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Amy Strecker and Amanda Byer

Introduction:
Landscape, Law, and Spatial Justice in the former British Empire
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1. Background to the section

The chapters in this section of the volume were written in the context of an ongoing ERC funded research project entitled PROPERTY [IN]JUSTICE,[1] which investigates the role of international law in facilitating spatial justice and *in*justice through its conceptualisation of property rights in land. International law plays an increasing role in land use decision-making (through international norms on trade and investment, energy, environment, human rights, and cultural heritage), and that role can exacerbate inequalities and geographic disparities, but can at times also act as a tool for improved spatial justice. The project is focusing on Ireland, the Caribbean, Kenya, and Southern Africa,[2] regions (and countries) that not only reflect the experience and heritage of the project team, but which also share an important historical dimension, since land law in these jurisdictions was heavily influenced by (British) colonial law. Although the research is concerned primarily with ongoing issues of spatial injustice, the legal history of empire necessarily underpins any study of the contemporary context, and the interaction and reception of international law cannot be analysed in a historical vacuum. In addition, the common law idea of property influenced and continues to influence various strands of international law affecting land governance. The chapters in this section therefore deal with the historical context of land governance in Ireland, the Caribbean, Kenya and Southern Africa, as well as

1 Funded by the European Research Council (ERC), under the EU's Horizon2020 research and innovation programme, grant agreement no. 853514, Sutherland School of Law, University College Dublin.
2 For more information see https://www.landlawandjustice.eu/.

the legacies of that context today – especially in terms of how law, via the deployment of colonial conceptions of property, environment, and community, erased spatial and cultural diversity in land use, with implications for the subsequent legal protection of land, people-place relations, and the ability of communities to relate to land. As the following chapters illustrate, the idea of property narrowly conceived engenders spatial injustice and reduces the importance of land to vacuous space, to be utilised and developed without adequate consideration of the social, environmental, and cultural consequences.

The focus on spatial justice reflects the project's legal geographical approach. Legal geography calls attention to law's "spatial blindness"[3] and the need for local conditions to be infused in the law to reconcile ostensibly impartial legal concepts such as property with their geographic reality or landscape. This often requires recognition of the unique interactions between local communities, land and law, to make law effective. To do so is necessarily decolonial in the Common Law world, as the legal system was imposed during the creation of the British Empire. Landscape as a legal concept in fact predates property.[4] The work of Kenneth Olwig in particular has shown how the elements of community justice, body politic and custom were inherently embedded in early notions of landscape.[5] In "Recovering the Substantive Nature of Landscape", Olwig advocates recovering the "substantive" understanding of landscape, one that is "more concerned with social law and justice than with natural law or aesthetics."[6] Similarly, in the early etymology of property, Nicole Graham has shown how land had significance greater than the sum of its economic production value and was also an important component of identity.[7] The etymology of property and landscape betray these early meanings that were more substantive in character, tied to identity and particular places, before being subverted in favour of more abstract concepts of exclusive ownership and scenery.[8] The substantive nature of landscape has been partially recovered in international law

3 Bennett/Layard (2015) 406.
4 Jones (2005); Olwig (1996, 2002).
5 Olwig (1996).
6 Olwig (1996).
7 Graham (2011).
8 Byer (2023).

norms,[9] but property law remains largely placeless.[10] Indeed, Nicole Graham and Amanda Byer have demonstrated how the (common) law rewrote the land in the language of private property.[11] Land law does not deal with land, but with "placeless property", othered, abstracted and disembodied from the physical or metaphysical being of the land itself, something also alluded to by Sinéad Mercier when discussing energy law.[12]

While legal geography is now a firmly established strand of research,[13] the relationship between transnational law and geography is far more intertwined than is often reflected in the current scholarship. Property rights have defined global power relations since the period of European expansion, and the institution of property, and how it has changed over time, has significantly altered landscapes and people-place relations in ways that have exacerbated environmental degradation, geographical disparities in wealth, and access to resources.[14] On the surface, legal geography (the study of law, its institutions, and norms in relation to space) may not appear to have much to do with legal history, but this is because landscapes (specific geographical spaces or places that are culturally inscribed, evolving out of relationships between land, law and community) have not been foregrounded in the history of law. This is unfortunate for two reasons: first, landscape change can only be meaningfully observed in the longue durée, which necessarily imports the temporal element; and second, landscapes are shaped by law and legal developments, in the sense of customary practices generating landscape dynamics as communities interact with their local environments, as well as extinguishing that dynamic through the creation of legal concepts such as property rights in land.[15] Law and history are therefore implicated in the concept of landscape, the legal origins of which connote a particular area of land as well as the relationships between people and that land over time.[16] By paying attention to the way in which geographic dis-

9 Strecker (2018).
10 Byer (2023).
11 Graham (2011); Byer (2023).
12 See the chapter by Sinead Mercier in this section of the volume.
13 Blomley/Ford (eds.) (2001); Peil/Jones (eds.) (2005); Braverman et al. (2014); Layard (2019).
14 Strecker (2019).
15 Olwig (2002); Peil/Jones (eds.) (2005); Strecker (2018); Byer (2023).
16 Olwig (1996).

parities shape human behavior and activity,[17] lawmaking can be rendered more geographically sensitive to place, or spatially just.[18]

The idea of law as neutral or universal in character is being increasingly challenged in light of its historical complicity in acts of genocide, slavery and colonialism, as well as the failure of contemporary law to provide meaningful redress for such historical crimes.[19] There is also increasing criticism of international law more generally for its role in perpetuating colonial patterns of inequality and racial capitalism,[20] for the "misery" created by international economic law,[21] and for the way in which international environmental law indirectly establishes new forms of global authority over land in ways that benefit some while marginalising others.[22] Legal geographers contribute to this critique by advocating for law's embedding in the local, eschewing universal or global approaches when the geophysical reality is complex, in terms of diverse ecosystems and natural resource endowments that vary from country to country. Local interactions with these environments produce cultural understandings of land and the environment.

Legal geographers' critique of law also extends to legal history.[23] The linear progressive trajectory often assumed in legal history fails to engage law in all its complexity, particularly the cultural relativity of law and its institutions.[24] Russell Sandberg has argued that countering the misuse of history, the "evolutionary functionalism" inherent in legal historical research, requires an exploration of space as an additional element in the critique of law.[25] Following this introduction, the below chapters addresses how the law erased spatial diversity in land use via the deployment of colonial conceptions of property, environment, and community, whether by the creation of reserves for people and nature, in the classifications of community, or the extraction of natural resources for energy.

17 Layard (2019).
18 Graham (2011); Bartel et al. (2013) 341.
19 Anghie (2007) 32.
20 Anghie (2007); Gathii (2007); Koskenniemi (2012, 2017); Tzouvala (2020).
21 Linarelli et al. (2018).
22 Dehm (2021).
23 Blomley (1994) 8.
24 Sandberg (2021) 8.
25 Sandberg (2021) 170.

2. Section overview

In "Reserving space: land, nature, and empire in the development of Commonwealth Caribbean environmental law", Amanda Byer shows how science and early environmental protection went hand in hand to create landscapes of injustice and reify abstract logics of property, where lived in landscapes were reconstituted as abstract space, in service of the metropole, something that continues via environmental governance today. Byer tracks the emergence of the colonial nature reserve in early law and policy creating the Grenada Governorate, the islands ceded to the British after the Seven Years' War, which opened the second phase of British colonial expansion into the Caribbean. Against the backdrop of imperial interests in absorbing land and perceptions of 'uninhabited' islands, Byer argues that colonial conservation law helped concretize the idea of a homogenous 'paradise', which was based on oppression of Native and enslaved peoples with the place-based knowledge to sustain those environments. The erasure of inhabited nature became the raison d'être of colonial science, which is foundational to environmental law. Byer considers the implications for vulnerable small island states in the region facing unique environmental challenges when environmental law continues to uphold protection of a 'placeless' nature, where the law's current relationship with the environment forecloses any possibility of environmental protection, because conservation is an extension, rather than a repudiation of property's extractive imaginary. In particular, the re-ordering and degradation of Caribbean-island environments inspired and informed the conservationist consciousness and ethos, which today underpins the abstract logic of international environmental law, a field also critiqued in the work of Usha Natarajan and Julia Dehm.[26]

In "Legislating 'community' in southern Africa's plural properties", Sonya Cotton discusses how colonial categorisations of community as hermetically sealed have influenced the law in five anglophone countries in southern Africa – Namibia, South Africa, Botswana, Zambia, and Zimbabwe. In a similar vein to Byer, she shows how this form of classification stemmed from the same mental practices of land mapping, collecting and taxonomizing of nature developed in the Caribbean, and demonstrated how the strong influence of classical scholarship in Europe's understanding of African identities

26 Natarajan/Dehm (eds.) (2022).

is in no small part due to the fact that the European "experts" who authored the material on Africa that served as epistemic repositories of knowledge (including dictionaries and ethnographic work) were typically educated in Europe and trained in philology, which meant that African societies were "clumsily strained" through a prism of ancient Greece, Latin and Hebrew.[27] Rather than view these repositories of accurate information, Cotton shows how much archival material may instead be read as psychological biographies of settler-colonial anxiety, with early Europeans in Africa overemphasizing their epistemic authority in compensation for feelings of alienation and lack of control. The upshot is that the legal meaning of community is grounded in an abstract ideal, originally a foreign export, that does not consider the social geographies of communities in practice.[28] Cotton argues that while there is recognition of communal land as an independent form of tenure to private and state ownership, such legal pluralism is "anxious", and modulated through legal positivism and / or deference to colonial discourses of "tribe" that renders the state the final authority on identification. Accordingly, this reflects the uncomfortable position of pluralism within post-colonial African countries, which may inscribe customary rights whilst simultaneously stripping communities of substantive self-determination related to communal land.

In "Competing Notions of Land in Colonial Kenya and the Impact on Present-Day Land Governance", Raphael Ng'etich focuses on the legacies of British rule on land governance in Kenya, particularly as regards the superimposition of exclusive property rights over customary collective forms of land use. Ng'etich addresses the tensions between the newly introduced notion of private land ownership in Kenya against pre-existing communal ownership. To achieve its objective of phasing out collective land use, the colonial enterprise deployed various strategies, including 'agreements' with communities to cede some of their land to the Crown, depiction of local land practices as backward and retrogressive, subjugation of customary law to statutory and common law, incentives to facilitate the private ownership

27 Gilmour (2006) 67–117; Errington (2001); Makoni / Pennycook (2005); Strommer (2015); Chimhundu (1992); Gordon (2021) 27–28. On the persistent relevance of classical and Christian scholarship in the creation of the foundations of international law, see Koskenniemi (2021).

28 Strecker (2018); Graham (2011).

of land, and moving communities to reserves. The result was that social systems were disrupted, and communities moved to the less productive and challenging terrains in the "reserves",[29] with several consequences for access to land (and attendant resources and services) into post-independence. As Ng'etich notes, independence did not change the fundamental aspects of land relations,[30] as the racial discrimination in the colonial state transitioned to class and ethnic domination in the post-colonial state.

Finally, in "*A haunting absence*: Tracing the origins of international energy law from the laboratory of Ireland", Sinéad Mercier traces the historical development of energy law from its origins in the colonial-capitalist treatment of land and natural resources beginning in 17th-century Ireland. An outlier in the discussions on colonialism, Ireland has an ambiguous relationship with the British Empire, as both victim and protagonist. It was, as Mercier notes in the title of her chapter, a "laboratory" for empire, because the techniques, primarily in the use of new property regimes of dispossession through imperial laws, were first developed here.[31] Mercier also cites Michael Cronin, who concurs that the Tudor experiment in (language) extinction and (territorial) extraction "made Ireland the ideal laboratory for a form of ecological dispossession that will be replayed endlessly in various corners of the Empire".[32] Ireland was England's first colony after all, and it was here that the process of surveying sought to measure and quantify all land, reducing it to what Brenna Bhandar terms "an amalgam of economic units [...] estimating the value of people's productive output, the cost of their labor, and the value of stock ('wealth') of the nation".[33] Mercier illustrates how energy is "placeless in the law", in effect representing the ultimate disconnect from the land, and the limits of the earth, "with no responsibility to the places from which it is produced, or the people that produce it," a counterproductive legal situation that originated precisely in the colonial techniques that "transformed emplaced land into product" in the 1600s, when property law was being crystallized and sanctified. Mercier points out that despite the sources of the world's energy being from a concentrated number of places, the focus is on ensuring that energy – once

29 Okoth-Ogendo (2000) 6.
30 Manji (2020) 10.
31 Ohlmeyer (2004) 26–60.
32 Cronin (2019) 11.
33 Bhandar (2018) 40–43.

released from the land – becomes as fluid as possible. A proprietary regime similar to stocks and shares, she notes how energy can be bounced around from space to space, as a commercial product in a free market. This level of abstraction has facilitated a disconnect between cause and effect, with devastating consequences resulting in the climate crisis, degradation of local environments, and loss of cultural and biological diversity. Even in the realm of climate policy, carbon offset schemes would not be possible without an abstract logic of property rights, a logic that believes land (and its use) is an infinite tradeable commodity.

Cumulatively, the foregoing chapters illustrate the unquestionable way in which questions over the use of and access to land were framed within a property paradigm, how property is inextricably linked to empire, and how this 'property' was abstract and yet assumed to be superior to endogenous forms of land governance, forms that relied upon layered knowledge about particular places over time. The aim is not to romanticise the past, or erase any conflict in precolonial relationships with land, but rather to show categorically that colonial expansion went hand in hand with proprietary attitudes to land and people, which in turn not only shaped land relations in post-independence Ireland, the Caribbean, Kenya, and Southern Africa, but also shaped global property regimes underpinning land transactions, land use and access to land today. There is recognition of the value of a spatial turn in legal history scholarship, which increasingly focuses on examining the transnational effects of imperial interests.[34] These chapters thus contribute to new legal historical insights via the analysis of the interrelated touchstones of land, law and spatial justice in the British Empire.

In sum, adopting a landscape, law and justice lens to scrutinise property rights allows for a much broader appraisal of the law, one that incorporates research from historical geography and other disciplines, to analyse problems of land governance exacerbated and facilitated as they are by a narrow interpretation of property rights in land. This is particularly apposite given the centrality of land acquisition to the British colonial project. Empires absorb land, consolidate their power through the law, and by maintaining these uneven power dynamics across far flung geographies, drive spatial injustice.

34 Dorsett/McLaren (eds.) (2014) 9.

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