

Law, Property & Society

The Idea of
Home in Law
Displacement
and Dispossession

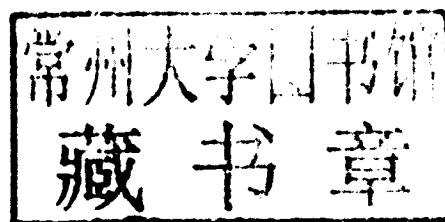
Edited by Lorna Fox O'Mahony
and James A. Sweeney

The Idea of Home in Law

Displacement and Dispossession

LORNA FOX O'MAHONY
University of Durham, UK

JAMES A. SWEENEY
University of Durham, UK



ASHGATE

© Lorna Fox O'Mahony and James A. Sweeney 2011

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior permission of the publisher.

Lorna Fox O'Mahony and James A. Sweeney have asserted their right under the Copyright, Designs and Patents Act, 1988, to be identified as the editors of this work.

Published by

Ashgate Publishing Limited
Wey Court East
Union Road
Farnham
Surrey, GU9 7PT
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington
VT 05401-4405
USA

www.ashgate.com

British Library Cataloguing in Publication Data

The idea of home in law : displacement and dispossession.

-- (Law, property and society)

1. Right of property. 2. Eviction. 3. Refugee property.

4. Eminent domain (International law)

I. Series II. Fox O'Mahony, Lorna. III. Sweeney, James A.

346'.04-dc22

Library of Congress Cataloging-in-Publication Data

The idea of home in law : displacement and dispossession / Lorna Fox O'Mahony and James A. Sweeney.

p. cm.

Includes index.

ISBN 978-0-7546-7947-9 (hardback) -- ISBN 978-0-7546-9886-9 (ebook)

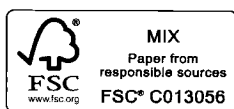
1. Right to housing. 2. Housing--Law and legislation. 3. Refugees--Legal status, laws, etc. 4. Home--Social aspects. I. Fox O'Mahony, Lorna. II. Sweeney, James A.

K738.I34 2010

344'.063635--dc22

ISBN 978 0 7546 7947 9 (hbk)

ISBN 978 0 7546 9886 9 (ebk)



Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall.

Notes on Contributors

Professor Susan Breau is Professor of International Law at Flinders University, Australia. She was formerly the Dorset Fellow in Public International Law at the British Institute of International and Comparative Law and Reader in International Law at the University of Surrey. Her monograph entitled *Humanitarian Intervention: The United Nations and Collective Responsibility* was published by Cameron May in 2005. Professor Breau is also co-author of K. Yildiz and S. Breau, *The Kurdish Conflict: Political Context, the Law of Armed Conflict, and Post-Conflict Mechanisms* (Routledge 2010); co-editor of E. Wilmshurst and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007) and J. Rehman and S. Breau (eds), *Religion, Human Rights and International Law* (Martinus Nijhoff, 2007). She has published several chapters and articles on various aspects of international law and the international protection of human rights.

Professor Susan Bright is a Professor in Land Law at New College, Oxford University. The majority of her publications are in the field of real property law. Her most recent book, *Landlord and Tenant Law in Context* (Hart, 2007), weaves together discussion of law and policy in both the residential and commercial property sectors. In her current research she is exploring legal models for the delivery of affordable housing, and the challenge of ‘greening’ commercial tenanted property.

Dr Antoine Buyse is Associate Professor at the Netherlands Institute of Human Rights (SIM), Utrecht University, where he teaches the courses International Human Rights at University College, and Economic, Social and Cultural Rights in the human rights LL.M. programme. His research interests are the European Convention on Human Rights (ECHR), human rights in post-conflict situations, housing rights, and the freedom of expression. He is author of *Post-Conflict Housing Restitution: The European Human Rights Perspective, with a Case Study on Bosnia and Herzegovina* (Intersentia: Antwerpen 2008), as well as several journal articles. His work has been awarded the *Erasmus Research Prize 2008*, the *Max van der Stoep Award 2008*, the *G.J Wiarda Prize 2008*.

Professor Rashmi Dyal-Chand is Professor of Law at Northeastern University. Professor Dyal-Chand’s research and teaching focus on property law, poverty and economic development. Her recent projects examine credit, including microlending and credit card lending, as a means of economic development. Her

current research explores property formalization and wealth accumulation by the poor in the United States. Professor Dyal-Chand's article, "Human Worth as Collateral," won the 2006 Association of American Law Schools' scholarly papers competition for new law teachers. Her work has appeared in journals including the *Stanford Journal of International Law*, *Tennessee Law Review*, and *Rutgers Law Journal*. She teaches Modern Real Estate Development, Intellectual Property and Property.

Professor Lorna Fox O'Mahony is Professor of Law at Durham University. She is author of *Conceptualising Home: Theories, Laws and Policies* (2006, Hart Publishing), which was awarded First Prize in the Society of Legal Scholars' Birks Prizes for Outstanding Legal Scholarship (2007), and was shortlisted for the Socio-Legal Studies Association Book Prize (2008). Her work to develop a legal concept of home is often cited as laying the foundations for new approaches to the idea of home in law, including giving content to rights to housing and home. Lorna is Associate Editor-in-Chief of the *International Encyclopaedia of Housing and Home* (Elsevier Publishing, 2011) and co-editor of *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable* (Cambridge University Press, 2010) (with M. Kenny and J. Devenney). Her new monograph, *Home Equity and Older Owners: Between Risk and Regulation* will be published by Hart Publishing in 2011.

Dr Padraic Kenna lectures in land law and housing law and policy at the School of Law, National University of Ireland, Galway. He has published widely in the area of housing rights, socio-economic rights and related topics. Books include *Housing Law and Policy in Ireland* (Dublin: Clarus Press, 2006), *Housing Rights and Human Rights* (Brussels: FEANTSA, 2005) and *Housing Law, Rights and Policy* (Dublin, Clarus Press, 2010). A key area of his research work involves the development of socio-economic rights and their implementation in the areas of housing, land and property across the national and regional systems and approaches. His book, *Housing Law and Policy in Ireland* addresses both traditional legal areas as well as the developing issues arising from the International Law, ECHR, European Law and the movement towards equality, inclusion and rights-based approaches, both in the public and market spheres. He is a member of the Editorial Advisory Board of the *International Journal of the Law in the Built Environment*. Padraic has worked within a range of statutory and NGO agencies in the UK and Ireland in an advocacy role and in the development and management of housing.

Dr James A. Sweeney is Senior Lecturer in Law at Durham University. He is the founder and convenor of the 'Law and Conflict at Durham' research group. His research is about the after-effects of conflict; principally human rights law in transitional democracies and the rights of refugees. His work on the rights of asylum seekers to be free from destitution has been cited by the highest court in the UK. During 2009 he advised the European Union's Committee of the Regions as it

drafted its responses to proposed amendments of the Common European Asylum System. His monograph *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* will be published by Routledge in 2011. Dr Sweeney has acted as an expert advisor to the Council of Europe on democratic transition and freedom of assembly in Armenia, Azerbaijan and Kosovo.

Professor A. J. van der Walt holds the South African Research Chair in Property Law at Stellenbosch University. He has been the recipient of the Alexander von Humboldt fellowship on several occasions and has been a visiting fellow commoner at Trinity College, Cambridge. Professor Van der Walt is author, co-author or editor of and contributor to more than 20 books on legal history, research methodology and property law, and has published more than 100 articles in legal journals. His most recent work is mainly concerned with constitutional property, land reform and property theory. His most recent books include *Constitutional Property Clauses: A Comparative Analysis* (Kluwer 1999); *Constitutional Property Law* (Juta 2005) and *Property in the Margins* (Hart 2009).

Acknowledgements

We would like to express our gratitude to Durham University's Institute of Advanced Study, Human Rights Centre, Centre for Criminal Law and Criminal Justice, and Institute for Commercial and Corporate Law who generously funded the Home Symposium held on the 29 June 2009 that gave rise to the work presented in this collection. We would like to thank all those who presented and participated in lively discussions on the day: Professor Susan C. Breau (Flinders University); Alan Brice, Medical Foundation for the Care of Victims of Torture; Professor Susan Bright (New College, University of Oxford); Dr Antoine Buyse (Netherlands Institute of Human Rights (SIM)); Professor Suzanne Fitzpatrick (Director of the Centre for Housing Policy, University of York); Dr Padraic Kenna (NUI Galway); Judy Nixon (Sheffield Hallam University); Simon Underwood, Head of the Social Inclusion Unit at Newcastle City Council; and Professor André van der Walt (Stellenbosch University). This symposium formed part of a wider series of events exploring the importance of 'Home' in 'Being Human' and we also want to thank all those who participated in the 'Home' theme, especially our colleagues Dr Divya Tolia-Kelly (Department of Geography, Durham University), Dr Simon James and Dr Benedict Smith (Department of Philosophy, Durham University), and Dr John Chapman (Department of Archaeology, Durham University). Their contributions and our shared discussions greatly enriched our understandings of the human experience of losing home.

The team at Ashgate have been wonderfully efficient in managing the publication process, and we'd especially like to thank Eric Levy, Pam Bertram and Helen Parry. Finally for their constant help and support, Lorna would like to thank David and Conor, and James would like to thank Sarah, Grace and Isla.

Professor Lorna Fox O'Mahony
Dr James A Sweeney
Durham Law School
November 2010

Contents

<i>Notes on Contributors</i>	<i>vii</i>
<i>Acknowledgements</i>	<i>xi</i>
1 The Idea of Home in Law: Displacement and Dispossession <i>Lorna Fox O'Mahony and James A. Sweeney</i>	1
2 Dispossession for Arrears: The Weight of Home in English Law <i>Susan Bright</i>	13
3 Home as Ownership, Dispossession as Foreclosure: The Impact of the Current Crisis on the American Model of 'Home' <i>Rashmi Dyal-Chand</i>	41
4 Housing Rights in the Intersection between Expropriation and Eviction Law <i>A.J. van der Walt</i>	55
5 The Displacement and Dispossession of Asylum Seekers: Recalibrating the Legal Perspective <i>James A. Sweeney and Lorna Fox O'Mahony</i>	101
6 Can International Housing Rights Based on Public International Law Really Impact on Contemporary Housing Systems? <i>Padraic Kenna</i>	133
7 The International Law Rights to Home and Homeland <i>Susan Breau</i>	165
8 Loss of the Home during Armed Conflict: ECHR Case Law on Destruction, Eviction and Denial of Access <i>Antoine Buyse</i>	195
9 Re-thinking Responses to Displacement and Dispossession <i>Lorna Fox O'Mahony and James A. Sweeney</i>	211
<i>Index</i>	<i>227</i>

Chapter 1

The Idea of Home in Law: Displacement and Dispossession

Lorna Fox O'Mahony and James A. Sweeney¹

(1) The Idea of Home in Law: Thinking about Loss of Home

The idea of home is both present and absent in law. In one sense, ideas concerning home – both in the sense of the dwelling place as a special type of property, and territorial claims to homeland – underpin many contemporary legal problems, typically where people have been displaced or dispossessed from their homes. For example, the significance of the home as dwelling place has been highlighted in the rise in repossession and foreclosure statistics following the recent crunch in the credit and housing markets.² Indeed, the global financial crisis triggered by the subprime mortgage lending crisis that began in 2007 has clearly demonstrated the potentially widespread risks of displacement and dispossession from our dwellings, bringing into sharp relief the adverse consequences associated with losing their home³ to many individuals and households who might not previously have expected that they would have been exposed in this way.⁴ As the crisis in the housing and mortgage markets has brought home to us our vulnerability to displacement and dispossession, we are well placed – perhaps more so than at any other time in recent years – to empathise with those people, whether in our own communities or elsewhere in the world, who have lost, or are at risk of losing, their homes and so becoming displaced or dispossessed. This presents an opportune moment to reflect on our shared human need for a secure dwelling place, and our vulnerability to loss of home. With this in mind, this collection sets out to examine some of the circumstances in which displacement and dispossession takes place, and argues that it is timely to consider how law and policy respond to such circumstances.

1 lorna.fox@durham.ac.uk / j.a.sweeney@durham.ac.uk

2 See for example, S. Bright, 'Dispossession for Arrears: The Weight of Home in English Law' and R. Dyal-Chand, 'Home as Ownership, Dispossession as Foreclosure: The Impact of the Current Crisis on the American Model of "Home"' in this volume.

3 See L. Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, Oxford 2006) 109–22.

4 See S. Bright, 'Dispossession for Arrears: The Weight of Home in English Law' and R. Dyal-Chand, 'Home as Ownership, Dispossession as Foreclosure: The Impact of the Current Crisis on the American Model of "Home"' in this volume.

There are a myriad of circumstances in which displacement and dispossession from home occurs, ranging from mortgage repossession to displacement following natural disaster.⁵ This collection focuses primarily on those instances of displacement and dispossession which might be regarded as resulting from human agency, specifically, from either economic or political events or circumstances. There is a particular case for scrutinising law and policy responses to displacement and dispossession in these cases, as the causes of these home losses can be viewed as rooted in the human actions of law and policy agendas. In addition, as in any case of displacement and dispossession, the consequences of loss of home, particularly where it occurs on a widespread basis, generate costs which are borne not only by individuals but by society at large.⁶ Where home loss results from economic or political circumstances the balancing exercise carried out by the policy maker in each context – between protecting home values and a range of countervailing demands – merits particular attention.

The importance of ‘being at home in the world’ for human flourishing, and the consequences of alienation when the connection with one’s home is lost, are common philosophical themes,⁷ and underpin much political philosophy, from Hegel to Heidegger. These perspectives have, in turn, influenced property theory as it has been brought to bear on issues in law and society. For Hegel,⁸ the justification for private property was rooted in the role of property appropriation in the formation of identity. Property was identified as a vehicle through which the individual could manifest himself as a human being in the world; by appropriating property, the person confers personal meaning onto the property and expresses his identity outwardly through exercising his will in relation to the property.⁹ Furthermore, the purpose of this appropriation was not merely to satisfy the

5 See, for example, Robin Paul Malloy (ed.), *Law and Recovery From Disaster: Hurricane Katrina* (Ashgate, Aldershot 2009) in this series.

6 See for example, S. Nettleton, ‘Losing a Home through Mortgage Repossession: A “New” Public Health Issue’ (1998) 8 *Critical Public Health* 47; S. Nettleton and R. Burrows, ‘When a Capital Investment becomes an Emotional Loss: The Health Consequences of the Experience of Mortgage Possession in England’ (2000) 15 *Housing Stud.* 463; L. Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, Oxford 2006), especially 115–22.

7 See, for example, D. Cooper, *The Measure of Things* (2nd edn, Oxford University Press, Oxford 2008) for a philosophical account of what it might mean to ‘be at home in the world’. Levinas described the home as a precondition for existence, since: ‘[m]an abides in the world as having come from a private domain, from being at home with himself, to which at each moment he can retire’; E. Levinas, *Totality and Infinity* (Martinus Nijhoff, The Hague 1969), 152.

8 G.W.F. Hegel, A.W. Wood (ed.), H.B. Nisbet (trans.), *Elements of the Philosophy of Right* (Cambridge University Press, Cambridge 1991).

9 Ibid., s. 44 p. 76.

possessor's needs, but also to enable the human person to experience freedom;¹⁰ and only from that position of freedom could the person then engage in civil society. While Hegel's analysis focused on private property more generally, and particularly on ownership of private property, the significance of housing and home for Hegelian self-development, and the implications this bears for law and policy, has been most notably developed through Radin's concept of property for personhood.¹¹

The core of Radin's theory was the idea that an individual's attachment to particular property, for example their home, may be so strong that the particular property becomes constitutive of their personhood. Radin conducted a positivist analysis of the personhood perspective, and concluded that the relationship between property and 'personhood' had: 'commonly been both ignored and taken for granted in legal thought'.¹² However, the central premise of Radin's analysis was her normative argument 'that to achieve proper self-development – to be a *person* – an individual needs some control over resources in the external environment'.¹³ Furthermore, in identifying those resources most essential to the person, Radin noted firstly that 'some property is worthier of protection than other property',¹⁴ and – crucially – that the measure of whether property is 'worthier of protection' by virtue of its role in personhood, can be determined by considering the loss that would be suffered by the property holder if they were to be dispossessed of that property. Indeed, Radin proposed that the function of the personhood perspective was to 'serve as an explicit source of values for making moral distinctions in property disputes';¹⁵ for example, by taking account of the impact of dispossession or displacement in contests where a certain type of property is at stake.

The occupied home is widely recognised as a quintessential example of 'worthy' property. In Radin's analysis, different forms of property were described as being located on a continuum, ranging from property that is constitutive of

10 'To have even external power over something constitutes *possession* just as the particular circumstance that I make something my own out of natural need, drive, and arbitrary will is the particular interest of possession. But the circumstance that I, as free will, am an object to myself in what I possess and only become an actual will by this means constitutes the genuine and rightful element in possession, the determination of *property*... In relation to needs – if these are taken as primary – the possession of property appears as a means; but the true position is that, from the point of view of freedom, property, as the first *existence* of freedom, is an essential end for itself'; *ibid.*, s. 45 pp. 76–7.

11 See M.J. Radin, 'Property and Personhood' (1982) 34 *Stanford Law Rev.* 957; M.J. Radin, *Reinterpreting Property* (University of Chicago Press, Chicago 1993).

12 M.J. Radin, 'Property and Personhood' (1982) 34 *Stanford Law Rev.* 957.

13 *Ibid.*

14 M.J. Radin, *Reinterpreting Property* (University of Chicago Press, Chicago 1993) 48.

15 *Ibid.*, 35.

personhood (described as ‘personal property’¹⁶) to property that carries no meaning beyond its capital value (described as ‘fungible property’). Radin argued that ‘in our social context a house that is owned by someone who resides there is generally understood to be towards the personal end of the continuum.’¹⁷ This argument was strengthened by the view that where certain types of property are constitutive of personhood, this is valued as a positive relationship between the person and the property. Radin claimed that ‘[t]here is both a positive sense that people are bound up with their homes and a normative sense that this is not fetishistic’;¹⁸ and so is a relationship which laws and policies should support.

The chapters in this collection develop this argument through analyses of various contexts in which the individual’s personhood is threatened by loss of control over the ‘resources’ – both practical and symbolic – represented by control over or connection with *home*. The papers start from the premise that it is a necessary aspect of human existence that, at the most basic level, everyone must exist in some relationship with place and either with a meaningful connection to *home*; or, in the absence of such a meaningful connection, in a state of alienation.¹⁹ Heidegger argued that the human condition – human ‘being’ – is rooted in these connections with home: people cannot ‘be’ without having some connection to a particular place.²⁰ This human need for connection to home can be described as ‘multi-scalar’,²¹ in that it involves connections at various levels, from the attachment to home at the household level through the dwelling house itself, to the connection a person feels to a home-city or nation-state as home. As such, the issues of displacement and dispossession from home clearly go beyond considerations of private property, to encompass a set of issues relating to citizenship and exile from homeland. The importance of dwelling as the basis for human existence is brought into sharp relief by experiences of displacement and dispossession, and these multi-scalar attachments to home – from dwelling house to nation-state – are also reflected in this collection. These essays reflect on law and policy responses to disruptions ranging from repossession of the

16 Radin later conceded that this categorisation was not ideal, as it could potentially create confusion with the separate dichotomy between real property (land) and personal property (chattels and intangible property).

17 M.J. Radin, *Reinterpreting Property* (University of Chicago Press, Chicago 1993) 54.

18 Ibid. The notion of ‘fetishism’ is applied to distinguish between ‘healthy’ object relations, which are not fetishistic, and ‘unhealthy’ object relations.

19 M. Heidegger, ‘Bauen, Wohnen, Denken’ (1951) [‘Building Dwelling Thinking’] and the 1951 lecture ‘...dichterisch wohnet der Mensch’ [‘...Poetically man dwells...’] in A. Hofstadter (trans.), *Poetry, Language, Thought* (Harper Colophon Books, New York 1971).

20 ‘The way in which you are and I am, the manner in which we humans are on the earth, is Buan, dwelling. To be a human being means to be on the earth as a mortal. It means to dwell...man is insofar as he dwells.’ Ibid., ‘Building, Dwelling, Thinking’, Part I.

21 See A. Blunt and R. Dowling, *Home* (Routledge, Abingdon 2006) 27.

dwelling house, whether in a landlord or creditor possession action or at the hands of the state through compulsory acquisition, to the experiences of people who are both dispossessed from their properties and displaced from their homelands, often because of conflict or other political events. Yet a common thread connects the varied contexts considered in the essays: the impact of loss of home for the human person, and the extent to which this is present, or absent, in legal analyses.

The contribution of political philosophy is important in bridging the gap from a factual account of the ways in which a person identifies with a place as their home – towards an argument for the protection of ‘settled expectations’ that can support ideas of ‘rights’ and so generate a legal endorsement of a person’s ability to exercise control within the territory that provides their housing and home. In the context of *property* rights, this argument appears to support the proposition that only those settled expectations generated by law – and so already protected – should be recognised.²² Waldron argued that ‘the principle of respect for expectations and the concomitant idea of identifying with a property object cannot be the *foundation* of a principle of entitlement; such a principle must already be generally respected before the relevant expectations can come into play.’²³ The question which remains concerning the origin of such principles of entitlement has been variously answered in theories of concerning first acquisition of property. Hegel, for example, argued that the recognition of property rights rooted in the expression of the person’s will through possession was an essential precondition for the person to engage in civil society: that one achieves personality through the social anchor of property, which enables the person to become at home in the world.²⁴

Yet, while Hegel’s justification for private property recognises that property can function to anchor the person in the world, and Radin’s theory of property for personhood provides a basis for arguing that certain types of property, most particularly the home, are worthy of special protection because of their role in constituting personhood, these property theories do not go so far as to advocate that housing or home should be available to all: ‘There is no suggestion that each and every person can or should have certain sorts of property in order to be at home in the world...’.²⁵ This argument is, however, explicitly made in the statement on ‘Progressive Property’ published in the *Cornell Law Review* in

22 Waldron described the Benthamite argument as suggesting that ‘Only when he can predict that by and large others will abide by some principle of respect for his acquisitions is he likely to form a settled expectation of keeping them’; J. Waldron, *The Right to Private Property* (Oxford University Press, Oxford 1988) 197.

23 Ibid.

24 G.W.F. Hegel, A.W. Wood (ed.), H.B. Nisbet (trans.), *Elements of the Philosophy of Right* (Cambridge University Press, Cambridge 1991) s. 33.

25 A. Ryan, *Property and Political Theory* (Blackwell, Oxford, New York, 1984) 124.

2009,²⁶ which proposed that our shared commitment to the values of ‘life and human flourishing, the protection of physical security, the ability to acquire knowledge and make choices, and the freedom to live one’s own life on one’s own terms’,²⁷ implicates moral and political conceptions that require property law to promote ‘human flourishing’. While our perspectives are sympathetic with those underpinning progressive property, the question of ‘property entitlements’ is not one this book seeks to address. Rather, the papers in this collection seek to consider the significance of human relationships with housing and home not from a ‘strong property rights’ stance, but from alternative perspectives.²⁸ The emergent legal concept of home²⁹ focuses on the proposition that the relationship between a person and their home – distinct from any ‘strong property rights’ the person may or may not have in that home as an item of property – can potentially generate the basis for a legal claim which should be weighed in the balance against other types of claim. These papers develop that line of scholarship by considering normative questions concerning law and policy responses to displacement and dispossession from a variety of perspectives.

A key feature of the collection is the connection made between housing and home and human rights approaches. This provides a useful perspective because the proposition that particular rights or expectations are essential to human dignity or flourishing is one that is more typically encountered in the context of human rights discourse.³⁰ Writing on the subject of the universality of human rights, Jack Donnelly argued that the modern human rights movement is an historically bounded response to protecting human dignity inspired by the need for protection from the, ‘economic, social and cultural intrusions into, and disruptions of, the traditional community [which] have removed the support and protection which would “justify” or “compensate for” the absence of individual human rights.’³¹

26 G.S. Alexander, E.M. Peñalver, J.W. Singer and L.S. Underkuffler, ‘A Statement on Progressive Property’ (2009) 94 *Cornell Law Rev.* 743.

27 Ibid.

28 For an extensive illustration of the insights to be gained through considering alternative perspectives to the ‘strong property rights’ paradigm, and arguing for a wider notion of what can be considered worthy of recognition as property ‘interests’, see A.J. van der Walt, *Property in the Margins* (Hart Publishing, Oxford 2009).

29 See, for example, L. Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, Oxford 2006); D.B. Barros, ‘Home as a Legal Concept’ (2006) 46 *Santa Clara L. Rev.* 255; M.J. Ballard, ‘Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy’ (2006) 56 *Syracuse L. Rev.* 277; Tang Hang Wu, ‘The Legal Representation of the Singaporean Home and the Influence of the Common Law’ (2007) 37 *HKLJ* 81; A. Buyse, ‘Strings Attached: The Concept of “Home” in the Case Law of the European Court of Human Rights’ [2006] *EHRLR* 294.

30 See O. Schachter, ‘Human Dignity as a Normative Concept’ (1983) 77(4) *AJIL* 848.

31 J. Donnelly, ‘Human Rights and Human Dignity: An Analytic Critique of Non-western Conceptions of Human Rights’ (1982) 76 *Amer. Polit. Sci. Rev.* 303, 314.

Likewise Beyleveld and Brownsword have identified human dignity as the source for human rights in many human rights treaties.³² It is particularly apposite to consider the human dignity aspect of rights to home in the context of a project that takes 'being human' as its initial stimulus, at a time when the human rights movement itself is at risk of being subverted by the recognition of 'human' rights for corporate and profit-making entities.³³ It is fascinating to see, for example, that the tenuous grasp that displaced and dispossessed people may have upon their human rights to 'home' is more difficult to conceptualise from the legal standpoint of the European Convention on Human Rights³⁴ than a corporation's right to 'home, family and private life' in the course of competition proceedings brought against it.³⁵

International human rights law recognises some fusion of property law approaches and human rights approaches to the extent that the right to (peaceful enjoyment of) property is (sometimes) recognised as a human right itself. This is the case in Article 17 of the Universal Declaration of Human Rights;³⁶ the European Convention on Human Rights, where it is included in Article 1 of Protocol 1;³⁷ Article 14 of the African Charter on Human and Peoples' Rights;³⁸

32 D. Beyleveld and R. Brownsword, 'Human Dignity, Human Rights and Human Genetics' (1998) 6 *MLR* 661. Indeed Beyleveld and Brownsword go further, and argue that in another more specific sense human dignity can become a species of human right itself. (In the context of personal autonomy and the right to profit from the use of one's own body, they argue that the notion of human dignity, if properly conceptualised, can help resolve complicated questions surrounding new technologies such as the cloning of genetic material, or even humans.)

33 See M.K. Addo, 'The Corporation as a Victim of Human Rights Violations', in Addo (ed.) *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer, The Hague 1999) 187 (supporting this development); M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press, Oxford 2006); cf. A. Gear, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights' (2007) 7(3) *Human Rights Law Review* 511.

34 See Sweeney and Fox O'Mahony in this volume.

35 See *Société Colas Est and Others v. France* (2004) 39 EHRR 17 at [41] in particular, where the European Court held that, 'Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises.'

36 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

37 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR); Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

38 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

Article 21 of the American Convention on Human Rights;³⁹ and Article 23 of the American Declaration on the Rights and Duties of Man;⁴⁰ although it is notably absent from both the International Covenant on Civil and Political Rights⁴¹ and the International Covenant on Economic, Social and Cultural Rights.⁴² The aim of this volume is to recognise the specific role of housing and home to human dignity. The research presented here opens up avenues for exploration of these related issues: it is not intended to promote a specific agenda for strong property rights (e.g. ownership), but rather to use ways of thinking about normative claims about the promotion of 'human rights' to shed new light on issues of displacement and dispossession.

(2) Displacement and Dispossession

The subject matter covered in the book addresses issues of major contemporary intellectual and policy interest. Both within states and globally, questions of forced evictions, displacement and dispossession, refugees and homelessness are of obvious current importance. On the global stage, the UN's Global Land Tools Network and the UN-Habitat Global Campaign for Secure Tenure have focused attention on issues such as the importance of security of tenure and the role of law and policy in protecting people who are vulnerable to forced eviction. Yet, despite the authenticity of home attachments, and the indisputable significance of access to housing and home for human flourishing, government policies, as expressed through law, struggle to attach significant weight to these home meanings or to their central role in relation to the occupier's experience of 'being human'. While scholarship on the legal concept of home has been a growing area in recent years, this collection progresses that debate into a new legal arena by shining a spotlight on the human rights and international law aspects of questions concerning displacement and dispossession from one's home.

The dispossession aspects include focusing on the relationship between 'home' and the law in relation to a range of circumstances, from responses to repossession triggered by inability to pay housing costs – including repossession for rent arrears or mortgage default in the UK (Bright) and foreclosure in the US (Dyal-Chand) – to dispossession caused by expropriation of land by the state for public purposes (van der Walt). The displacement theme draws the focus across to transnational

39 American Convention on Human Rights (entered into force 18 July 1978) (1969) 9 ILM 99.

40 Reprinted in 'Basic Documents Pertaining to Human Rights in the Inter-American System', OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992); (1949) 43 AJIL Supp. 133.

41 UNGA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; (1967) 6 ILM 368.

42 UNGA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; (1967) 6 ILM 368.

'home' issues: papers cover topics concerning the experience of displacement from home, for example for exiles and refugees (Breau), in the developing world and elsewhere in times of conflict (Buyse) and in the context of economic, social and cultural rights (Kenna, Breau). Bridging both themes, Sweeney and Fox O'Mahony analyse responses to the 'double displacement and dispossession' of asylum seekers and the intersecting issues of immigration and social welfare that characterise housing and home for asylum seekers in UK domestic and international human rights laws and norms.

This book brings together key protagonists across a range of interconnected global debates relating to the human experience of displacement and dispossession, to share insights into the role of law and policy in responding to displacement and dispossession from one's home, both at the national and international level, and to discuss priorities and strategies for future research in this important field. By bringing these perspectives together in a single work, we address a range of interconnected issues for the person experiencing displacement and/or dispossession from home, which are set out and examined in more detail in the concluding chapter. The papers address issues across a range of jurisdictions, including domestic legal approaches across the United Kingdom, United States of America, South Africa and Germany, and at different levels of legal system, including regional and international organisations such as the European Union, Council of Europe and United Nations, as well as public international law, international human rights law and international humanitarian law (otherwise known as the law of armed conflict).

(3) 'Being Human'

The impetus for this collection was a workshop held at the Institute of Advanced Study at Durham University on 29 June 2009, and we would like to acknowledge the generous support of the Institute in supporting and enabling the research collected in this volume. The workshop was the fourth in a thematic series focusing on 'Home' as an aspect of 'Being Human', which in turn formed part of the Institute of Advanced Study's 'Being Human' theme in the academic year 2008–2009. Durham University's Institute of Advanced Study is an ideas-driven institute, which is distinctive in organising the core of its work around a rolling programme of thematic priorities. Core themes have interdisciplinary appeal; they are controversial, lie at the cutting edge of research and require urgent attention from more than one perspective. Typically, themes run across one academic year, and provide a forum to gather together scholars, intellectuals and public figures of world standing or world promise from a varied range of backgrounds to address topics of major academic or public interest.

The 'Being Human' theme explored the fundamental question at the heart of human history: 'What does it mean to be human?'; specifically, what does it mean to be human at this moment in history, and including the proposition that there may