expropriation Bill,[2] through the ideas it puts forth.

This note starts by discussing the 18th Amendment Bill and the Expropriation Bill.[3] The focus will be on clauses 12(3) and (4) of the Bill, which propose instances in which compensation *may* be nil. After that, I will briefly look at liberal theories of property with reference to some of the guardians of these liberal ideas in South Africa. This will be followed by a discussion of Hanoch Dagan's work in this regard, looking at the amendment process through what I understand his argument to be. The conclusion will contain a few critical reflections on the way forward.

2 The 18th Constitutional Amendment Bill and the Expropriation Bill

2.1 Constitutional amendment

On 7 December 2021, South Africa's National Assembly rejected the 18th Constitutional Amendment Bill, resulting in it lapsing. The road to the final Bill spanned more than four years (Du Plessis and Lubbe, 2021). The final proposal pertaining to compensation stated:

> '(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court: *Provided that where land and any improvements thereon are expropriated for purposes of land reform as contemplated in subsection (8), the amount of compensation may be nil.*' (18th Constitutional Amendment Bill, 2021, clause 1(a), emphasis added)

[1] Available at https://dictionary.cambridge.org/dictionary/english/libtard (accessed 20 January 2022).
[2] Expropriation Bill 23 of 2020.
[3] *Ibid.*

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It adds:

> 'For the furtherance of land reform, national legislation must, subject to subsections (2) and (3), set out circumstances where the amount of compensation is nil.' (18th Constitutional Amendment Bill, 2021, clause 1(c))

There was a suggested amendment to section 25(5):

> 'The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable *state custodianship of certain land* in order for citizens to gain access to land on an equitable basis.' (18th Constitutional Amendment Bill, 2021, clause 1(e), emphasis added)

The focus of this response is not on the issue of custodianship that entails an abolishment of a system of existing private property rights and replacing it with a state-controlled system of rights in terms of the Constitution (Du Plessis and Lubbe, 2021). Nor is the focus on government's failure in executing land reform (*Mwelase v. Director-General for the Department of Rural Development and Land Reform*;[4] Advisory Panel on Land Reform Agriculture, 2019) although this is important. Instead, the focus is on the question of whether a liberal theory of property *à la Dagan* can support a view that compensation for expropriation, at least in land-reform instances, can be nil.

2.2 Expropriation Bill

Parallel to this process runs the process of enacting a new expropriation act. The Expropriation Bill[5] aims to bring expropriation practices in line with the Constitution, consolidating all the areas of expropriation that changed under the Constitution, such as administrative law (Du Plessis, 2020). This Bill has been long in the making, with a version of the current bills starting in 2013, being refined in various fora, once adopted by the National Assembly but not promulgated by the president, only to be (hopefully) passed by the end of the year. Of interest for this paper is the addition of clauses 12(3) and (4) that seek to signal the instances in which the state *may* pay 'nil [rand]' compensation for expropriation. The clause states (emphasis added):

> '(3) It *may* be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to –
>
> (a) where the land is not being used and the owner's main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value;
> (b) where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration;
> (c) notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), where an owner has abandoned the land by failing to exercise control over it;
> (d) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and
> (e) when the nature or condition of the property poses a health, safety or physical risk to persons or other property.
>
> (4) When a court or arbitrator determines the amount of compensation in terms of section 23 of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), it may be just and equitable for nil compensation to be paid, having regard to all relevant circumstances.'

[4] *Mwelase v. Director-General for the Department of Rural Development and Land Reform* (CCT 232/18) [2019] ZACC 30.
[5] Expropriation Bill 23 of 2020.

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In general, the obligation to compensate remains in the Bill, and the standard of compensation remains 'just and equitable'. The clause signal that no large-scale blanket expropriation of especially productive property is in the state's vision for expropriation.

Again, many organisations that situate themselves on the 'liberal' spectrum are deeply against the inclusion of this clause (Du Plessis, 2020; 2021; Jeffery, 2021).

3 The classic liberal notion of property and liberalism in South Africa

In the US, Richard Epstein is perhaps the most ardent supporter of the classic liberal view, making it clear that '[t]he conception of property includes the exclusive rights of possession, use, and disposition' (Epstein, 1985, p. 304), where property comprises the absolute right to exclude (Dagan, 2021). Nuisance is the only limit to your right to use (or not use) your property (Dagan, 2021). Another essential element of property is the right to alienate, which links to freedom of contract and, therefore, impacts the market order (Epstein, 1985; Radin, 1988). What is important for this review – any interference of these rights (possession, use and alienation) is a 'taking' (expropriation).

This links into the general liberal view of human rights and democracy, where great emphasis is placed on protecting individual liberty from the state (Allen, 2010). Seen in this way, expropriation is an interference in a natural or normal state of affairs. Since property has a real value, determined by considering what it would sell for in an unregulated market, this compensation is due in the event of an expropriation (Allen, 2010). An owner must not be left worse off than they would have been if it was a regular consensual contract with other private persons (Allen, 2010).

What is more, property is essential for democracy and liberty. Individuals rely on the fact that there is a minimum level of personal and economic security to enable them to engage with the democratic process. Private property provides this (Allen, 2010).

In the South African conversation about 'expropriation without compensation', this thinking is supported by the Institute of Race Relations[6] – a classical liberal think-tank, the Sakeliga[7] and the Free Market Foundation,[8] among others.

In the public submissions on the 18th Constitution Amendment Bill, an argument was made (Van Staden, 2020) that certain principles or features in the Constitution are so fundamental to its basic structure (Devenish, 2005; Henderson, 1997) that even a supermajority of parliament cannot overturn it. The argument is then made that private property rights are recognised and entrenched by the Constitution (Van Staden, 2020); the fact that the Constitution contains a 'property clause' indicates its intent to protect property rights more comprehensively than normal private law would (Badenhorst and Malherbe, 2001). In a recent op-ed (Van Staden and Alberts, 2021), commentators in this camp, referring to the 18th Constitutional amendment, stated that 'expropriation is not a tool of justice or punishment. It is the last resort invocable only when a government, responsible to the whole society and not only the owners of the property in question, has no other choice but to seize such property for some social improvement' (Van Staden and Alberts, 2021).

To them, adequate compensation means 'owners must receive the market value of their property in addition to what is called *solatium*, effectively payment for inconvenience – an apology by the government that it had to burden the owners in this drastic but unavoidable way' (Van Staden and Alberts, 2021).

AgriSA, one of South Africa's most prominent agricultural unions, made an extensive submission on the Expropriation Bill (AgriSA, 2019). The submission makes it clear that AgriSA is against expropriation without compensation but that it supports the principle of equality in bearing public burdens

[6]The website https://irr.org.za (accessed 20 January 2022) states that it stands 'for classical liberalism – an effective way to defeat poverty and tyranny through a system of limited government, a market economy, private enterprise, freedom of speech, individual liberty, property rights, and the rule of law'.

[7]Available at https://sakeliga.co.za/en/about-us/ (accessed 20 January 2022).

[8]It is stated on https://www.freemarketfoundation.com/about-us-who-we-are (accessed 20 January 2022) that the Foundation convened a business caucus through which business leaders successfully negotiated the inclusion of property rights in the Bill of Rights.

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and that 'current landowners should not be required to bear a disproportionate burden of the imperative for land reform in the public interest'. This is because a 'property owner's wealth status must not be affected by the expropriation, which means that their economic position must in principle be the same after the expropriation as before'.

AgriSA raises concerns about the impact that the issue of 'nil compensation' will have on its members. The introduction to the discussion states that

> 'we acknowledge that no person should be allowed to benefit from land reform unduly,[9] and that deductions from market value may be fair in certain cases, we feel quite strongly that no individual landowner should be unduly penalized for something, which is in the collective national interest.' (AgriSA, 2019, p. 13)

This, AgriSA fears, may lead to landowners being undercompensated for their property. Compensation substantially below market value will have dire consequences for investment in land and lending in the agricultural sector. More pertinently, AgriSA warns that '[i]ndividuals belonging to one industry cannot be expected to bear the cost of a national priority' (AgriSA, 2019, p. 14).

The main opposition party, the Democratic Alliance (DA), made it clear that they view property rights as the cornerstone of any democracy and economy (Mkentane, 2021).[10] The DA was consistently against the amendment of the Constitution, arguing that the language leaves too much room for subjective, unreasonable and arbitrary decision-making.[11] In the liberal camp (if it can be so crudely delineated), there is thus either fierce opposition to the possibility of stating clearly that in some instances, 'nil compensation' *may* be paid or a request for the Constitution or national legislation clearly setting out in what circumstances (and then a *numerus clausus*) this can be done.

I want to briefly venture here to the area of social democracy, with the understanding that while there are various congruences between the two traditions (Holtham, 1999),[12] there are also marked differences (Gombert *et al.*, 2017).[13] However, the short discussion is important because the African National Conference (ANC), although it does not self-identify as a social democrat party, has many policies that reflect social democratic thinking.[14] Analysts also argue that the party is neoliberalist (Narsiah, 2002).

A social democratic view would state that human rights are not *only* about individual autonomy and the limitations of state power (Allen, 2010). Human rights also extend to claims to the basic goods needed to live a meaningful life. Regulation of property does not per se threaten human rights. In fact, in some instances, failing to regulate may be a more significant threat. Regulation is regarded as normal (Allen, 2010). Here, Tom Allen distinguishes between liberals who view compensation as corrective – expropriation injures, compensation corrects. Social democrats regard compensation as distributive – where compensation weighs up how human needs are addressed through public projects, and its potential risk and impact on investor behaviour is considered (Allen, 2010).[15]

[9]Presumably referring to instances in which owners were over-compensated in the past.

[10]The party's land-reform policy can be accessed at https://cdn.da.org.za/wp-content/uploads/2018/02/14234228/Land-Reform1.pdf (accessed 20 January 2022).

The DA's roots are interesting. Established in 1989 as the Democratic Party (DP), it was the successor to the centrist Progressive Party. Four liberal parties – the Progressive Federal Party, the Independent Party, the National Democratic Movement and a group of Afrikaners-speakers – merged to form the DP. It provided a left-of-centre option to the National Party (NP) in apartheid South Africa. It advocated for the abolition of apartheid to create a non-racial social democracy; see Ghaleb Cachalia (2021) and Michael Cardo (2012).

[11]See meeting minutes at https://pmg.org.za/committee-meeting/33275/ and https://pmg.org.za/committee-meeting/33219/ (both accessed 20 January 2022).

[12]E.g. free markets and private property.

[13]E.g. political freedom is combined with economic equality – the latter not always being a focus in liberal thinking.

[14]The country's Reconstruction and Development Programme of the early 1990s had a strong social democratic resonance. See Alden (1993) speak of the ANC as a political party in the social democratic mould.

[15]See e.g. how this plays out in para. (8) of the 2018 motion: 'notes that in his State of the Nation Address, President Cyril Ramaphosa in recognising the original sin of land dispossession, made a commitment that Government would continue the

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Of course, liberalism is on a spectrum, and Dagan's version of liberal property seems to suggest a more social democratic flavour, although perhaps stopping short of it. The following paragraph will delve into his argument.

4 Dagan's version of liberal property

Dagan starts his liberal property theory with the mainstream liberal tradition of focusing on individual autonomy, self-determination and self-authorship to ensure that all of us free and equal individuals are able to write (and rewrite) our own life stories (Dagan, 2021). Although property is not the most crucial element of self-determination, it plays a 'distinctive and irreducible role in empowering people' (Dagan, 2021, p. 2).

With regard to non-owners, Dagan (2021, p. 2) makes clear that '[w]ithout suitable justification, law's demand (or even expectation) that non-owners – whose right to self-determination is equally important – defer to owners' authority regarding what to do with an object seems arbitrary and unjust'. This means that property law needs to be answerable to non-owners too, since it vests normative power to owners over others. This 'interpersonal vulnerability generated by property suggests that this justificatory standard is quite onerous' (Dagan, 2021, p. 2). In this sense, focusing on the autonomy-enhancing function is not enough. There is a need for a background regime that 'guarantees the material, social, and intellectual preconditions of self-authorship to everyone, together with the authority typical of full private ownership' (Dagan, 2021, p. 3). Also, 'liberal law should ensure both that no private authority can be claimed in excess of what is required for owners' self-determination, and that such authority is consistent with the self-determination of others' (Dagan, 2021, p. 4).

This then forms the basis of the book – Dagan makes a case for a liberal polity that rests on three pillars of the autonomy-enhancing conception of property (Dagan, 2021, p. 4):

'(1) Limitation of owners' private authority in order to ensure that it tracks property's contribution to self-determination;

'(2) The creation of a structurally pluralistic catalogue of property types offering people real choice;[16]

'(3) Ensuring compliance of owners' powers with relational justice to prove that property does not offend the principle of reciprocal respect for self-determination confirming its legitimacy.'[17]

While there are many aspects on which to comment on this liberal polity in the South African context – and I had difficulty in choosing a focal point – in this review, I limit myself to the possible

land-reform programme that entails expropriation of land without compensation, making use of all mechanisms at the disposal of the state, implemented in a manner that increases agricultural production, improve food security and ensures that the land is returned to those from whom it was taken under colonialism and apartheid and undertake a process of consultation to determine the modalities of the governing party resolution.'

[16]This is an acknowledgement that property types are not heterogenous – there are many ways in which property can support self-determination (Dagan, 2021). This was another possible point to focus on, especially in South Africa with its various forms of rights in property, or property rights that do not amount to ownership. *If* this were to be my focus, my questions would revolve around the idea of whether liberal property theory can make space for other modes of being – such as rights in customary law that are typically socially embedded in the community, although the rights themselves are arguably individually held. Alas, space does not allow me to venture into this question for now.

[17]This also refers to owners' duty of mutual respect for self-determination. It is not distributive justice, but rather interpersonal justice, focusing on the self-determination of non-owners without overriding the self-determination of owners (Dagan, 2021). Again, this is such an interesting avenue to venture down, also in the South African context, where the majority of people are non-owners. In fact, 30 million people in South Africa do not even have their property rights formally recognised. What is the implication for owners? How does one move to a place where self-determination is at all possible in a liberal polity?

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implication of such a theory in the South African context of 'compensation for expropriation', and then restrict it to when this happens for land- or other reform purposes.

5 Property pacts and compensation

In the process of delineating private authority, Dagan (2021, p. 4) states that '[s]elf-determination involves planning'. In this sense, 'dynamic changes in the configuration and distribution of property rights' must be considered. Property transitions will upset owners' plans, which is where the idea of the property pact emerges (Dagan, 2021, p. 4). This forms the core of Chapter 8 of the book.

Introducing the chapter, Dagan points out that '[f]or the state to function – and to remain justified on liberal principles – the government must have this ability to adjust ownership' (Dagan, 2021, p. 4). In this context, there are two propositions that Dagan makes regarding 'liberal property across the dimension of time' (Dagan, 2021, p. 210).

First, the vulnerability of *non-owners* – these are the people who suffer when property law recognises the private authority of owners over scares resources. That is why it is important to note the continuous challenge to property's legitimacy – because non-owners are continuously vulnerable. The creation moment is not the moment of focus – but throughout the life of property, it is important to legitimate property. In this sense, a reframing of the discussion surrounding the section 25 amendment process can indicate that even if the outcome of the process is no amendment, the discussion and the contestations that took place – however imperfect and messy, because law-making is perfectly messy – served a vital function in the quest for legitimising property.

Second, property can serve autonomy because the authority it gives the owner is stable. Stability is important for an owner to plan – which is important for self-determination. Interesting, in this regard, '[p]roperty's liberal *telos* does imply rejection of a radical destabilization of holdings that would utterly frustrate property's autonomy-enhancing function' (Dagan, 2021, p. 211). This does not mean that property must stand still – it just means that the change must not be dramatic and destabilising.[18] The question is whether the changes disrupt the owner's ability to plan (Dagan, 2021). In other words, not all changes, even if they detrimentally affect some of an owner's property rights, will be against the liberal idea of property. Only those changes that are too dramatic and thus disruptive, limiting an owner's path to self-authorship, will need to be protected by the law.[19] In an earlier publication, Dagan makes the point:

> 'Together, the happy middle ascribes to citizens an expectation of *incremental* legal developments in the *mid-level principles* of the property landscapes. Although such changes may affect our holdings, they are part of our 'background' risks and opportunities as co-citizens.' (Dagan, 2016, p. 39, emphasis in original)

This is the idea of 'the liberal property pact'. What is this property pact? It stipulates the foundational limits of the state's authority to revise our property rights. This informs our expectations as to the stability of existing property law. This speaks to the 'ability to develop *protected* (or *reasonable*) expectations regarding our property' (Dagan, 2021, p. 217, emphasis in original). When these expectations are protected (in line with the property pact), individuals should not be required to carry a concentrated burden when the state modifies the expectations (Dagan, 2021). However, an unexpected change does not occur when the law is clarified or changes are made to comply with the operative property pact (Dagan, 2021). Such a pact must be transparent and – I would add – clear. Dagan then discusses three

[18]Again, Dagan uses the example of accretion and avulsion to illustrate this point, which I find a very useful and tangible example. Space will not allow me to go into detail other than to say that accretion – which involves small incremental additions to a riparian owner's land – accrues to the owner. With avulsion, which is a sudden change, this is not the case. See Dagan (2021, p. 211).

[19]In the South African instance at least, a 'taking' (expropriation) that is not within the prescripts of the law can probably not be saved by compensation but will be declared invalid. In general, see Elsabe van der Sijde (2015).

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different types of pacts – libertarian,[20] progressive[21] and liberal. For brevity, I only focus on the liberal property pact. This pact responds to

> 'property's autonomy-enhancing *telos*, which commands a polity to entrench property's stability. At the same time, it also allows for sufficient dynamism so as to ensure that the private authority of owners is not improperly augmented and that they comply with the property-based civic duty of keeping the property system both just and viable.' (Dagan, 2021, p. 228)

Constitutions contains such expectations – but it is not only restricted to constitutions. Legal traditions also play a role. Things are bound to get interesting when one interrogates what happens in transforming legal traditions that actively seek to change property's pact[22] (or at least in South Africa's case must ideally do so).

Nevertheless, the pact also has boundaries. These are the boundaries that an owner should bear, although there seems to be an acceptance that we all have to support the state in ensuring that the property system is both just and viable (Dagan, 2021). But, again, a liberal property pact, according to Dagan, assumes that the owner's private authority was initially justified. This is why only slow incremental changes do not need to be compensated – but big legal disruptions should (Dagan, 2021).

But what if that initial private authority is not justified? Well, that might be non-compensable because '[t]he protection against legal avulsions provided in a liberal property pact must not serve as a sanctuary allowing legitimation of property rights that were unjust to begin with' (Dagan, 2021, p. 232). Dagan goes further by stating that 'especially given the intrinsic normative difficulty of any claim to private authority, the liberal property pact unapologetically destabilizes holdings of morally tainted entitlements' (Dagan, 2021, p. 233).

It seems as if Dagan suggests on the following page that South Africa's constitutional property clause addresses this issue by requiring a balancing act in determining 'just and equitable' compensation, and by listing as factors to consider the 'history of the acquisition and use of the property' and 'the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property' (Dagan, 2021, p. 234).

6 Liberal property theory and the 18th Amendment Bill

What might a liberal theory of property say about the process? A classical liberal theory would resist any proposed changes that do not adhere to market-related compensation. But it seems as if Dagan's liberal theory might allow for it, depending on the property pact. Furthermore, property unjustly acquired cannot be legitimised by liberal property. So much can be agreed upon, which probably explains the dire contestation about South Africa's land history, and the questions around legitimate landowners. Valid questions are also often raised about current bona fide owners who acquired their land in the open market.

In addition, the Constitution itself does not specify an economic system, does not guarantee free enterprise and does not say much about the content of property rights or land rights. This was left

[20]Dagan (2021, p. 221, emphasis in original) writes that this 'version of the property pact, read at face value, would seem to require transition relief for *every* change … of *every* rule of such transitions are incurred by the public and non by the landowners … [W]hile this putative pact does not object to legal changes that affect the value of specific holdings, it bars any incidental reconfiguration of the distribution of generic wealth, excepting, perhaps, a *de minimis* one'.

[21]'This view implies a broad no-compensation rule,' Dagan (2021, p. 222) writes, 'with a few pockets of exceptional categories. An injury to individual property that benefits the public, even while disproportionality burdening a specific individual with the weight of public interest, is legitimate in this view as long as it can be justified by "general, public, and ethically permissible policies"'. He furthermore writes that this 'progressive pact aims to ensure the continuous legitimacy of property, but sacrifices the stability owners require to implement their life plans'.

[22]See in this instance André van der Walt (1999), who warns that we need to reconfigure the property pact. Also see his later work on what this might look like (van der Walt, 2001).

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to future generations (Sachs, 2017). In this sense, the constant (re-)legitimisation of liberal property rights is a helpful argument, and something that liberals should take heed of – property rights are never final. Law creates the framework in which these contestations take place.

That is perhaps why the language of the Constitution is purposively vague and open-ended, indicating an open list of factors that should be considered when determining 'just and equitable' compensation. It leaves sufficient room for contextual inquiry. Our ability to do it is still under probation. We seem to not be able to move away from the (classic) liberal idea of full market value compensation or only able to consider certain and quantifiable factors. This needs to change; we need to find ways of determining 'just and equitable' compensation.

Of course, if the amendment *only* makes explicit what is implicit, this is not an amendment as such, but a clarification. In Dagan's liberal theory of property, such an explicit making is not a change and does not disturb the property pact.[23]

A more significant question is perhaps: If most people agree to a radical change in the property pact, what would a liberal theory or property response be to that?

Many people bemoan the process of the past four years, which ended in the non-amendment of the Constitution, as a waste. I am not so sure if it is true. We made strides. Many people who would previously insist that 'just and equitable' can *only* be market value will now concede that it might at least entail something *less* than market value, if not *nil*. Government has expressed concern that a process of land reform cannot threaten food security or harm commercial agriculture or the economy.

The process highlighted the government failures, and it placed land reform and its issues in the public imagination. It is another pivotal moment in our history that we can either embrace or ignore to our own peril. The majority of South Africans are non-owners. About 30 million people live 'off register' with their rights not even visible in the legal system. Liberals have much work to do in South Africa to ensure that owners exercising their rights do not prohibit non-owners from achieving self-authorship. This is perhaps where my path veers to social democracy that favours equality.

Low trust in government, low interpersonal trust and groups exploiting both the anger and the fear muddled the conversation at times. But maybe one day, looking back, we will – as we so often do – be able to write a linear story of the change and heave a sigh of relief. And then theorise about it. And for this, Dagan's book is an invaluable addition to understanding a liberal notion of property.

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[23]Just a note of acknowledgement: it might be that the committee did not only make explicit what is implicit and thus went outside its mandate.

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