

**DURHAM UNIVERSITY**  
**DEPARTMENT OF LAW**

**&**

**CENTER ON PROPERTY, CITIZENSHIP, AND SOCIAL  
ENTREPRENEURISM (PCSE)**  
("Peace")



*A CENTER FOR ADVANCED PROPERTY STUDIES  
COLLEGE OF LAW  
SYRACUSE UNIVERSITY*

**PRESENT:**

**A WORKSHOP ON  
COMPARATIVE, TRANSNATIONAL, & EMERGING  
ISSUES IN PROPERTY LAW**

**JULY 18-19, 2007**

**Durham, England**

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## Program

Note: All speakers are allocated 30 minutes for a presentation. Twenty minutes are allocated for the presentation and 10 minutes for questions and answers. Co-authored papers are allocated 45 minutes, 30 minutes for the presentation and 15 minutes for questions and answers. All times will be strictly enforced so that every participant receives equal time. Time is short so get to the heart of your work quickly. We encourage follow-up discussion between participants during breaks, lunch, and evening social events. Hopefully, discussion and scholarly exchange will continue among participants after the workshop is completed.

### WEDNESDAY, JULY 18

8:30 – 9:00	Coffee Service
9:00 – 9:15	Welcome – Tom Allen & Robin Paul Malloy
9:15 – 9:45	Robin Paul Malloy, From Property to Exchange: Opening Thoughts
9:45 – 10:15	Patrick MacAusian, Comparing Land Laws: Three Perspectives and some Reflections
10:15 – 10:45	Rose Villazor, Indigenous Land Alienation Laws in the U.S., France and Fiji: A Comparative Analysis
10:45 – 11:00	Break
11:00 – 11:30	Laura Underkuffler, Property, Polity, and Structural Inequality
11:30 – 12:00	Andre van der Walt, Property between Security and Citizenship: The Post-apartheid Transformation of South African Property Law
12:00 – 1:15	Lunch
1:15 – 1:45	Ann Bartow, The Propertization of Gender Via the Color Pink
1:45 – 2:15	Lisa Dolak, Media Portrayals of Intellectual Property Rights
2:15 – 2:45	Shubha Ghosh, Property and Competition
2:45 – 3:00	Break
3:00 – 3:30	John Lovett, Exploring the Limits of Private Land Use Restrictions from a Comparative Perspective

- 3:30 – 4:00 Sarah Harding, The Private Side of Property
- 4:00 – 4:30 Anna Lawson, Property v. Equality: The Challenge of Reasonable Accommodation
- 4:30 – 4:45 Wrap Up
- 5:00 Private tour of the Castle followed by reception (food & wine) at the Castle. Participants and family included

#### **THURSDAY, JULY 19**

- 8:30 – 9:00 Coffee Service
- 9:00 – 9:15 Morning Announcements
- 9:15 – 9:45 Rashmi Dyal-Chand, Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights
- 9:45 – 10:15 Robert K. Home, British Colonial Land Law and the Habitat Global Land Tools Network
- 10:15 – 10:45 Daniel Fitzpatrick, Property Regulation Through Private Ordering: Some Insights from Social Trauma in Aceh and East Timor
- 10:45 – 11:00 Break
- 11:00 – 11:30 Karen Morrow, EU Habitat Conservation and Individual Property Rights
- 11:30 – 12:00 David Driesen, Dirty Input Limits
- 12:00 – 1:15 Lunch
- 1:15 – 1:45 Thomas Mitchell, Undivided Ownership: Selected Comparison Reveals Fractionated Approaches
- 1:45 – 2:15 Jim Smith
- 2:15 – 3:00 Lorna Fox & Neil Cobb, Taxonomies Of Squatting: A Socio Legal Analysis Of Unlawful Occupation
- 3:00 – 3:15 Break

3:15 – 3:45	Peter Yu, Cultural Relics, Intellectual Property and Intangible Heritage
3:45 – 4:15	Hilary Lim, Islamic Law, Human Rights, and Land
4:15 – 4:45	Garth Jones,
4:45 – 5:15	Tom Allen, Parting Thoughts
5:30	Private Tour of Cathedral and Trip to a local pub (first pint on PCSE). Participants and families included.

# ***Abstracts***

***A Workshop On Comparative,  
Transnational & Emerging  
Issues in Property Law***

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## ***The Propertization of Gender Via the Color Pink***

**Ann Bartow**

**University of South Carolina School of Law**

*This paper will identify and discuss ways in which “femaleness” functions as intangible property that is commoditized and commercialized through application of various trademark law constructs. The particular focus for this article (and related presentation) will be on the intersection of color pink, trademark law, and gender.*

## ***Media Portrayals of Intellectual Property Rights***

**Lisa A Dolak<sup>1</sup>**  
**Syracuse University College of Law**

*The recent dramatic expansion of intellectual property rights (IPR) acquisition and exploitation around the globe has made IPR a pressing issue of policy debate and a regular item on the Supreme Court's docket. The surge in IPR activity has also drawn increased media attention, including extensive coverage of several high-profile IPR disputes. This study of how the national and international mass media portrays intellectual property rights assesses this coverage, examining the images of IPR constructed by the media as well as how these media images have shaped popular understanding and influenced judicial decisionmaking.*

*I am presently focusing (for purposes of refining my study method) on selected newspaper coverage from the last few years, tracking the incidence and nature of errors and negative, positive, and neutral messages relating to the United States patent system. Ultimately, I plan to expand my research to include additional media sources and categories, and to consider questions such as: Are different types of IPR owners represented favorably or unfavorably in the media? Which IPR-related conduct (e.g., acquisition, enforcement, licensing) does the media laud or condemn, and under what circumstances? Is there evidence that media portrayals influence judicial decisionmaking or legislative policy-making?*

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<sup>1</sup> Professor of Law and Senior Associate Dean for Academic Affairs, Syracuse University College of Law

## ***Dirty Input Limits***

**David M. Driesen**  
**Angela S. Cooney Professor**  
**Syracuse University College of Law**

*The debate about the relative merits of command and control regulation and emissions trading has become increasingly stale, and has tended to displace academic discussion of more important issues. This paper seeks to address one key overlooked issue, what precisely should we "propertize"? Constant discussion of "emissions trading" suggests that we must propertize emissions. But the most successful environmental programs do not limit allowances to emit, they limit the inputs that cause emissions. I will present preliminary work on a paper I'm preparing with Amy Sinden (Temple Law School) exploring the idea of propertizing and then limiting rights to employ "dirty inputs," like coal and gasoline, that lie at the root of many of our most serious environmental problems. Such "dirty input limits" can be made into tradable allowances, and have been, as part of the implementation of our most successful environmental efforts, those limiting production of ozone depleting chemicals and eliminating lead from gasoline.*

***Exporting the ownership society:  
A CASE STUDY ON THE ECONOMIC IMPACT OF PROPERTY  
RIGHTS***

**Rashmi Dyal-Chand  
Northeastern University School of Law**

*Peruvian economist Hernando de Soto is a favorite of the World Bank, numerous world leaders, and politicians in both parties in the United States. His work has been so influential that he has been considered for the Nobel Prize in Economics. Perhaps de Soto's prescription for the ills of developing economies is so influential because it seems so simple. He claims that if poor people in the Third World are given formal title to the assets they currently hold "extra-legally," they will be able to generate capital, the "surplus value" that produces wealth. This article raises some cautionary notes, concluding that things are not so simple. It examines whether poor people who have formal title to their homes in the US, the country de Soto uses as his paramount example, experience the benefits that de Soto attributes to formal ownership. The article finds that the expansion of the ownership society to include the poor does produce many of the benefits de Soto claims. The greatest benefit is increased access to the markets for both residential real estate and mortgage loans. However, much of the wealth accruing from poor people's participation in these markets goes to market participants other than the poor. For example, many poor homeowners who seek to enhance their wealth by accessing more credit are victimized by predatory lenders who capture the wealth. For many also, the conversion of debt into long-term improvement of welfare is an uncertain and difficult process. For those who epitomize de Soto's hypothesis by using their formal title as an aid in starting small businesses, the path is especially complex and uncertain. In the end, there is no clear connection between property formalization and greater social welfare. This lesson in turn provides useful information about what it is reasonable to expect from rule of law reforms.*

# **TAXONOMIES OF SQUATTING: A SOCIO-LEGAL ANALYSIS OF UNLAWFUL OCCUPATION**

**Lorna Fox and Neil Cobb,  
Law Department, University of Durham**

*'Squatting', the unauthorised occupation of land belonging to another, is constructed through a variety of discourses; political, legal, cultural, personal. This paper argues that the variety of legal responses to squatting (particularly, but not exclusively, the law of adverse possession) are underpinned by a specific set of moral precepts, derived from both explicit and implicit value-laden assumptions about the squatter and the dispossessed landowner. Unpacking the range of circumstances in which squatting occurs, the paper proposes a series of taxonomies by which legal responses to unlawful occupation can be classified, and employed to facilitate a more systematic and coherent understanding of law's responses to the phenomenon of squatting. Specifically, it contends that three key factors define the legal construction of the squatter: (1) the identity of the squatter; (2) the type of property squatted; and (3) the squatter's motivation for trespass.*

## **"Property and Competition"**

**Shubha Ghosh**  
**Southern Methodist University, Dedman School of Law**

*This paper makes the case for considering intellectual property law as a type of competition policy by examining norms of competition in the debate over the scope of intellectual property. Contrary to the neoclassical theory of competition that informs certain aspects of the intellectual property debate, the rhetoric of competition does not focus solely on the tension between price and non-price competition as a mechanism for the allocation of scarce resources. Instead, competition serves to counter two competing visions of the creative and inventive process: the process as a system of patronage and the process as one of collaboration and cooperation. Patronage systems focus on top down hierarchical arrangements where economic resources are used to support the author whose talents are used often to the benefit of the vision and values of the patron. By contrast, collaborative creative arrangements are horizontal and based on cooperation. Competition resolves tensions in each of these alternative arrangements. First, competition serves to decouple the patron from the author. In other situations, competition serves to resolve tensions that arise in collaborative enterprises when conflicts in vision and values in creative processes arise. While competition can resolve some of the problems with both patronage and collaborative arrangements, competition introduces problems of its own such as the economic dependence of the author on the marketplace and the problem of duplication and redundancy associated with the independent author. Against this theoretical backdrop, the paper will conclude by consideration of two examples: the patronage system during the period of creative energy known as the Harlem Renaissance and the continuing intellectual property debates in the fashion industry. These examples illustrate the tensions among competitive, patronage, and collaborative arrangements. These examples also show how the development of competitive norms serve to resolve these tensions.*

## ***The Private Side of Property***

**Sarah Harding**  
**Chicago-Kent College of Law**

*One of the recent and important questions explored by scholars focusing on the constitutional protection of property in the U.S. Constitution and as a comparative matter is whether constitutionally protected property rights incorporate social obligations not just rights. Further, is such a constitutional definition of a right to property different from a private law right to property? These questions are at the heart of Professor Alexander's recent book *The Global Debate over Constitutional Property* in which he concludes that constitutional property questions cannot be controlled by private law meaning.*

*The flip-side of this is a sort of constitutional over-reaching. If constitutional property rights are different from private law property rights is the use of fundamental rights analysis to resolve questions in private property disputes as problematic as using private law to limit our understanding of constitutional property rights? Arguably this is what happened in the recent case of *Pye v. UK*. In *Pye* the European Court of Human Rights found that the doctrine of adverse possession runs contrary to the right of "peaceful enjoyment" of property as guaranteed in the European Convention on Human Rights. This paper will explore this issue as a counterpart to the question addressed in Professor Alexander's recent work. Should how we define property rights in private law adjudication be different from the definition of property rights in constitutional adjudication?*

## ***British colonial land law and the Habitat Global Land Tools Network***

**Professor Rob Home  
Anglia Ruskin University**

*This paper examines issues of land management in the context of Hernando de Soto's thesis in *The mystery of capital*, that private property rights offer no less than a potential solution to world poverty. British land law, the philosophy of possessive individualism and common law rights, was transferred to its colonies, with a utilitarian strong-state ideology. It offers a 'pro-poor' analysis, considering those who might be excluded, such as indigenous peoples, tribal communities and those with 'no fixed abode.' The Middle East illustrates problems of eviction, absentee ownership, and restitution of land rights, while the post-colonial legacy continues through hierarchical and divisive frameworks of land law and regulation. The newly-created UN Habitat Global Land Tools Network offers a loose agency for the transfer of land law between nations and cultures, often based upon co-operative and communal models, such as including garden cities, condominium title and land readjustment.*

# ***Property v Equality: The Challenge of Reasonable Accommodation***

**Anna Lawson  
University of Leeds**

*Throughout history, redistributive arguments based on principles of equality or social justice have come into conflict with the claims of property owners. Such arguments have taken many forms. Examples which have attracted global attention over the past half century are the arguments of indigenous or dispossessed peoples for the return of land forcibly taken from their ancestors. In this context, the redistributive nature of the claim is clear and the conflict with the property rights of others is stark. In this paper I will explore another context in which similar, if sometimes less explicit, tensions between claims to equality and claims to property are being played out.*

*My focus is the duty imposed on employers, service providers, landlords and others to take reasonable steps to accommodate the needs of disabled people – the reasonable accommodation duty. Such a duty, which first found expression in US civil-rights jurisprudence, has become a fundamental feature of powerful disability equality laws and the subject of intensive campaigning on the part of disability activists.*

*The Framework Equal Treatment Directive (Directive 2000/78/EC) requires all EU Member States to impose such a duty on employers. The UN Convention on the Rights of Persons with Disabilities, which opened for signature on 30 March 2007, will require all signatory States to enact such a duty in situations extending beyond employment. In the near future, then, the duty is likely to become an important element in the domestic legal systems of an increasing number of countries all over the world.*

*Despite its rapid rise to prominence, the reasonable accommodation duty presents certain challenges to property rights. It may, on occasion, require employers and others to undertake significant expenditure with obvious implications for their freedom to decide how to use their possessions or to make a profit. It may also require physical adaptations to premises. This, too, may restrict the freedom of*

*property owners to exercise control over their possessions and may even result in potential devaluation.*

*In both Ireland and the UK, attempts to introduce comprehensive and effective reasonable accommodation duties have encountered the solid obstacle of property rights. In Ireland, the barrier took the form of Article 26 of the Constitution – an obstacle which, after a helpful push from the Framework Directive, has now been successfully overcome. In the UK, the barrier has taken the more limited, but nonetheless intractable, form of the traditional proprietary rights and concerns of residential landlords. Although the Disability Discrimination Act 2005 has done much to whittle this barrier away, it has not yet been entirely removed.*

*In this paper I will consider relevant developments in both Ireland and the UK. I will also refer briefly to developments in the homeland of the reasonable accommodation duty – the US. Despite the fact that that country appears to have escaped head-on collisions between principles of equality and property in this context, a largely unarticulated desire to avoid trespassing on the latter may well underlie some of the most significant (and unfortunate) limitations on the scope of the Americans with Disabilities Act 1990.*

*The reasonable accommodation duty represents a tool of vital importance in the struggle to achieve societies in which disabled people are fully included and valued as citizens on an equal basis with others. It places a burden on private individuals, as well as State bodies, to consider how best to remove the barriers which would otherwise operate to exclude disabled people. Financial assistance from the State towards the costs of accommodations has the potential greatly to enhance the effectiveness of the duty. It is, however, no substitute for the duty. The striking of an appropriate balance between the demands of equality and those of property is therefore unavoidable. It will be suggested that an over-enthusiastic protection of the property rights of those subjected to reasonable accommodation duties is one of the most serious threats to the implementation of effective disability equality law.*

## ***Exploring the Limits of Private Land Use Restrictions from a Comparative Perspective***

**John A. Lovett**  
**Loyola University New Orleans College of Law**

*Over the last thirty years, courts, law reformers and academics in many jurisdictions have debated the extent to which private land owners can enter into private contractual agreements that restrict future owners and possessors' activities on and uses of that land. Beginning with the seminal decision in *Tulk v. Moxhay* in England and then continuing in the United States with *Neponsit Property Owners Ass'n v. Emigrant Industrial Savings Bank*, English and American courts gradually abandoned some of the traditional common law rules that limited landowners' ability to impose negative restrictions on land by enforcing equitable servitudes and restrictive covenants with meaningful remedies. In the last decade of the twentieth century, the American Law Institute's Restatement (Third) of Property: Servitudes offered an even more radical departure from common law limitations on the content of private land use restrictions by dropping the traditional common law touch and concern test and suggesting that private land owners should be able to exercise broad contractual freedom to enter into any kind of private land use restriction as long as the arrangement is not arbitrary, spiteful or capricious, does not unreasonably burden fundamental constitutional rights, and does not impose unreasonable restraints on alienation, trade or competition. (See Restatement, §§ 3.1-3.7.)*

*While some American courts have accepted the American Law Institute's invitation to drop the touch and concern standard for evaluating the permissibility of private land use restrictions, others continue to apply the common law touch and concern requirement. Meanwhile private parties continue to expand the boundaries of private land use restrictions by creating ever more invasive, detailed and often controversial kinds of restrictions (and sometimes obligations), whether they arise in the context of carefully planned common interest residential communities, in commercial contexts where the restrictions often aim to restrict (or carefully manage)*

*competition or restrict future land owners' ability to seek judicial redress for environmental harm, and in conservation and preservations contexts in which land use restrictions are used to freeze land use patterns for long periods of time.*

*My talk aims to explore the outer boundaries of private land use restrictions from a comparative perspective. I will explore both the motivations that seem to drive private parties and sometimes government institutions to seek to establish private land use restrictions that push beyond the limits of traditional servitude and covenant categories and instances in which courts and legislators have sought to impose limits on the extent of contractual freedom that can be used to create these long-term land use restrictions that run with the land either in favor of other property estates or in favor of natural or juridical persons. I will also seek to determine what triggers, if any, typically cause courts and legislatures to cabin this general trend toward expanding contractual freedom in the creation of private land use restrictions.*

*My examples will come both from recent developments in American and English law and from two mixed jurisdictions that operate on the fringes of the dominant Anglo-American tradition—namely Louisiana and Scotland—whose private law of land use restrictions draws inspiration from and has deep substantive roots in continental, Romanist legal traditions. Examples of controversial forms of land use restrictions at the outer boundaries of traditional common law categories, attempts to limit restrictions and the unraveling of limits that I may examine include:*

- Recent American court decisions following or rejecting the Restatement (Third) of Servitudes approach to regulating the content of restrictive covenants and negative servitudes.*
- The recent controversial New Jersey decision in *Committee for a Better Twin Rivers v. Twin Rivers Homeowner's Association*, 890 A.2d 947 (N.Y. App. Div. 2006) (certiorari granted by the New Jersey Supreme Court), holding that a planned unit development's governing association is the functional equivalent of a governmental body and thus cannot deprive residents of their right to express views on matters of public or community concern.*

- *The recent Louisiana decision in RCC Properties, LLC v. Wenster Properties, L.P., 930 So.2d 1233 (La. Ct. App. 2006), enforcing a covenant against competition for the first time under Louisiana law.*
- *The Louisiana Recovery Authority's recent efforts to create owner occupancy and other covenants running with the land designed to promote redevelopment of residential housing after the devastation caused by Hurricane Katrina in Louisiana.*
- *The Title Conditions (Scotland) Act 2003, § 3, and Scottish judicial decisions preceding the Act.*
- *Recent developments in English law.*

## **Comparing Land Laws: Three Perspectives and some Reflections**

**Patrick MacAuslan  
Birkbeck College, London**

*In the last year three books written by lawyers have been published which from very different stand points, address issues of land law from a comparative perspective; Ambreena Manji's *The Politics of Land Reform in Africa*, a critical examination from an academic perspective of land law reform in Africa; John Bruce's *Land Law Reform: Achieving Development Policy Objectives*; a view from the World Bank focusing on drafting new land laws and Siraj Sarit and Hilary Lim's, (both from the Law Faculty at the London Metropolitan University) *Land Law and Islam: Property and Human Rights in the Muslim World*, a survey of the subject written as part of UN-Habitat's Global Tenure Security project. As a major contributor to land law reform in Africa, I come in for some sharp criticism from Manji, a Reader in Law at Keele University. John Bruce, a former senior lawyer and land tenure adviser in the World Bank, (and formerly at the Land Tenure Centre, University of Wisconsin, Madison) and I have had a friendly disagreement for many years on drafting land laws: he is a minimalist; I am a maximalist. I worked for UN-Habitat for three years as their Land Management Adviser and still work for them and other agencies increasingly in Islamic countries on land issues – Afghanistan, Somalia/Somaliland, Sudan, Syria and Yemen. This paper would consider issues of land law reform, transplantation and homogenisation in the light of, and by way of commentary on these three publications and offer some reflections from my own experiences in the field.*

## ***Property in a Market Context: From Property to Exchange***

**Robin Paul Malloy  
Syracuse University**

*It is important for emerging and transitional economies to have an informed understanding of property in a market context. As F.A. Hayek suggested, the primary function of a market economy is not to allocate resources efficiently but to overcome knowledge problems resulting from dispersed and fragmented information. In this function the market is facilitated by a formal, transparent, stable, and predictable system of property rights. In this paper I discuss some of the implications of this Hayekian view which runs counter to the American law and economics paradigm. Significance is given to the idea that knowledge and information are socially situated and involve exchange within and among cultural-interpretive communities. In this context, property functions as an information signifier for exchange, and communities with well developed property law infrastructure have a competitive advantage over communities without such systems. Moreover, the paradox of property is that as exchange networks based on property improve, property itself becomes less important.*

*In this paper I suggest some implications of focusing on the exchange aspects of property rather than on its definition. In this way I hope to set a framework for some of the various topics that will be discussed in the workshop.*

# ***EU Habitat Conservation and Individual Property Rights***

**Karen Morrow  
University of Whales**

*This paper will examine the operation of EU nature conservation law and its impact on individual interests and property in the UK. It will look at both the regulation of activities that have adverse impacts on nature under the Birds (Directive 79/409/EEC) and Habitats (Directive 92/43/EEC) Directives and the funding of protective activities under the LIFE mechanism, in ways that directly impinge upon individual interests in property. The operation of both regulation and funding in this area can prove to be extremely controversial both in principle and in practice and this paper will examine the key problems that arise and attempts to use law and policy to address them.*

## ***Undivided Ownership: Selected Comparison Reveals Fractionated Approaches***

**Thomas Mitchell  
University of Wisconsin Law School**

*This paper analyzes the manner in which property regimes from a selected number of countries uphold or undermine various undivided forms of property ownership. Sometimes these forms of ownership are referred to as concurrent forms of ownership. More colloquially, in some countries, some of these forms of ownership are referred to as heirs' property or family land. The paper will examine the policy reasons that courts, legislatures or other legal institutions in the selected countries under review have offered in support of their particular legal regime that governs undivided ownership. In addition, the paper will consider the extent to which property laws governing undivided property in some countries have influenced the development of laws of undivided ownership in other countries.*

## ***Property, Polity, and Structural Inequality***

**Laura Underkuffler  
Duke University College of Law**

*Recently, the question of the taking of private property for general economic development has loomed large in American constitutional jurisprudence. In particular, a recent decision by the United States Supreme Court which upheld the taking of modest private homes for the purpose of commercial and residential economic development ignited an unprecedented outcry from politicians, journalists, and ordinary citizens. This paper will explore the deeper, structural issues in property and its protection that cases like this raise in the American and other constitutional (and non-constitutional) contexts. It will argue that justice, in such cases, requires recognition of the deep linkages of property, the meaning of community, and socio-economic equality.*

# ***Property between Security and Citizenship: The post-apartheid Transformation of South African Property Law***

**Professor André van der Walt  
Stellenbosch University**

*During the second half of the 20th century, "grand apartheid" undermined democratic forms of governance and citizenship by institutionalizing discriminatory and socially divisive and destructive agricultural and urban land policies and management systems, thereby causing or exacerbating overcrowding, social displacement and economic marginalisation. At the same time, the discriminatory land-use and -management laws and practices of "petty apartheid" destroyed any possibility of fostering social justice, good citizenship and the building of sustainable and supportive communities. The advent of the post-1994 democratic dispensation in South Africa and the concomitant constitutional directives to eradicate the legacy of apartheid and to promote the values of human dignity, equality and freedom present a felicitous opportunity to ask, in the spirit of this conference, whether the land and other property reforms required by or foreseen in the new constitutional dispensation can reverse the legacy of apartheid by, among other things, fostering democratic forms of governance and citizenship and advancing social justice and the building of sustainable and supportive communities.*

*Although I focus on the South African context my analysis is broader than just South African law or South African issues; I attempt to discuss the issue of citizenship and property in a wider perspective with reference to the South African example.*

# ***Indigenous Land Alienation Laws in the U.S., France and Fiji: A Comparative Analysis***

**Rose Cuison Villazor  
Southern Methodist University,  
Dedman School of Law**

*The right to self-determination has become a fundamental principle of international law. Yet it continues to meet resistance from those who view the right to self-determination contrary to the right of the individual against discrimination. The conflict between the right to self-determination and equal protection is illustrated well in the context of indigenous peoples' property rights. For indigenous peoples, the right to self-determination encompass, among other things, the right to own, develop, control and use the lands in their territories and, where relevant, according to their customary laws and traditions. Many States and groups, however, regard any laws and policies that give preferential property laws to indigenous peoples inconsistent with equal protection norms.*

*This paper examines the tensions between the right to self-determination and the right to equal protection in the context of the struggle of indigenous peoples' to gain or ensure autonomy over their lands. In particular, the paper compares and analyzes land alienation laws in the U.S., France and Fiji that limit ownership of land to indigenous persons. The paper first examines whether these laws have furthered the indigenous peoples' right to self-determination. It next compares the legal and political tensions that arose in these nations that were either caused by or related to the land alienation laws. The paper suggests different frameworks for reconciling the tension between the right to self-determination and equal protection principles in these nation states.*

## ***Cultural Relics, Intellectual Property and Intangible Heritage***

**Peter K. Yu**

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*With the adoption of the Convention for the Safeguarding of the Intangible Cultural Heritage, the protection of intangible cultural heritage has received increasing international attention. This paper begins by examining the similarities and differences between cultural patrimony and intellectual property rights. It then highlights the challenges confronting the protection of intangible cultural heritage.*

*The paper concludes by discussing the policy implications concerning whether the law treats intangible cultural heritage as cultural patrimony or intellectual property rights.*