THE INSTITUTION OF HOUSING: HANOCH DAGAN'S REALIST THEORIES OF PROPERTY AND PUBLIC HOUSING IN IRELAND

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A INTRODUCTION

The work of Hanoch Dagan deals extensively with property law from a unique legal realist perspective, offering an original view not seen in traditional property law theories. Based on an appreciation for promoting human values and relationships, Dagan seeks to resolve actual property law with what people expect property law to be.

This paper will critically analyse Dagan's property law theories and, naturally, in examining Dagan's theories, examples and analogies will generally be drawn from Irish property law. However, a more radical and interesting approach to the greater application of these theories could be to attempt application of Dagan's approach to a more challenging, though peripheral, issue in property law. In this vein, the subject of tenure and rights in public housing law under s 62 of the Housing Act 1966 is in need of reform.

To begin the analysis of Dagan, I will introduce 'American legal realism', or more simply 'legal realism': a significant albeit broad label for the intellectual tendencies of certain early to mid-20th century US jurisprudential reformists.[1] Dagan follows and defends legal realism vigorously throughout his work. As Dagan presents his thoughts in a contextual fashion, in keeping with his legal realist approach, I will attempt to present and analyse his theories in the same way. Dagan states that an institution should be 'determined by its character, namely by the unique balance of property values characterizing the institution at issue'.[2] After examining Dagan's theories, I will explain the legal character of the institution described in s 62 of the Housing Act 1966, before addressing the theoretical relationship between public housing law and property values and attempting to reconcile them, while discussing appropriate social values in public law and the nature of a property right in the context of this paper.

B LEGAL REALISM

First, legal realism has been described as 'not a philosophy, but a technology',[3] necessitated by a 'scepticism as to some of the conventional theories, a scepticism stimulated by zeal to reform, in the interest of justice, some courthouse ways'.[4] As 'legal formalism'- a judicial methodism borne out of scientific and mathematical schools of thought which applied

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[1] Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon Press 1997) 69.

[2] Hanoch Dagan, 'Exclusion and Inclusion in Property' in *Property, State and Community* (Oxford University Press 2011) 10.

[3] William Twining, *Karl Llewellyn and the Realist Movement* (Cambridge University Press 2012) 575.

[4] Jerome Frank, 'Legal Thinking in Three Dimensions' (1949) 1 Syracuse Law Review 9, 10.

abstract reasoning and logic in jurisprudence- became popular, legal realists reacted critically. In a conflict reminiscent of that between rationalism and empiricism in the modern philosophical era, realists claimed that the a priori categorisations of formalists were not fine enough to fully engage uniqueness of each case. Thus, when a judicial decision was finally made, it could be said to be, in reality, a posteriori and normative but clothed in the 'rationalizations' of the meticulously sign-posted rationalist approach.[5]

As there are many unique writers on the subject of legal realism, as well as differing schools of thought, there is no precise encapsulation of a realist ethos. However, certain principles and trends can be seen throughout legal realism. Prediction of procedural results is at the forefront of their analysis, as the normal person is primarily concerned with the outcome of a trial rather than the finer details within. This has led to scepticism over the value of rules in and of themselves in judicial process, as well as scepticism of judicial regard for and treatment of the facts of the cases. The role of the judge is of great importance to the realist as the ultimate decision maker in the court; the study of judicial behaviouralism developed to predict a judge's possible thoughts based on the tiniest indicators of bias, conscious or subconscious.[6] One could say that legal realism's empirical approach developed to a highly scientific degree, a development which was encouraged greatly by Loevinger through 'jurimetrics', a thoroughly scientific treatment of legal data.[7]

The rule of precedent could be said to be key in the development of legal realism. Legal realism as understood in this paper is largely a US phenomenon, and it puts great importance in determining the actions of the court outside of the actual rules at play. It has been noted that the rule of precedent is far stronger in the UK and Ireland than it is in the US,[8] and this is a factor to consider in determining whether a broad legal realist approach is feasible in Ireland.

Dagan's extensive writing on the subject of legal realism includes a great focus on real world development of realist law,[9] which in his property law theories comes in the form of 'property institutions'.

C REALIST INSTITUTIONS IN PROPERTY LAW

Stated basically, Dagan's approach to property law entails an empirical, normative examination of property, furnished with institutions based in human values and relationships, subject to comprehensive rules that give people a sense of familiarity with and expectation of

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[5] Brian Leiter, 'American Legal Realism' [2002] The University of Texas School of Law, Public Law and Legal Theory Research Paper No 042, 1-3.
[6] Karl Llewellyn, 'Some Realism about Realism - Responding to Dean Pound' (1931) 44 Harvard Law Review 8, 1222; JG Riddall, *Jurisprudence* (2nd edn, Oxford University Press 2005) 223.
[7] Lee Loevinger, 'Jurimetrics: The Methodology of Legal Inquiry' (1963) 28 Law and Contemporary Problems 5.
[8] Freeman (n 4) 988.
[9] Hanoch Dagan, 'Lawmaking for Legal Realists' (2012) Tel Aviv University Law Faculty Papers Working Paper 168.

what the institutions entail.[10] A rather detailed concept, I will discuss the property institution both comparatively as a property model and specifically in terms of its more definite legal aspects.

D INSTITUTIONS IN THE CONTEXT OF PROPERTY MODELS

Dagan contextualises the role of the property institution by comparing it to two forms that are already used: property as a standalone form and property as the Hohfeldian 'bundle of rights' or 'bundle of sticks'.[11]

Property as a form, as the name may suggest, is a preferred method of interpretation by Dagan's jurisprudential opponents, legal formalists. He criticises this treatment of property as it creates a bubble in which courts and lawyers determine the law based on preconceived forms that they fit the case into, and thus produce a judgment based on internal doctrine.[12] By ignoring the greater questions of the human values and relationships at stake, formalist jurisprudence can be a case of 'form obscuring substance'.[13] Dagan argues that these forms create situations in which doctrine forces certain limited judgment choices to appear inevitable, despite the potential of empirical or normative critique to open up a wider realm of possible outcomes.

Although arguably undermining much of common law jurisprudence, Dagan presents the words of Felix Cohen in explanation of his feelings on rigid property forms:[14]

> When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions… the author, as well as the reader, of the opinion or argument is apt to forget the social forces which mould the law and the social ideals by which the law is moulded.[15]

On the other hand, the 'bundle of rights' offers a vastly different conception of property law. The bundle of rights 'characterizes property as a bundle of entitlements regulating relations among persons concerning a valued resource'.[16] This property conception is preferable to Dagan to the idea of single forms. He recognises that the bundle of rights requires a judge to consider the interplay of different rights and obligations at play during a property dispute, with the uniqueness of each exercise (by virtue of being outside recognised doctrinal forms) allowing consideration of human values to be introduced.[17] However, Dagan states that the bundle of rights cannot simply be used in place of a genuine analysis of views, but merely as

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[10] Dagan (n 2) 10.
[11] Hanoch Dagan, 'The Craft of Property' (2003) 91 California Law Review 1518, 1519.
[12] ibid 1528.
[13] ibid 1527.
[14] ibid 1528.
[15] Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columbia Law Review 809, 812.
[16] Anna di Robilant, 'Property: A Bundle of Sticks or a Tree?' (2013) 66 Vanderbilt Law Review 869, 871.
[17] Dagan (n 11) 1533.

a facilitator of such analysis.[18] One could gather from this that Dagan appreciates the bundle of rights mostly as a form disrupter that may allow analysis of values to creep in.

Dagan's criticism is not completely against the bundle of rights, but also against its misapplication in court. Taking the example of *US v Craft*[19] as a case study, he argued that misuse can reduce the bundle of rights to a mere 'laundry list', a menu of specific rights from which forms as explained above could be selected.[20] Dagan stated that to enumerate the rights in a bundle of rights defeats its purpose. However it is contended here that merely by examining the bundle of rights in the courtroom, its components are revealed and subsequently prioritised to determine the justice of the case; in the practical sense the metaphor is defeated. While it is a useful description of the existence of property rights in a given situation outside of court, the facts of each legal case in court soon clarify whether the myriad extant property rights are relevant or irrelevant.

This problem arises because, as suggested, a bundle of rights is constituted by rights. Taking *Craft* as an example, it is sometimes simple to identify the particular relevant relationships and rights: the right a man has to enjoy community property with his family and the right of the tax collectors to seek the payment of his debts. Two clear values stand out from this: protection of the family and the payment of tax as a member of society. Indeed the court in *Craft* split based generally on these values. It seems that although Dagan decries the use of forms through misinterpretation of the bundle of rights, he understates that the values which exist behind the forms were strongly considered.

This being said, any flaws which may exist in Dagan's bundle of rights argument relating to *Craft* do not obscure the potential good the property institutions could do. If the relationships such as that between a man, his family and the tax man are defined specifically by law, there would surely be less ambiguity in the outcome of the conflict. As long as the foundation values are sure and solid, the property institutions can be constructed; the split decision in *Craft* suggests that in reality it is the very determination of such values that could pose the biggest difficulty.

E THE NUMERUS CLAUSUS DOCTRINE

Unfortunately, the bundle of rights–institution–forms paradigm reveals another potential pitfall in the creation of property institutions. Dagan states that property law should only offer limited bundles which are justifiable jointly in law and human values but the bundle of rights has endless permutations offering countless bundles.[21] In response to this, he brings in the numerus clausus principle to limit the number of property institutions he proposes. The numerus clausus principle in property law dictates that there is a limited number of property rights that exist in order to avoid confusion and ensure the law is accessible for any interested

[18] ibid 1534.
[19] *United States v Craft* 535 US 274 (2002).
[20] Dagan (n 11) 1534.
[21] Dagan (n 11) 1534.

parties.[22] The numerus clausus principle is not explicitly seen in Irish law, however it is possible to draw an analogy to English law here as the numerus clausus in that jurisdiction includes the same rights found in the Irish system (for example mortgages, easements and restrictive covenants), limited to around twelve categories.[23]

Dagan emphasises the importance of the numerus clausus principle to the institutions concept, but while it is desirable to keep property within limited, recognisable parameters, the need to apply strict rules to specific value–based property relationships indicates that specificity may fundamental in defining property institutions. This specificity means that a property institution may have limited scope in terms of relationships and values, so another property institution will theoretically comprise a variation on the same theme. Taking into account the extent of property law, variations could create a massive amount of property institutions and, therefore, rules. Furthermore, new types of property right can simply be created, or derived from first principles, that did not necessarily exist before; the Civil Partnership and Certain Rights and Obligations Act (CPCROC) 2010 is an example of this, as it provides familiar property ownership and succession rights, though using an altered legal framework for a new class of people.[24]

A solution to this potential conflict could be to allow for the creation or derivation of new property rights as long as they are in keeping with Dagan's model of values, relationships and expectations. In allowing them to pass in into property law, the numerus clausus is expanded. Taking the CPCROC Act as a model, it precisely presents the property rules for a section of society, covering various legal and human relationships based on widely accepted modern values. Although the elements of the numerus clausus in England are far broader than to be subject to alteration by the provisions of the CPCROC Act, it may be wise to try and keep precision in the larger scheme of property institutions as each internal scheme grows more precise.

Failing a loosening of the numerus clausus principle, it could be foreseen that potential property institutions could find themselves outside of their ideal form, and thus become subject to judicial interpretation outside of their expectations; a realist such as Dagan would find this fundamentally objectionable.

F THE NECESSITY OF STRICT RULES

Dagan presents the property institutions as being accompanied by their own strict rules for defining how the relationships are to operate; basically a code for each. He says that by using property institutions with strict rules, the rights and interests of all parties are vindicated through the reassurance of having the relationships explicitly verified by law, the clarity of separating the elements of one's property rights regarding each actor ('ownership for one purpose does not necessarily imply ownership for another and that the configuration of

[22] Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, Oxford University Press 2009) 137.
[23] ibid 139.
[24] Civil Partnership and Certain Rights and Obligations Act 2010, ss 4 and 8.

property rights is context dependent'[25]) and the economy of having the information detailing the property relationship readily available for interested third parties (also by virtue of the numerus clausus doctrine stopping over–development of property institutions).[26]

Dagan's realist leanings can be seen at work here in the introduction of strict rules. As has already been noted, scepticism of rules is fundamental to realist thought, and by introducing such rules it is possible that Dagan wishes to describe a realist ideal, a system in which rules hold greater authority and thus those entering into property relationships are secure in their expectations.

Looking more closely at the rules, Dagan describes the process of creating them as reform through abolition, reconstruction of content and restatement.[27] In Ireland, property law is overwhelmingly covered by modern legislation (Registration of Title Act 1964, Succession Act 1965, Registration of Deeds and Title Act 2006, Land and Conveyancing Law Reform Act (LCLRA) 2009, CPCROC 2010 to name some of the key acts) and is still subject to reform (The Law Reform Commission's Fourth Programme of Law Reform includes proposals for succession law, compulsory acquisition of land and landlord and tenant law).[28] Property law has been changing in keeping with the development of values in Ireland, taking into account new institutions based on new values and relationships in a progressive fashion; as Fiona de Londras observed, '[i]t goes without saying that the Civil Partnership and Certain Rights and Obligations Act 2010 is, in itself, a significant if not monumental piece of legislation for a country that only decriminalised male homosexual sex in 1993.'[29] The subsequent Marriage Bill 2015 exemplified further the rapidly changeable nature of property institutions. In this respect, one could say that, overall, Ireland possesses the self–awareness to make sure that domestic property law is of its time, and that Dagan would be satisfied that the scope and development of legislation suit his institutions concept.

However, realists also know that ultimately the power to interpret these rules lies with the judiciary. In an ideal system as described, it is foreseeable that any judicial interpretation of the law outside the strict rules could completely subvert expectations. In Ireland, Dagan may again find satisfaction in the respect shown to the legislature by the judiciary under Ireland's interpretation of the separation of powers.[30] On this matter, it could be said that the success of the strict rules aspect of property institutions is a reality in Ireland.

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[25] Dagan (n 11) 1563.
[26] ibid 1565.
[27] ibid 1565.
[28] Law Reform Commission, 'Fourth Programme of Law Reform' (LRC 110 – 2013).
[29] Fiona de Londras, 'CPCROCA 2010: de Londras on Civil Partnership and (Marriage) Inequality' (*Human Rights in Ireland*, 5 August 2010) <http://humanrights.ie/children-and-the-law/cpcroc-act-de-londras-on-civil-partnership-and-marriage-inequality/> accessed 23 February 2015.
[30] *McGrath v McDermott* [1988]1 IR 258, 276. 'The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable. In rare and limited circumstances words or phrases may be implied into statutory provisions solely for the purpose of making them effective to achieve their expressly avowed objective' (Finlay CJ).

G APPLICATION TO IRISH HOUSING LAW

As a contentious legal and political issue, various sources of law provide various examples of respect for values relating to housing, such as in the Treaty on European Union, which outlines respect for values such as 'human dignity' in Article 2,[31] and 'social and housing assistance so as to ensure a decent existence' in Article 34(3)[32] and the less specific (though more legally reliable) provisions of the European Convention on Human Rights. While these values have driven development of social housing law and theory, this specific issue in housing law could benefit from being addressed from a new perspective. It is proposed here that Dagan's realist institution concept of property provides an ideal legal framework for this task, while maintaining the normative tradition of housing law.

H THE PROBLEM

The crucial area for improvement is the occupier–landlord relationship and recovery of dwellings in local authority housing, currently covered by s 62 of the Housing Act 1966. Section 62 specifically states that there is no tenancy in dwellings provided under the Act, and the dwellings may be recovered upon demand by the relevant authority (ie landlord), with supplementary support unconditionally provided by court order.[33]

This section of the Act has garnered a large body of legal criticism, primarily from the European Court of Human Rights (ECHR), and increasingly from national courts. It has been argued that the mechanism of the statute generally constitutes degrading treatment (ie a lack of respect for the individual's rights) in the lack of fair procedure in protecting the home, relating to Articles 3, 6 and 8 of the European Convention on Human Rights (ECHR) respectively.[34] In Ireland this criticism, brought into the courts through the enactment of the Human Rights Act 2003, was initially deflected in rulings that judicial review constituted enough of a safeguard.[35] This changed with *Donegan v Dublin City Council*,[36] in which section 62 was deemed disproportionate to the housing management requirements of local authorities, resulting in a declaration of incompatibility. A similar outcome came subsequently in *Dublin City Council v Gallagher*,[37] indicating that Irish courts had come into alignment with the ECHR on this matter.[38]

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[31] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Article 2.
[32] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Article 34(3).
[33] Housing Act 1966, s 62.
[34] *López Ostra v Spain* App no 16798/90 (ECtHR, 9 December 1994), *Moldovan v Romania* App nos 41138/98 and 64320/01 (ECtHR, 5 July 2005).
[35] *Gifford and Another v Dublin City Council* [2007] IEHC 387, *Leonard v Dublin City Council* [2008] IEHC 79.
[36] [2008] IEHC 288.
[37] [2008] IEHC 354.
[38] *McCann v United Kingdom* (2008) 47 EHRR 913.

I THE PRINCIPAL SOLUTION

In *Pullen v Dublin City Council*[39] it was suggested that section 14 of the Conveyancing Act 1881, concerning applications for a landlord's re-entry to the property, could provide an ECHR-compliant method of repossession. This suggestion has also been made by various legal agencies.[40] From the Realist perspective this proposed remedy to the offending section 62 could seem counterintuitive- a reversion to archaic legislation while criticisms of housing law already condemn its complexity and wide spread of sources (it has been suggested that more codification is needed)[41]- and a missed opportunity for modern normative reform.

It is argued here that a reform of the existing section could introduce the courts or an independent tribunal to provide the option of defence for dispossessed tenants, which would be a sufficiently equitable reconstruction of the repossession element of the landlord–tenant relationship, in accordance with the values espoused by the ECHR. In this context traditional realist theory is subverted, as it is the judiciary that potentially provides the security of strict rules to limit the unpredictability of the legislature and executive in housing management.

J A GREATER REALIST REFORM

Expanding on the scope of the legal values already established in the ECHR and courts, a realist reform of section 62 could go beyond meeting the ECHR's 'safeguard' requirements, but a *Craft*–like conflict of values exists. On one hand, an approach following the concepts of dignity and equality is desirable. It was stated by Kearns J in *Dublin City Council v Fennell* that '[i]t goes without saying… that the position of a tenant of a housing authority compares unfavourably with that of a private law tenant,'[42] in relation to various statutory protections, and the ECHR has also recognised this, as seen above. Furthermore, recent legal commentary has been critical of the idea of 'property insiders and property outsiders' in property values. Lorna Fox O'Mahony argues that equality is impossible under the current legal framework as it favours one group over another, and this hampers effective treatment of problems; the different treatment of recipients of social support (such as housing) in property law 'others' them and hampers their ability to achieve the greater goals in society such as citizenship, welfare and life chances.[43] Dagan also recognises property relations as being fundamental to one's independence and interpersonal power, and notes that 'interpersonal dependence often takes the form of subordination, which is generated by severe inequalities even when everyone's survival and basic needs are secured'.[44]

Therefore, theoretically, a desirable result of a reformed section 62 would be a desegregation of the enjoyers of property rights in the family home and the 'others'. It could be argued that

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[39] [2008] IEHC 379.
[40] Padraic Kenna, *Housing Law, Rights and Policy* (Clarus Press 2011) 791.
[41] Neil Maddox, *Housing Authority Law* (Round Hall 2010) viii.
[42] *Dublin City Council v Fennell* [2005] IESC 33, [2005] 1 IR 604, 614.
[43] Lorna Fox O'Mahony, 'Property Outsiders and the Hidden Politics of Doctrinalism' [2014] Current Legal Problems 1, 9.
[44] Hanoch Dagan, *Property: Values and Institutions* (Oxford University Press 2011) 64.

the removal of the aforementioned 'no tenancy' aspect of section 62 and insertion of a system of individually reviewed, renewable fixed term tenancies would fulfil the requirements of a secure home. With the local authority retaining control of the housing stock by introducing tenures with limitations of time, both parties would have more accurate expectations of security of the housing during the terms provided for, while it could also be a step towards equality as discussed.

The introduction of a system of statutory fixed term tenancies with the provision of a legal intermediary in the repossessions process could ideally tie the three values of access to the law and legal protection, the right to a safe home and executive societal management in the best possible configuration. This potential property institution would be well tailored to Dagan's idea of strict rules defining a relationship, and leaves the judiciary the natural role of deciding the outcome of conflicts, which would hypothetically be fewer and more precise in nature.

However, an opposing value is utilitarianism via the pragmatic management of the housing stock, facilitated by the straightforward repossessions process of s 62, argued by the defendant in *Pullen*.[45] This notion was dismissed as disproportionate in both that case and *Donegan*,[46] however the ever growing housing crisis suggests pragmatism could take priority over the intricacies of human rights law or a normative reform. The view that this value is of paramount importance in the immensity and complexity of modern government policy could lead one to argue that the s 62 is normatively appropriate as it stands.

K THE QUALITIES OF PROPERTY

The final question to consider is whether such legal discussion falls within the realm of property rights; in adapting Dagan's theories of property, straying too far from what constitutes property could defeat the undertaking entirely.

The numerus clausus doctrine which is of vital importance to Dagan's property institutions, currently leans against the inclusion of a right to social housing as described above. In *National Provincial Bank Ltd v Ainsworth*, Lord Wilberforce stated that:

> Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.[47]

While the first three numerus clausus qualities listed lend themselves conveniently to the construction of property institutions, the latter does not, due to the 'no tenancy' aspect of section 62. However, in theory, as each of the two amendments to section 62 outlined above is made, the permanency and stability of the local authority tenant is increased, and the right

[45] [2008] IEHC 379.
[46] [2008] IEHC 288.
[47] *National Provincial Bank Ltd v Ainsworth* [1965] UKHL J0513-4 20.

becomes more property–like. While such a right may not be purely property based, it could be considered an associated right, as mentioned by Lord Wilberforce. Gray and Gray note that traditionally the courts in England have been extremely strict on the creation of new forms and holdings in real property, but predict a decline in the traditional numerus clausus in modern times.[48] From a legal reformist standpoint, some proposals for landlord–tenant related aspects under the numerus clausus suggest abandoning the law of property entirely for contract law,[49] emphasising the appropriateness of property rights in the social housing context, where the law is derived from human rights rather than economic interests.

In addition, theorists such as Charles Reich state that as the value of state largesse grows to the individual (eg to one's livelihood and family life) the realm of property rights will have to expand to protect it.[50] This new thinking about what constitutes property may be foreshadowed in housing law in the ECHR's granting of a property right on an order of entitlement to housing in *Telyatyeva v Russia* by declaring it a possession;[51] although case–specific and technical construction rather than normative judgment, it shows to a State's obligation to provide housing to an individual can be ascribed most readily to the law of property.

A contrary argument on the expansion of the scope of property rights has been made by JW Harris, who argues that:

> [p]ersonal and political rights of fundamental importance deserve a firmer basis than any which can be supplied by controversial extensions of provisions historically targeted on the protection of private wealth. There are more important things than property.[52]

It could be said that Harris frames the most convincing arguments against the extension of property rights: the avoidance of confusion and the individual importance of each human right. One can see the attractiveness of such clarity to a legal realist, but the values associated with property are of arguably greater importance, and make it an essential 'conceptual shift'[53] to hitch the institution of housing to.

L CONCLUSION

The least advantaged are not, if all goes well, the unfortunate and unlucky—objects of our charity and compassion, much less our pity—but those to whom reciprocity is owed as a matter of basic justice.[54]

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[48] Gray and Gray (n 22) 139.
[49] Henry Smith and Thomas Merrill, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 Yale Law Journal 1, 69.
[50] Charles Reich, 'The New Property' (1964) 73(5) Yale Law Journal 733.
[51] *Telyatyeva v Russia* App no 18762/06 (ECtHR, 12 July 2007).
[52] JW Harris, *Property and Justic'* (Oxford University Press 2002) 154.
[53] ibid 159.
[54] John Rawls and Erin Kelly (eds), *Justice as Fairness: A Restatement* (Harvard University Press 2001) 139.

When taken in its original form, Hanoch Dagan's system of property institutions is conceptually simple; one finds the relationship, determines the appropriate values, and defines it with precise statutory rules. There are certain prerequisites to the exercise, such as the appropriate determination of values and adherence to the numerus clausus, which could prove problematic; however, the property institutions can offer a refreshing approach to the modern complexities of property law and normative ambiguities. It is precisely this reason that Dagan's property institutions are an attractive model for reform.

This paper has adapted the Dagan model beyond pure property law to suit the problem of section 62 of the Housing Act and showed how law can either be fixed, or, when the opportunity arises, completely reformed with a clear design. In this case, the property institution provided the ideal vessel to carry the range of values and laws needed to achieve what could be said to be a fairer balance of interests in the repossessions area of social housing law.

Finally, criticism of a model such as the one described above could raise issues based on various problems, such as the difference between 'respecting rights' and real obligations in social housing, or the financial implications of such a large property reform, but as Dagan notes, the realist approach to property law is 'an exercise in legal optimism',[55] and it could be said that any consideration of it would be a move in the right direction.

[55] Dagan (n 11) 1564.