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Challenging property law's faceless "reason" through literature and language

Abstract

Property law has long relied on its lack of empathy to remain the most loyal servant of capitalism – a discipline shaped by the pursuit of stability, predictability, and the protection of capital. Seeking to present itself as a law of reason, it reflects the logic of a market that demands abstraction over humanity and order over justice. Under Classical Legal Thought, property law's legal subject became faceless and contextless, a construct designed to serve economic rationality rather than human experience. Yet, in South Africa's constitutional era, this detachment has been challenged through the emergence of literature as a tool of legal reasoning. This article explores how literature disrupts property law's formalism by reintroducing empathy, history, and humanity into judicial decision-making. Through an analysis of Constitutional Court judgments, I examine three categories of property law decisions: those that engage with literature and recognise unequal power relations; those that do not rely on literature, where parties stand on more equal footing; and those that, despite stark inequalities, remain devoid of literary or empathetic engagement. These case studies demonstrate literature's ability to pierce through property law's rational veneer, compelling judges to confront the

lived experiences of those before them. By contrasting the formalist rigidity of Classical Legal Thought with the transformative potential of literature, I argue that literature's narrative and justificatory functions allow for a more humane application of the law, one that allows property law to move beyond its illusion of neutrality — towards empathy, contextual sensitivity, and an engagement with the stories that constitute the human condition.

Keywords: law and literature; legal formalism; property law; capitalism

Introduction

If law is often accused of being void of empathy and humanity, then property law might be the guiltiest of all. Often seen as the guardians of capital, property lawyers took very seriously the claim that capitalism demands a “rational” and “predictable” legal system to prosper. They chase a precedent at all costs, all in the name of stability, under the honourable guise of the rule of law. However, constitutional property law has made considerable headway over the last decades. The most well-known cases from the field are known for their heavy reliance on literature, poetry, or empathetic language.

Whereas property law was previously often seen as the “law of reason with no history and time – no past or future – [almost] omnipresent”,¹ and the legal subject that came before it was seen as “genderless and context less, a *persona* or mask placed before the body”,² courts have now used literature to unveil this mask. Where the self was once only seen to be free and with history in literature, the same now has been attempted in law, partly *through* literature. As the Constitutional Court reminds us in *Port Elizabeth Municipality v Various Occupiers*,³ one should no longer rely on “concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances.”⁴

In this article, I show that literature can, and has, pierced through property law's veil of perceived “reason” and has instead brought about a much-needed wave of humanity. I do so by first setting out the role of literature in legal reasoning, especially in the South African context. By considering the clash

1 Douzinas C & Gearey A *Critical Jurisprudence: The Political Philosophy of Justice* Oxford: Hart Publishing (2005) at 343.

2 Douzinas & Geary (2005) at 343.

3 2005 (1) SA 217 (CC) (“*PE Municipality*”).

4 *PE Municipality* at para 41.

of legal formalism against the interests of justice, I reflect on property law's propensity to prioritise what many claim to be "rationality" over the need for empathy and the transformative potential of literature in this context. I then define literature in the legal context for the purposes of this article, before embarking on a case study of three categories of constitutional property law judgments : judgments that rely on literature and highlight the unequal power relationship between the parties; judgments where there is mostly no substantive power difference between the parties and do not rely on literature; and finally, the third category, judgments that do not rely on literature, in spite of the stark unequal power relationship between the parties. Through an analysis of these judgments of the Constitutional Court, I argue that literature has a compelling trait of requiring judges to consider the circumstances of the parties before them and allows for more empathetic judicial engagement and reasoning. By comparing judgments on an array of matters of property law considerations, I discuss the generative role of literature in legal reasoning and consider its justificatory and narrative functions. I first start by laying the theoretical framework, considering more specifically where property law finds itself in the debate between legal formalism and the law and literature movement.

Theoretical framework: law, literature, and empathy

Legal formalism v law and literature

Property law has historically been a tool for economic entrenchment, designed for predictability and stability in the interest of capital, by turning property into capital. Pistor states this eloquently in *The Code of Capital*:

Ordinary assets are just that—a plot of land, a promise to be paid in the future, the pooled resources from friends and family to set up a new business, or individual skills and knowhow. Yet every one of these assets can be transformed into capital by cloaking it in the legal modules that were also used to code asset-backed securities and their derivatives, which were at the core of the rise of finance in recent decades.⁵

5 Pistor K *The Code of Capital: How the Law Creates Wealth and Equality* Princeton: Princeton University Press (2019) at x.

Lawyers are seen by Pistor to be the weavers of this code of capital, allowing some benefactors to use the law to get an advantage over others.⁶ While contract and property law often support free markets, Pistor argues that capitalism requires much more. It requires “the legal privileging of some assets” – which is guaranteed by these precise legal modules, allowing certain people to accumulate more wealth.⁷ However, property law can only function as a tool for social ordering with State support.⁸ This is because property rights are enforceable against the world through coercive State power.⁹ It is only enforceable through the relentless threat of enforcement through the presence of courts, sheriffs, and police.¹⁰ Naturally, State power is needed to have the buy-in of society. Given property law’s well-established function in today’s society, one can bear witness to Pistor’s claim that “the law has been placed firmly in the service of capital”.¹¹

This claim is evident in South African society, where “property relations in capitalist ‘post’-apartheid South Africa operate and exist within a hierarchy of property interests, resulting in more protection being afforded to certain forms of property interests and less (and sometimes no) protection for others”.¹² For instance, South African property law preserves the free market by safeguarding certain categories of property, such as immovable property – what has been termed as “formal property” – but also undermines “informal property”. This can be seen in the promulgation of the City of Cape Town’s Unlawful Occupation By-Law 2021, where sections 9(2) and (4) give the City the power to impound the belonging of homeless people – in spite of the constitutional protection extended to property under section 25(1).¹³

6 Pistor (2019) at 160.

7 Pistor (2019) at 4.

8 Pistor (2019) at xi.

9 Jeewa TR “Yes, there is a Right to Property – Just Not for Everybody: An Audit of the Legitimacy of the Current South African Property System Thirty Years Down the Line” (2014) 8 *Journal of Law, Property, and Society* 49 at 52.

10 Jeewa (2014) at 52.

11 Pistor (2019) at xi; and Jeewa TR & Nxumalo SB “(In)Equality in Property Ownership: The Rhetoric of the Homelessness” (2024) 45 *Obiter* 354 at 356.

12 Jeewa & Nxumalo (2024) at 356.

13 City of Cape Town “Unlawful Occupation By-Law 2021” https://resource.capetown.gov.za/documentcentre/Documents/Bylaws%20and%20policies/Unlawful_Occupation_By-law.pdf (accessed 2025-04-04).

As argued elsewhere, when section 25(1) of the Constitution states “no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”, it does not contemplate, let alone allow for, the distinction of property on the basis of its economic value.¹⁴ Yet, as Pistor pointed out, a property law system in service of capital is one with little concern for historical injustices or social disparities. It is one of pre-existing rights and entitlements. Law being subservient to capital means that despite section 25(1)’s guarantee, laws like the Unlawful Occupation By-law still exist. Capitalism turns property law into a space in which legal formalism thrives, and where judges can claim to apply “neutral principles” without considering the individuality of the claimants before the court.¹⁵ Yet, legal formalism, which discards the past experiences of claimants, goes against the spirit of the Constitution.¹⁶ While purporting to be black-letter law, it is in conflict with the supreme law.

Legal formalism treats law as self-contained, objective, and detached from social reality.¹⁷ Much like property law used to be – and for the most part, still is – treated as “faceless”, ahistorical, and devoid of empathy, many scholars of Classical Legal Thought believe that this formalism is necessary. Some might argue that even the introduction of literature, given that it can bring about the unveiling of the faceless applicants and a wrestling with their identities, is disruptive. This is because, people like Christopher Columbus Langdell, the founder of Classical Legal Thought in the Anglo-American tradition, believed that “law, considered as a science, consists of certain principles or doctrines”.¹⁸ Law, according to Langdell, is analogous to scientific reasoning and legal principles can be logically deduced from a finite set of cases.¹⁹ Langdell’s “science” overlooks the fact that judges hold implicit bias, and instead assumes

14 See Jeewa & Nxumalo (2024) 354–370 for more.

15 See Kennedy D “Three Globalizations of Law and Legal Thought: 1850–2000” in Trubek DM (ed) *The New Law and Economic Development: A Critical Appraisal* Cambridge: Cambridge University Press (2006) 19–73.

16 Jeewa TR & Nxumalo SB “Dignity restoration through property rights in *Thubakgale v Ekurhuleni Metropolitan Municipality*” in Robbie J (ed) *Property Law Perspectives VIII* The Hague: Eleven Pub (2023) 89–114, 94.

17 See Kennedy (2006).

18 Langdell CC *Preface to Cases on Contract* Boston: Little, Brown, and Co (1st ed, 1871) as quoted in Schofield W “Christopher Columbus Langdell” (1907) *The American Law Register* 279–296 at 279.

19 Schofield (1907) at 279.

that judges are neutral and should merely apply the law without bringing in external considerations, be they social, emotional or moral.²⁰

In Langdell's view, empathy, history, social context, or emotion have no place in judicial reasoning.²¹ Legal rules are to be applied like mathematical formulas, regardless of the human consequences. Moreover, according to him, legal education should focus only on casebooks and doctrinal analysis.²² Langdell's ideas were also extended through Classical Legal Thought which dominated scholarship and jurisprudence in the USA between 1870 and 1930.²³ This particularly applied to branches like property law for several reasons. Rights, especially property rights, were viewed as natural, timeless, and pre-political.²⁴ This meant that courts were not to question how those rights were historically acquired or who had been excluded. The legal subject was perceived as rational, autonomous, and abstract – exactly the kind of “faceless” persona that property law conceives parties to be. Classical Legal Thought assumes that all individuals have equal access to the law and equal bargaining power in contracts. It treats social inequality as legally irrelevant.²⁵

Classical Legal Thought often presents law as objective, neutral, and self-contained. This hides the fact that the legal system often reinforces existing hierarchies such as race, class, and gender. This school of thought is what Karl Klare critiqued as the dominant legal culture in South Africa in the 1990s.²⁶ In particular, Klare focused on the judiciary because he believed that “adjudication uniquely reveals ways in which law-making and, by extension, legal practices generally, are and/or could be a medium for accomplishing justice”.²⁷ Importantly, in South Africa, adjudication is of utmost importance, because parliamentary-sovereignty was replaced by constitutional supremacy,²⁸ and the

20 Schofield (1907) at 279.

21 Schofield (1907) at 279.

22 Schofield (1907) at 279.

23 Grey TC “*Langdell's Orthodoxy*” (1983) 45 *U Pitt L Rev* 1.

24 Schofield (1907) at 279 (referring to Langdell).

25 Kennedy (2006) at 19–73 and Grey (1983) at 1.

26 See Klare KE “Legal Culture and Transformative Constitutionalism” (1998) *South African Journal on Human Rights* 146–188; and Davis DM & Klare K “Transformative Constitutionalism and the Common and Customary Law” (2010) *South African Journal on Human Rights* 403–509.

27 Klare (1998) at 147.

28 Section 2 of the Constitution, states that “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

Constitutional Court remains the final arbiter of how the Constitution ought to be interpreted.

In the wake of this new era, Klare, quoting Etienne Mureinik, spoke of the importance of being a "conscientious judge".²⁹ Unlike Langdell's idea of a judge, Mureinik and Klare believed that "a conscientious judge would have been one who both faithfully fulfilled [their] oath of office to carry out apartheid law, yet did so in a way calculated to undermine and nullify it, or at least to mitigate the cruelty of its impact on its victims".³⁰ Hence, while accepting the shackles of legal constraints, especially under as strict a regime as apartheid, they both believed that some judges still had an agenda, and in fact *ought* to have had an agenda. In contrast with Langdell's neutral judge, "a conscientious judge operates within and to some degree authentically accepts legal constraint, yet acts strategically to accomplish freedom and social justice."³¹ Indeed, for classical legal thinkers "*iudex est lex loquens*" – the judge is the law speaking, meaning that there is no room for interpretative biases.³²

In this way, Klare remained transparent about the "conflicting pulls and tensions of freedom and constraint" that judges faced – legal constraint being the favourite mantra evoked along with the "rule of law".³³ Klare questioned whether the rule of law necessarily implies a depoliticised conception of law or whether there can exist practices of constitutional interpretation that acknowledge and fulfil the duty of interpretive fidelity and yet are engaged with and committed to "'establish[ing] a society based on democratic values, social justice and fundamental human rights,' a society that will '[i]mprove the quality of life of all citizens and free the potential of each person[.],' in the words of the Preamble [of the Constitution]" – hence, transformative constitutionalism.³⁴

It is trite that transformative constitutionalism has since been adopted widely and enthusiastically in the South African arena.³⁵ Klare described it as a

29 Mureinik E "Dworkin and Apartheid" in Corder H (ed) *Essays On Law & Social Practice in South Africa* Cape Town: Juta Ltd (1988) 181-183; Klare (1998) at 148.

30 Klare (1998) at 148.

31 Klare (1998) at 148.

32 Wiecek WM *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937* Oxford: Oxford University Press (2001) at 7.

33 Klare (1998) at 149.

34 Klare (1998) at 149.

35 See, for example, Langa P "Transformative constitutionalism" (2006) *Stellenbosch Law Review* 351-360.

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 democratic, participatory, and egalitarian direction.³⁶

Clearly, transformative constitutionalism leaves little to no space for Classical Legal Thought, as can be seen below.

In its pure form, Classical Legal Thought, which values neutrality, objectivity, and a rigid application of the law, views the law as a self-contained system, not influenced by the specific histories or power structures that shape society.³⁷ While it assumes that law's neutrality can lead to justice, transformative constitutionalism understands that neutrality is often an illusion.³⁸ Transformative constitutionalism understands that law has historically been an instrument of power, maintaining existing social structures that perpetuate discrimination and marginalisation.³⁹ Hence, transformative constitutionalism actively disrupts this view, by recognising that the law must be used purposefully to rectify past wrongs and create equitable access to rights.⁴⁰

Additionally, in transformative constitutionalism, there is a strong emphasis on historical consciousness. The law is seen as a tool for healing past injustices, which requires acknowledging the historical realities of race, class, gender, and colonialism. Classical Legal Thought tends to abstract the law from history, presenting it as a timeless, neutral system. However, according to the Constitution, history matters. In fact, addressing past injustices is required of the Constitution, which itself is deeply cognisant of the context within which

36 Klare (1998) at 150.

37 Klare (1998) at 147.

38 Klare (1998) at 150.

39 Klare (1998) at 150.

40 The Preamble of the South African Constitution states: "We, the people of South Africa, *recognise the injustices of our past; honour those who suffered for justice and freedom in our land; ... We therefore, through our freely elected representatives, 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. ...*" (Emphases added.)

it emerged.⁴¹ The present legal framework cannot be understood without recognising its historical roots in inequality and oppression.⁴² For instance, when courts interpret property law, they must consider historical context (like dispossession and the need for land reform) and social reality (such as the lived experiences of the poor and dispossessed).⁴³ Classical formalism has no room for such factors.⁴⁴ Instead, Classical Legal Thought's focus is on formal rules and objective application and ignores the particularities of people's circumstances.⁴⁵ In contrast, transformative constitutionalism demands contextual and flexible interpretations of the law.

Yet, certain aspects of Classic Legal Thought can still have a role in transformative constitutionalism. For instance, some core values of Classical Legal Thought – legal certainty and stability – are essential for transformation. Transformative constitutionalism needs clear legal standards that ensure fairness and protect rights. Certainty and predictability in law are still important to maintain the integrity of the legal system while moving toward social change. However, these should be tempered with sensitivity, with regard to context and a focus on justice over formalism.

Another aspect of the rule of law integral to transformative constitutionalism is procedural fairness. Classical Legal Thought's emphasis on institutional integrity and adherence to procedures can help maintain legitimacy in legal reforms, ensuring that changes are systematic and broadly accepted. In the same breath, Classical Legal Thought's focus on rules and precedents may be useful when balancing competing interests in a transformative framework, particularly in cases that involve constitutional rights.⁴⁶ For example, when balancing rights to property with land reform or social welfare, judges might need to consider the common law as it currently stands, while also acknowledging the need for reform and progress.

41 See the Preamble of the Constitution, sections 9(2), 25(6) – (8), 29(2), and 195(1)(i).

42 For more, see the Preamble of the Constitution, sections 9(2), 25(6) – (8), 29(2), and 195(1)(i).

43 See Jeewa & Nxumalo (2024) 354–370 for more. One such example would be section 25(6) of the Constitution, which states “A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.”

44 Kennedy (2006) at 19–73 and Grey (1983) at 1.

45 Kennedy (2006) at 19–73 and Grey (1983) at 1.

46 See Jeewa & Nxumalo (2024) 354–370 for more.

Nonetheless, from the limited ways in which Classical Legal Thought and transformative constitutionalism find common ground, it is obvious that Classical Legal Thought, in its strictest sense, is largely incompatible with transformative constitutionalism. It fails to account for context, social realities, and historical injustice. This is important for the purposes of this article, given that Classical Legal Thought seeks a “scientific” application of the law. Legal science has no space for literature, it “encouraged lawyers to think they were expounding principles of universal validity, applicable to all categories they fit, beyond human powers to manipulate or modify”.⁴⁷ Unlike abstract reasoning, literature forces particularity. However, the use of literature, in its rejection of the “faceless” legal subject by bringing back empathy, context, and historical consciousness, and shifting legal reasoning toward a more humane and just approach to property law, is exactly what transformative constitutionalism requires. Judges must recognise that the legal subject is not just an abstract individual, but a person with a history – one based on their identity. This is where the law and literature movement becomes relevant.

The role of literature in judicial reasoning

The term “literature” lends itself to many definitions. Some are very narrow, referring only to “written artistic works, especially those with a high and lasting artistic value”.⁴⁸ Others are broader and there is extensive discourse about what ought to constitute literature.⁴⁹ For the purposes of this article, I define literature flexibly. Here, literature refers to narrative, poetic, or expressive texts – whether fictional or non-fictional – that represent, evoke, or explore human experiences, emotions, social contexts, and power dynamics. In the context of legal judgments, literature is understood not solely as artistic or creative writing but as a source that provides richness to the human aspects of law. It includes, but is not limited to, novels, poems, autobiographies, essays, histories, folklore, and culturally significant texts about personal stories, identities, and marginalised voices.

47 Wiecek (2001) at 5.

48 See “Literature”, *Cambridge Dictionary*, available at <https://dictionary.cambridge.org/dictionary/english/literature>.

49 For instance, see Steen G “Genres of discourse and the definition of literature” in *Discourse Processes* (1999) London: Routledge 109–120.

There are numerous reasons why literature should be actively and consciously used in judgment writing. Martha Nussbaum argues in "Poetic Justice: The Literary Imagination and Public Life" that literature and narrative are powerful tools in cultivating empathy and moral imagination.⁵⁰ Her work explores how literature can contribute to a more humane and just society, emphasising the role of literature in understanding the lives of others. Her central claim is that judges, like novel readers, should imaginatively step into the shoes of others to render fair judgments.⁵¹ She suggests, that literature (especially novels and poetry) cultivates empathy – which is precisely what many courts have done in property law cases by referencing literary texts.⁵² Richard Sherwin echoes Nussbaum's idea, discussing how legal reasoning can be influenced by narratives, both literary and popular, and the shifting boundaries between legal discourse and storytelling.⁵³

On the other hand, James Boyd White argues in "The Legal Imagination" that law itself is a form of literature.⁵⁴ He suggests that, unlike the propositions of Classical Legal Thought, legal judgments are not neutral applications of rules but are rather stories judges tell about society.⁵⁵ Legal texts are narratives about power, rights, and obligations – and literature plays a role in constructing these narratives.⁵⁶ Hence, White believes that legal writing should engage with storytelling rather than clinging to the illusion of objectivity.⁵⁷ Scholars such as David Wilkins even explored how law schools incorporate literary works to challenge students' assumptions and develop more empathetic and nuanced views of justice.⁵⁸ This further solidifies White's view regarding legal writing and storytelling.

In the context of legal reasoning – especially within transformative constitutionalism – literature plays a vital role in humanising the law, disrupting

50 Nussbaum MC *Poetic Justice: The Literary Imagination and Public Life* Boston: Beacon Press (1997).

51 For more, see Nussbaum (1997).

52 For more, see Nussbaum (1997).

53 See Sherwin RK "Law and the Poetic Imagination" (2016) *New York Law School Law Review* 347–368.

54 See White JB *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* Chicago: University of Chicago Press (1973).

55 For more, see White (1973).

56 For more, see White (1973).

57 For more, see White (1973).

58 See Wilkins DB & Mitu G "Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis" (1996) 84 *California Law Review* 493–625.

formalism, and shaping a more empathetic, responsive jurisprudence. This is particularly significant in property law, where the stakes involve homes, land, and identity. To frame property in “cold” legal terms is clearly inadequate. In many ways, when White speaks about judgments being narratives in disguise, he is speaking to the aspect that judges often choose which facts matter; how to frame the parties; and what counts as justice. Rather than simply quoting literature for rhetorical flair, some judgments actively integrate literary modes of reasoning: storytelling, metaphor, and character-driven narrative. This changes not only how judges write, but also how they think. Literature helps judges see that these choices are not neutral. As will be seen in the next section, a narrative of “unlawful occupation” tells a different story than one of “generations of dispossession”. Literature offers alternative frames – often more emotionally and ethically textured – through which law can understand human claims.

Literature challenges the idea that law is fixed, closed, and objective. Instead, it is a discursive space – shaped by language, metaphor, and imagination. Judges who draw on literature recognise this fluidity and write in a way that expands what the law can say and do. As Desmond Manderson argued, “[l]aw must be proximate, responsive, and attuned to the other. Literature fosters that attentiveness – to voice, to vulnerability, to time.”⁵⁹ In this way, “literary judgments” can be seen as a form of resistance and active change, driving forward the project of transformative constitutionalism – as will be seen below.

Literature in constitutional property law judgments

Explicit use of literature in judgments

The Constitutional Court has, over the years, developed a rich jurisprudence in constitutional property law. Literary references often appear in the opening or closing of a judgment and serve to frame the legal dispute within a broader socio-political or emotional context. For instance, in the oft-cited *Daniels v Scribante*,⁶⁰ Madlanga J’s opening lines are poignant – quoting the words of

59 See Manderson D “Modernism and the Critique of Law and Literature” (2011) *Australian Feminist Law Journal* 105-123; and Manderson D “Modernism, Polarity, and the Rule of Law” (2012) *Yale Journal of Law and Humanities* 475-505.

60 2017 (4) SA 341 (CC) (“*Daniels v Scribante*”).

an old man, Mr Petros Nkosi, as he uttered them back then at a community meeting in the Eastern Transvaal:

The land, our purpose is the land; that is what we must achieve. The land is our whole lives: we plough it for food; we build our houses from the soil; we live on it; and we are buried in it. When the whites took our land away from us, we lost the dignity of our lives: we could no longer feed our children; we were forced to become servants; we were treated like animals. Our people have many problems; we are beaten and killed by the farmers; the wages we earn are too little to buy even a bag of mielie-meal. We must unite together to help each other and face the Boers. But in everything we do, we must remember that there is only one aim and one solution and that is the land, the soil, our world.⁶¹

It is evident as one reads Madlanga J's judgment, that this opening quote sets the scene for a judgment that seeks to tie the relationship between the land and one's identity. The quote so vividly conveys what it means to be stripped of dignity when one suffers from land dispossession. In doing so, it shows the power of using literature as a tool in judgment-writing. Madlanga J also went on to rely on Sol Plaatje's books in the remainder of the judgment. He relies on Plaatje's description of his own experience of colonialism, which evocatively conveys what being Black in South Africa meant in the 1900s: "Awaking on Friday morning June 20, 1913, the South African native found himself, not actually a slave, but a pariah in the land of his birth."⁶²

Interestingly, both Froneman J and Madlanga J rely on Sol Plaatje's description of the Natives Land Act,⁶³ even though Plaatje was not a lawyer. This shows the value of literature in depicting the impact of law and its ability to strip one of their own dignity. The choice of both judges to use Plaatje's description of his experience, in spite of the availability of multitude of more recent peer-reviewed articles describing the impact of Natives Land Act, highlights literature's mastery at conveying a sentiment.

61 *Daniels v Scribante* at para 1. While this text does not come from what might traditionally be seen as literature, it does fall within the wide definition of literature adopted in this article, given that it is considered as "expressive texts – non-fictional – ... that represent, evoke, or explore human experiences, emotions, social contexts, and power dynamics".

62 *Daniels v Scribante* at para 14.

63 No. 27 of 1913.

Froneman J also draws on Afrikaans biographies to situate the dispute in South Africa's history of racialised land dispossession and cultural marginalisation.⁶⁴ Interestingly, in a similar fashion to Madlanga J's opening statement, Froneman J also uses literature to set the tone to his judgment. Relying on the Afrikaans-speaking historian, Hermann Giliomee's book *The Afrikaners: Biography of a People*, Froneman J holds that he concurs with Madlanga J's judgment, but not without feeling a sense of shame. In sharing this sentiment, he reflects on a question Giliomee spent a significant portion of his life pondering on: how can "[Afrikaaners] who are sincere in their Christian beliefs and staunch defenders of their own liberties ... become identified with policies of discrimination and restriction"? It is an important moment, both for Giliomee and for Froneman J, and the reader understands easily – through this use of literature – why the judge would have felt shame while reading Madlanga J's judgment. Even more poignantly is how Froneman J decides to start his own judgment, ironically with Giliomee's concluding words, "I now realise that I have not succeeded in answering that question."⁶⁵

There is an ongoing conversation between Madlanga J and Froneman J, through their judgments and the use of these literary devices. Both have chosen texts and "voices" which represent the stories they want their judgments to carry. These literary references create a bridge between individual suffering and systemic injustice. The choice of literature matters, as can be seen from Froneman J's reference of "The Seed is Mine", written by historian, Charles van Onselen. There van Onselen wrote about Kas Maine, one of the many successful Black agriculturalists who, despite difficult odds, managed to make a reasonable living as a sharecropper. The following passage is quoted by Froneman J in *Daniels*:

The Highveld has, for more than a century, also been the site of some of the most intense, intimate and searing interactions between Afrikaner landlords and their predominantly Sotho-speaking labour tenants and farm labourers. Bitter-sweet relationships born of paternalism and unending rural hardship have seen the emergence of peculiar quasi-kinship terms such as *outa* (venerable father) and *ousie* (older sister) – nouns that are as embedded in the modern [Setswana] lexicon as they are in Afrikaans. When an authentic identity eventually emerges from this troubled country it will, in large part, have come from painful shared experiences on the Highveld.⁶⁶

64 *Daniels v Scribante* at paras 14 and 18.

65 *Daniels v Scribante* at para 9.

66 *Daniels v Scribante* at para 128.

Froneman J weaves in the works of van Onselen and Giliomee, as if they were in conversation with each other. In response to van Onselen's description of Kas Maine's pain when describing the relationship between Afrikaaner landlords and Black sharecroppers, Froneman J quotes Giliomee's words "The advance of black sharecroppers spelled great danger to the Afrikaner bywoners".⁶⁷ This is all the more poignant as Froneman J quotes Kas Maine's words as written again: "You know, one day God will allow us to purchase property – just like you – and I will hire you, and overwork you just as you are doing to me."⁶⁸ Through the use of literature, Froneman J drives the point home – especially in a case like *Daniels v Scribante*. A case where the power imbalance between the parties reflected the legacy of apartheid, and there was an urgent need to restore the dignity that had been stripped away from Ms Daniels, the labour tenant.

Two years later, in the case of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited*,⁶⁹ which concerned an application to overturn an eviction order concerning 13 families against a mining-right holder, the Constitutional Court's opening statement quoted Frantz Fanon's classic *The Wretched of the Earth*.⁷⁰ Once again, as with Madlanga J in *Daniels v Scribante*, this quote highlighted the relationship between dignity and the land: "[f]or a colonised people the most essential value, because the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity".⁷¹

In *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others*,⁷² storytelling through letters is employed to highlight the emotional and historical continuities in rural land claims, drawing attention to how bureaucratic delay further disfigures constitutional promises. In fact, the judgment opens strongly with a quote from an open letter to the multiparty negotiations at the World Trade Centre,⁷³ in 1993 when submissions were being accepted regarding what the final Constitution should contain, reading: "There can be no freedom, without land. There can also be no peace until the emotional issue of land is settled."⁷⁴

67 *Daniels v Scribante* at para 130.

68 *Daniels v Scribante* at para 129.

69 2019 (2) SA 1 (CC) ("*Maledu v Itereleng Bakgatla Mineral Resources*").

70 Fanon F *The Wretched of The Earth* New York: Grove Press (1963).

71 *Maledu v Itereleng Bakgatla Mineral Resources* at para 1.

72 2019 (6) SA 568 (CC) ("*LAMOSA 2*").

73 "Open Letter to the Multiparty Negotiations at the World Trade Centre, 18 August 1993" AFRA News: Newsletter of the Association for Rural Development (August/September 1993).

74 *LAMOSA 2* at para 1.

These examples reflect a purposeful engagement with literature as a narrative tool – one that allows judges to layer emotional, historical, and cultural meaning into otherwise abstract legal questions. Here, literature operates as a rhetorical and ethical device, enabling empathy and connection beyond the language of doctrine. Literature also encourages judges to employ what could be called literary techniques – tone, metaphor, structure, and imagery – to shape the moral and emotional resonance of the judgment. The use of literature, as we have seen above, allows the judge's empathy to emerge through a sustained moral voice rather than through legal technicalities.

Literary judgments as a form of resistance to capitalist logic

The above judgments are literary judgments, those which consciously employ literary techniques (such as metaphor, allusion, characterisation, tone); quote or draw from literature, poetry, or storytelling traditions; centre the human story of the litigants; and emphasise empathy, voice, and narrative over technical legalese. They are a form of resistance to legal formalism and abstraction for several reasons.

Classical legal writing often strips the law of emotion, history, and narrative. By contrast, literary judgments resist the facelessness of the legal subject and the sterility of formal legal writing. They insist that real people – with names, stories, and traumas – appear before the court. As White has explained, “to write in a different voice is to think in a different way.”⁷⁵ Literary judgments resist thinking of litigants as abstract legal problems and force the law to rethink its own language and imagination.

In this way, literary judgments also act as a form of resistance to capitalist logic in property law. While property law is the code of capital, the use of literature tinkers with the code by revealing the human cost of market rationality. It asks what is lost when property is valued over people. More importantly, it asks *who* is displaced when property is protected as sacrosanct. Literary judgments often unmask these dynamics and make visible the suffering that a cold property regime would rather ignore.

Finally, literary judgments are also an act of resistance to structural injustice. By invoking literature, judges bring attention to historical marginalisation, often implicitly – and sometimes explicitly – referencing

75 For more, see White (1973).

colonialism, apartheid, gender, race, and class. Literature, with its capacity for metaphor and memory, allows the court to speak across time – to acknowledge a longer history of dispossession and the need for remedial justice.

Much like legal interpretation must be moral, imaginative, and historically aware when it comes to transformative constitutionalism, such is the case for literary judgments. They transform the role of the judge from cold arbiter to storyteller and moral agent. They also transform the courtroom from a site of exclusion to one of voice and memory. Finally, they transform the law itself, expanding its capacity for justice, empathy, and repair. This can be clearly seen from the literary property judgments canvassed.

Formalist judgments

While some Constitutional Court judgments draw on literary texts and storytelling to evoke empathy and affirm the dignity of affected parties, others remain grounded in a more traditional formalist mode of reasoning. These judgments tend to prioritise internal legal consistency, precedent, and abstract principles – often at the expense of context, emotional resonance, or the lived realities of the parties before the court.

Naturally, this approach is deeply rooted in Classical Legal Thought. This worldview that treats law as autonomous, neutral, and internally coherent, believes that the very same law has clear answers derivable through logic and precedent. In the South African context, this mode of legal reasoning risks reproducing historical injustices under the guise of legal neutrality, especially in the area of property law, which is inextricably tied to the legacies of apartheid, colonisation, and dispossession. The following judgments exemplify this formalist mode.

In *First National Bank of SA Ltd t/a Wesbank v SARS and Another*, First National Bank (FNB) challenged legislation allowing South African Revenue Services (SARS) to seize goods to satisfy tax debts, arguing this amounted to arbitrary deprivation under section 25(1) of the Constitution.⁷⁶ While the judgment is foundational in developing the test for constitutional property deprivation, its tone is restrained and heavily analytical. The Court focused on creating a structured, doctrinal framework for evaluating section 25 infringements – one that is methodical and principle-based. The reasoning is

76 2002(4)SA768.

systemic and abstract. There is no literary or emotive device, no particular focus on the consequences of the seizure beyond what is legally relevant. Although this might seem logical, due to the fact that the case involved juristic entities and, not people with narratives, it should be noted that this case is key for its technical contribution to constitutional property law. Said contribution went on to affect many more people in the way in which its methodology was then applied in terms of how deprivation and expropriation was then interpreted. Yet, it does not engage in the kind of empathetic or literary framing found in later judgments.

In *Mkontwana v Nelson Mandela Metropolitan Municipality*,⁷⁷ a law required property owners to settle outstanding municipal debts, like water and electricity, before transferring property – even if those debts were incurred by tenants. The majority focuses on legal structure and policy rationality, upholding the statutory provision based on the municipality's legitimate interest in recovering costs. Empathy is sidelined in favour of policy coherence and administrative efficiency. This is despite the fact that, Ms Mkontwana was exactly the kind of litigant whose circumstances the Constitution requires the judiciary to take into account.

Ms Mkontwana was not well off, and was only able to buy a house, whose market value was for R 24 560.00, with the help of a State housing subsidy of R 16 000.00. When she first applied to the municipality for a rates clearance certificate, she was informed that she had to pay consumption charges which had been incurred by previous occupiers, in excess of R 10 000.00. Needless to say that this amount would already be more than that she was able to afford to buy the house alone. Regardless of said circumstances, the judgment maintains a separation between doctrinal coherence and social fairness, suggesting that formalism still dominates in disputes involving property rights when not framed through literary or narrative modes.

Finally, in *Everfresh Market Virginia v Shoprite Checkers*. In *Shoprite Checkers*, the dispute was over a lease renewal clause that Everfresh claimed Shoprite had a duty to negotiate in good faith.⁷⁸ The majority judgment declines to develop the common law to include a duty to negotiate in good faith, treating the matter as one for the private law domain. It places a premium on legal certainty in commercial arrangements. The tone is technical, and no personal

77 2005 (1) SA 530 (CC).

78 2012 (1) SA 256 (CC).

or emotional narrative is explored. The parties are large corporate entities, and the judgment reflects that through its cold, contractual language. Once again, despite the identity of the parties, the judgment fails to reflect on the fact that the decision impacts many other parties who are later subject to the same law. In fact, the decision reaffirms the divide between constitutional values and private law obligations, and steers away from the imaginative possibilities offered by literary or empathetic reasoning.

A shared logic emerges across these cases, namely that of rigidity: the law is treated as self-referential and internally coherent with little space for social or emotional context. There are also disembodied subjects, where the litigants are only legal figures, not human beings with histories, pain, or aspirations. The absence of narrative devices is also obvious. These judgments do not draw on stories, metaphors, or literary texts. They prioritise clarity and predictability over rhetorical or empathetic richness. Finally, there is a clear commitment to the *status quo*. In prioritising certainty and legal structure, the court often reinforces economic and institutional hierarchies – especially in property disputes.

Interestingly, in these cases, parties often appear relatively equal in legal power and institutional identity (such as corporations, the state, or commercial entities). This may lead the Court to view the dispute as one that can be resolved within the confines of legal formalism, without recourse to empathetic or literary tools. However, this also seems to insulate the bench from the foresight of seeing how the decision in front of them will later impact parties who might not have the same institutional power. The lack of visible vulnerability in these disputes potentially sheathes the bench from the “temptation” to turn to literature or narrative to anchor their reasoning in lived experience.

Formalist judgments with power imbalances

In this third category, the legal power dynamics or historical contexts of the parties involved should, based on the hypothesis in the previous segment, provoke a more empathetic and nuanced approach to the judgment. An approach that incorporates literature to engage with the lived experiences of vulnerable or marginalised individuals. However, despite these imbalances, the judgments in this segment adhere strictly to formal legal reasoning and do not turn to literature or literary techniques to humanise the dispute. This omission is notable given the stark contrasts in the parties' social and economic power,

where a literary or empathetic approach could have meaningfully enriched the judgment. The failure to incorporate literature here might suggest an oversight, or a reluctance to engage fully with the human side of the legal conflict.

For instance, in *Grobler v Phillips*, the Court was faced with a complex dispute involving an eviction.⁷⁹ The legal formalism here focused on the technicalities of the law – specifically the procedural aspects of property rights and ownership disputes – yet failed to address the power imbalance between the parties, particularly with respect to the socio-economic circumstances of the property owners versus the alleged unlawful occupants. The Court did not concern itself with Mrs Phillips being an elderly lady who had lived on the property almost her whole life, and was living on the land with her disabled grandson.⁸⁰ Literature, or any form of narrative that acknowledged these power differences, could have added depth to the judgment, particularly in considering the historical context of land dispossession and the lived realities of the vulnerable party.

One year prior, the Constitutional Court heard *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others*, which involved desperately poor applicants living in appalling conditions and having little to nothing by way of access to water, sanitation and electricity.⁸¹ This was in spite of having been granted a state housing subsidy, some as far back as 1998. They never received possession of their houses, and instead the Municipality unlawfully gave possession of the subsidised houses intended for the applicants to other people. The majority judgment adhered strictly to formal legal reasoning, focusing on the technical aspects of the case without exploring the social and political realities of the parties involved. The failure to use literature in this case, where power imbalances and socio-political contexts should have been central, highlights how formalist reasoning can overlook the lived realities of the parties involved, even when these realities are critical to achieving substantive justice.

This was however, nothing new for the Constitutional Court. Even six years prior, the Court was guilty of the same approach in *Pitje v Shibambo*, which involved a dispute over the ownership of property leading to an eviction order.⁸²

79 2023 (1) SA 321 (CC).

80 *Grobler v Phillips* at para 2.

81 2022 (8) BCLR 985 (CC).

82 2016 (4) BCLR 460 (CC). The matter was remitted to the High Court, for the Court to assess whether the eviction order was indeed just and equitable under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

The identities and socio-economic realities of the parties – one of whom was an elderly man who had done everything in his power to legally buy his father's land where he grew up – should have prompted a more nuanced engagement with the applicant's context. However, the Court relied purely on doctrinal reasoning, focusing on the technicalities of property law without reference to any literary or empathetic approach that could have humanised the parties' lived experiences.

Finally, the dispute in *Malan v City of Cape Town* centred around an unlawful eviction,⁸³ with the respondents facing homelessness and dispossession in 2014. While the legal arguments were grounded in formal property law and contractual doctrines, the Court did not engage with the broader socio-political context of the applicant that could have informed its decision-making. Here, the identities and lived experiences of the vulnerable party – in this case, an elderly widow who had stayed in her home with her family for most of her life – warranted an empathetic and literary engagement with the case. Given the socio-economic and historical factors at play, the Court's decision, although arguably legally sound, missed an opportunity to humanise the parties through the use of literary techniques.

It should be noted that in all of these cases, the Court highlighted that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) applied or should have applied. This is important because section 4(6) of PIE requires the Court to take into consideration "all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women" before ordering an eviction. Hence, even though the Court did not rely on literature or literary techniques, it should have, at the very least, considered the personal circumstances of the parties in front of it.

The cases in this third category thus present scenarios where literature should have been a natural tool for judicial reasoning, especially given the imbalances of power and the marginalised status of the parties. In contrast to the literary judgments that actively engaged with the human side of property law, these formalist decisions failed to engage with the identity, context, and history of the parties. Literature could have offered a means to reflect on the lived experiences of vulnerable individuals, offering a deeper understanding of how constitutional principles of justice and dignity apply in these contexts. The

83 2014(6) SA 315 (CC).

lack of literary engagement in these judgments raises critical questions about the Court's approach to empathy and social justice, particularly in cases where these factors are crucial for a more holistic understanding of the dispute.

The function of literature: justification, narration, or both?

While the judgments above illustrate the use of literature in constitutional property law at the Constitutional Court, they do not necessarily show the function of literature in legal reasoning. Literature in legal reasoning, particularly in the context of constitutional property law, can serve multiple roles. It may inform a judge's legal decision and may also be employed as a narrative device that shapes how judges engage with the parties, the circumstances, and the broader social context of the case. These two functions are often intertwined.

It is generally possible that some judges are more likely to learn from the literature and then use it as a basis to ground a legally recognisable interest that would otherwise not feature in the analysis at all. For others, literature might be adopted as an *ex-post facto* justification of an equity-based conclusion that has been reached without a compelling legal analysis of the interests involved. Here, the literature would then be adopted to couch that conclusion in a narrative about the importance of taking this analytical approach. This relates to the narrative or justificatory role of literature in legal reasoning.

In some cases, the use of literature in legal reasoning may serve to justify a particular legal outcome by drawing upon narrative elements that resonate with the principles of justice, dignity, and empathy. This justification function is seen in judgments where literature is employed to frame legal outcomes within a broader, more humanised context. Literature in this context can provide a moral or ethical basis for the Court's decision, extending beyond rigid legal formalism to incorporate social realities and the lived experiences of the parties involved.

For example, when judges use literary devices to highlight themes such as dignity, history, and the social fabric, as was the case in *Daniels v Scribante*, they may be attempting to justify a legal conclusion that takes into account more than just the technical aspects of property law. In this sense, literature acts as a tool that provides an ethical foundation for why a judgment is fair, just, and appropriate in a specific social or historical context. A poetic quote, like Madlanga J's opening in *Daniels* or Petse AJ's in *Maledu*, could be used to underscore an idea of social justice or moral rightness, in a way that purely

formal reasoning cannot. This literary justification may appeal to the broader ideals embedded in constitutional texts, such as equality, human dignity, and the recognition of historical wrongs (for example, land dispossession or forced removals).

On the other hand, narration is a function of literature where the judicial process itself is framed within a storytelling framework that shapes how the parties' identities, histories, and circumstances are perceived and understood. Narration allows judges to engage with the context of a legal dispute, which may involve social, cultural, or historical narratives that are central to understanding the case fully. This can be clearly seen in how Madlanga J and Froneman J both used literature and narration in their respective judgments in *Daniels v Scribante*. While Froneman J concurred with Madlanga J's judgment, he expressed that his own Afrikaner identity came with the responsibility to confront its contribution to South Africa's past injustices – and he did so using literature.

When literature is used as a form of narration, it shapes the legal subject in a way that formalist doctrines often fail to do. Rather than treating the parties as anonymous entities in a legal vacuum – as is often the case in rigid legal formalism – literature allows the legal subject to be understood within their context, as a person with a history, emotions, experiences, and identity. In the case of property law, this could mean framing a case involving eviction in a broader narrative of dispossession and social justice, or describing the impact of a judgment on the broader community and society, rather than focusing only on abstract legal principles.

In judicial opinions where literature is used for narration, we often see references to stories, metaphors, or even poetry to help the court's audience understand the underlying social dynamics. This is particularly important in cases where there is a stark imbalance of power between the parties, or when the case involves marginalised groups whose voices might otherwise be suppressed in formal legal reasoning.

The functions of justification and narration are often intertwined in judicial opinions that employ literature. A narrative element can help explain why a particular justification, for instance, the recognition of social rights or protection of vulnerable communities, is appropriate in the specific context of the case. This dual role is important in transformative constitutionalism, where courts are called upon to address deeply entrenched societal inequalities and injustices.

An example of how literature can serve both as justification and narration can be found in property cases involving evictions. In such cases, the use of literary devices might allow the Court to provide a justification for a judgment that considers not only legal principles but also the historical and social implications of eviction in post-apartheid South Africa. At the same time, the narrative aspect might focus on the stories of the individuals involved in the dispute, telling the story of dispossession, resistance, and survival, which might help to humanise the legal decision.

Both functions of literature – justification and narration – play a critical role in transformative constitutionalism, which seeks not only to interpret law but to reshape society in a more just, inclusive, and democratic manner. In such a framework, the law is not an abstract set of rules, but a living process that must take into account the lived realities of the individuals it governs. When literature is used in property law judgments, it provides more than just legal reasoning; it opens up a space for the law to be humanised and responsive to the needs of those who are often marginalised or disenfranchised. It compels the Court to consider the context, the people, and the social dynamics that underlie a legal dispute, which is crucial for ensuring that the law serves to transform society toward greater justice.

Conclusion

In examining the intersection of property law, literature, and empathy, it is clear that transformative constitutionalism demands a shift from the traditional, faceless legal subject embodied by Classical Legal Thought. Classical Legal Thought, with its emphasis on neutrality, objectivity, and the detachment of the law from social contexts, presents an ahistorical and often inhumane application of legal principles. This framework is ill-suited to address the lived realities of marginalised individuals, especially when it comes to property law in South Africa. Legal formalism, as championed by Classical Legal Thought, requires judges to apply the law as a set of abstract rules, irrespective of the specific circumstances of the parties involved.

In contrast, the integration of literature into legal reasoning offers a means to challenge this detachment. Literature, with its ability to evoke empathy and bring attention to the human experiences behind legal disputes, presents a powerful tool for judges. It pushes against the mask of the “faceless” legal subject by recognising the individuality, history, and suffering of the people

before the court. This approach is not only aligned with the principles of transformative constitutionalism but also offers a more humane and context-sensitive approach to legal interpretation.

The juxtaposition of Classical Legal Thought and the use of literature in judicial reasoning reveals the limitations of a purely formalist approach and underscores the importance of empathy in the law. While elements of Classical Legal Thought have utility in valuing legal certainty and procedural fairness, it cannot adequately address the need for social justice and the rectification of historical inequalities. Transformative constitutionalism's use of literature, on the other hand, demands that judges recognise the complexities of individual lives, moving beyond abstract principles to achieve a more equitable and just legal system.

Ultimately, by embracing literature's narrative power, property law can move away from its traditional reliance on neutrality and detachment, embracing a more empathetic and transformative role in society. This shift reflects the broader evolution of law toward an inclusive, context-driven framework that seeks to redress historical wrongs and foster a more just legal order.

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