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Aller au sommaire du numéro

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LAND

*Kirsten Anker**

Land as an object of property in systems of law with European roots may appear to have patently obvious or unremarkable qualities, and yet its characteristics are both historically and culturally contingent. In the common law, land forms the first of the two major kinds of property designated by the distinction between *real* and *personal* property. The only disputes around the definition of land have traditionally related to the physical extent of boundaries (do they extend upwards so as to make overflying aircraft into trespassers, or downwards to include sub-surface minerals?), the transformation of personalty into realty by attaching it to land (fixtures), and the changing status of the lease (in England, leases were at one time dealt with by common law courts as personal property). We could entertain two lines of inquiry, however, that would provoke a deeper level of reflection on just what land "is." The first would ask how it is that, in the common law, land as the object of property came to shed material qualities related to local knowledge of the land's geographic particularities, such as modes of sustainable use, that are now dealt with under environmental law. The second arises when courts are confronted with claims by Indigenous peoples to their traditional territories, and contemplate including Indigenous perspectives on property, rights, and ownership as part of the process of recognition such that they engage in an exercise in cross-cultural comparison. In the very broadest of terms, the distinctions that emerge are those between land as an inert thing (an object) and land as a participant in a relationship (something that could be qualified as a distinction between space and place). Both inquiries lead us to a more complex appreciation of the way in which Western property is based in a particular geographic and social imaginary—a way of seeing and understanding land—that derives from its cultural evolution.

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English medieval land law was divided into royal law, which governed the freehold title of those within the feudal hierarchy, and the law of individual manors, which governed copyhold (the title of villeins holding land through the rolls of the manor) and rights in the commons, (based on the customs of the local peasant economy). These manorial laws provided often very specific rights of access to and enjoyment of local land, water, and resources, such as the right of estover (permitting collection of fallen dry timber for fuel and other household uses), piscary (fishing), common of mast (the right to turn pigs out to forage during fattening season), and turbary (regulating the cutting of turf). These rights, and important limitations on them derived from local geographic conditions, combined property rights and what we now think of as environmental regulation. There was no uniform, one-size-fits-all concept of property, which was shaped, instead, by the nature of land as a specific place, and local knowledge of its capacities. In fact, the Middle English use of the term property (as "proper to") indicated a fusion between personal identity and place. Land was quantified with reference to human experience—a day's walk—or as the location of events in local memory. Much of this was to change with the Enclosure movement, at its height between 1750 and 1820.

Enclosure entailed the physical and symbolic closing-off of lands previously available to peasant communities through the erection of fences or hedges, and the legal dispossession of these communities, by act of Parliament, in favour of private landowners. Landless peasants became labourers and migrated to cities or to the English colonies, bringing urban development that radically changed local geography and made historic local knowledge redundant. On enclosed farms, new rural proprietors had a primarily economic interest in exploiting the land as an enterprise in an emerging market economy, now governed by the uniform real property rules of the royal courts. Generalizable principles of agricultural science were employed to "improve" land by clearing forests and altering waterways, and by planting crops with the highest commercial return. Increased communication led to a perception of local spaces as parts of a whole, matched by the development of cartographic mapping which placed land onto a homogenizing, linear grid. While medieval forms of proof had relied on local memory as to the identity of land and the devolution of title, the use of cadastral mapping to record boundaries, and later, registration systems to establish property rights, helped achieve in representational terms what has been called the "dephysicalisation" of property that focuses on rights (as relations between persons) and not things. Cartographic property represents land as disembodied or flattened space, infinitely reproducible and exchangeable, the objective commodity of a capitalist system.

Modern land-as-property thus exists as a purely geometric entity, its bounded qualities necessary for the core right to exclude. All a land-owner

need know, for legal purposes, is represented in abstract terms in parcel descriptions and records of title devolution. Matters of material concern—soil degradation, erosion, weeds and invasive species, biodiversity, salination—are located as environmental rather than property issues; as such, environmental regulation is often viewed as an imposition on the rights of owners, rather than part and parcel of them.

The synergy between the symbolic representation of land and property law carried over into the colonial treatment of Indigenous land rights. In Australia, where early assumptions as to a barely populated territory flowered into the legal treatment of the colony as a *terra nullius* or uninhabited territory claimed through occupation by the British, colonial maps also offered up the vision of a land available for acquisition. Since its inception in the European imagination, *Terra Australis* was represented cartographically as a blank space within the initially vague outlines of its coast. Early English explorers had difficulty reading the monotonous, undifferentiated mass of land in the interior, for instance, for signs of water. New maps gradually inscribed colonial features of the landscape—fences, houses, roads—over Indigenous, unreadable, ones.

While the recognition of native title based in traditional Indigenous laws and customs in the Australian *Mabo* case of 1992 required a reversal of the legal "doctrine of terra nullius," there is a deeper ontology and epistemology of land, embodied in this cartographic imagination, that is largely not challenged. Each native title claim must be accompanied by a map that specifies the external boundaries of the claim and other land tenures, and indicates various aspects of the claimant's connection to their "country" through symbols that represent ancestral stories, for instance, alongside the symbols of European settlement. Although on one level these maps represent the possibility of coexistence, on another, recognition is limited by reducing Indigenous relationships to country to a singular, unambiguous discourse. The recognition of traditional title appears simply as a question of who is to have the right to use certain areas of land, rather than a recognition of Indigenous ways of knowing and owning land. The nature of this discourse can be illuminated by comparison with an alternative "map" of country that was presented by the Ngurrara claimants in 1997: a giant canvas painted by fifty or so of the traditional owners sporting bright series of lines, dots, concentric circles, and other symbols. This canvas was a representation of sacred places and their narrative relation to one another given by traditional stories.

Whereas classical European landscape painting uses Perspectivalism to represent space in a way that positions people apart from the physical world as an observing and possessing eye/I, neither the conventional map nor the Ngurrara canvas employ these spatial conventions. In cartography, the implicit sense of observation is erased. The flatness of projec-

tion is a view from no-where that naturalizes this vision of land, and excludes other perspectives by creating the illusion that these qualities inhere in the land rather than exist as subjective properties of vision. Land as bounded space just "is." In contrast, the Ngurrara canvas has a spatial organization in which there are no portions and each unique place is known and named. It is significant for positioning people in the landscape: in relation to it, and because of it. This map paints a country that is full rather than empty, full of people, history, law, stories, allusions, and symbolism. It is the kind of map in which it is impossible to draw a boundary that excludes: what matters is sites/places and the pathways that connect them. It does not work with a spatial imagery of bounded surface area.

But how can we imagine real property rights—the central element of which is exclusive possession—if land is not conceived of as a space whose perimeter determines the limits of exclusion? This was a problem faced in Canada by the Mi'kmaq of the maritime provinces in trying to prove historic exclusive possession in order to establish Aboriginal title in the *Marshall* and *Bernard* cases. Mi'kmaq witness Keptin Stephen Augustine describes his peoples' traditional territory in terms of the imagery of the branching arms of a tree, the seasonal movement of the sap matching the movement of people to different parts of the territory. This image of territory complements the Mi'kmaq adherence to the principle of sharing rather than that of exclusion. The claim of the Mi'kmaq to Aboriginal title failed for lack of proof of occupation, and the Court questioned whether an ethos of sharing was inimical to title.

Different understandings of land are also expressed through language and narrative. The Ngurrara claimants, and many other Indigenous Australians, designate land in English through the use of "country" as a proper noun—they visit country, care for country, speak for country. Their traditional stories designate specific kinship relations with the beings that created particular locations and geographic features. In Canada, kinship is also the way that the Gitxsan, who brought the landmark *Delgamuukw* case, explain the origin of their land title. Each house traces its territorial rights back to an original chief who first met with the spirit of the land. In one story, the chief's sister disappears. The people later meet with some frogs—embodiments of the spirit of the land—who are understood to be the offspring of a marriage between the sister and the frog spirit. The land now becomes patterned into an ordered set of family relationships.

Land is not, across different historical and cultural contexts, inherently a spatial entity. Its status as an object of property, defined by innate qualities such as dimension and cartographic position that can be represented in abstract terms on a map, emerged in England in the shift from the feudal agrarian economy to industrial capitalism and the accompany-

ing changes in law, demographics, scientific knowledge, and the technological means of representation. The uniformization and "dephysicalization" of land-as-space makes it difficult for law to be sensitive to the environmental exigencies of the great variety in land-as-place, and excludes the possibility of alternative modes of imagining the relationship between people and the land.

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