Guest editorial

Regulation and the morphology of property

This special issue has arisen from a conference held in Cambridge in May 2018, hosted by the Cambridge Centre for Property Law, concerning regulation of property. This conference drew together scholars from a wide range of perspectives, including property theorists, black letter land lawyers, socio-legal specialists and environmental lawyers, as well as practitioners. The topics under discussion ranged from explanations of the environmental consequences of private and state-based water rights in Mono Lake in California (Ryan, 2019), to the technical rules of landlord and tenant law (Odinet, 2019) and of the mortgage contract (Amodu, 2018). And yet underpinning all of these contributions was an understanding that the topic under consideration was "property". This term, however, is one which, fairly obviously, means different things to different people. Indeed, the idea that when we speak of property we mean much more than the technical rules of land law was the topic of a paper in the conference itself.

Any disagreement and contestation over the meaning of property is not simply a matter of semantic quibbling, nor is it resolvable by "more" property theory. Rather, it is in the very nature of property itself for property, like ideology (Geertz, 1973; Freeden, 1998), like democracy and like liberalism, is essentially contested (Gallie, 1956). There is no definition of property which we can unearth through further argumentation and consideration, no "true" meaning if only we think harder and reason further: rather, property will always mean different things to different people. This conclusion, though seemingly trite, is essential to building a true commonality of understanding and acceptance across the scholarly community. Such a vocabulary is necessary in developing approaches to property which are sensitive and nuanced, varied and interesting. To this end, it might be fruitful to consider not *the* meaning of property, but the morphology of this term and how this constellation of context shapes how we understand property, and therefore what we mean by "regulation of" property, and when and how such regulation is legitimate and warranted.

Morphology as a scholarly concept has its origins in linguistics (Freeden, 2013). In this sense it is concerned with the structures by which words take on their meaning, and the relationship between this meaning and the form of the word in question. In a wider sense, it is a means by which we can understand how contested elements can combine to give meaning to a single term: thus, property is made up, one might imagine, of notions such as ownership, power, rights, obligations, regulation and the like, each of which is itself an essentially contested notion. Property, in invoking this disparate range of ideas, is attempting to crystallise meaning based on these, themselves contested, terms. Any "fixing" of the meaning of property, therefore, would be an attempt to fix the meaning of these other terms which are themselves not susceptible of being fixed in this manner.

Edward Shepherd and myself have taken a similar analytical approach when exploring the role of the ideology of rule of law in legal discourse (Lees and Shepherd, 2018). There, we explained that, "the concepts comprising an ideology could mean subtly different things and relate to each other differently in different contexts and in different times" (Lees and Shepherd, 2018, p. 4). This statement could equally well apply to "property" as a concept. This understanding of the term property, and more fundamentally of the "notion of" property, has three important consequences. First, it means that whenever one scholar suggests that another is not "really" talking about property, but rather is considering something else, that criticism is as much two people talking at cross purposes rather than

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one or the other being right or wrong. Such a basic point is worth highlighting as it shows the weakness of arguments which begin with suggesting that "such and such" is "anathema" to property or similar – whilst that might be "true" (although we would never know it see citation in Pedersen, 2013), it is equally possible that property just means something different in the particular context.

Second, it emphasises the importance of pragmatism. The type of pragmatism to which I refer here is that explained by Pedersen when he argues that, in respect of environmental law, pragmatic approaches mean that, "[i]n light of this rejection of absolute metaphysical meanings and origins, pragmatists instead maintain that philosophy ought to direct itself towards more practical issues" (Pedersen, 2013). If we take this comment to apply to the nature and the forms of property, then the argument runs that we should apply ourselves not to attempting to unearth some fundamental truth about what property "is", but to consider what the consequence of different meanings are and to act accordingly. Thus, "[t]he goal of such inquiry is to achieve agreement among human beings about what to do, in order to facilitate compromise 'on the ends to be achieved and the means to be used'. Importantly, the goal of such inquiry is not absolute 'truth'" (Pedersen, 2013). This does not mean that property theory is worthless, far from it. It means that property theory is always exploring the limits of property, of ruling out avenues of exploration, without ever being dogmatic as to its own correctness.

Third, the consequence of this approach is that there will never be an end to our enquiry as to what property is, and how it does and should operate. In a strange sort of way, that's quite a pleasing idea. It means that what we include in "regulation of property" law conferences will change and shift over time, so that different generations of scholars may think the range of papers in our conference to have been hopelessly broad, or far too narrow, without either us or them being wrong. Rather, the context within which we understood and articulated what property is and should be has changed.

What this means, however, is that we must encompass changes in context into our conception of what property is. In the twenty-first century that means that our analysis of property should reflect the fact that we are now in the anthropocene. This does not mean that all land lawyers should be environmental lawyers, but rather that thinking that land law has nothing to do with the environment is like saying that being a lung surgeon has got nothing to do with air pollution. You do not need to be an expert in environmental problems to know that they affect land law, just as you do not need to be an expert in the chemical reactions present in diesel vehicles to recognise that they change the role and context of the job of lung surgeon.

Equally, one does not need to abandon analysis of the technical rules of mortgages simply because there are environmental concerns, just as we would still want the lung surgeon to know how to carry out a lung transplant even if the context of such transplantation encompasses air pollution in the wider environment. In other words, attempts to completely disaggregate environmental and property law is futile, but one scholar does not need to cover the entire ground. The same point could be made about other "linked" topics – human rights and property law springs to mind – but for the topic of this journal it is useful to note how intertwined the three scholarly topics it covers – planning, environment, and property – really are. Indeed, the meaning(s) of property depends, in part, on the meaning(s) of environment and planning.

Of course, many people would argue that the discussion here is taking scholarship in the wrong direction – that saying "property means different things to different people" is so blindingly obvious that any scholarship which explores this is hardly adding to the richness of our discussion and is instead merely an exercise in navel gazing. To an extent that is right: in environmental law we cannot solve environmental problems by worrying about precisely what is meant by "environmental"; in relation to the problem of homelessness and lack of security of tenure for families living in the private rented sector, we do not provide

legal solutions by which such issues can be addressed by worrying about whether we are engaged in an exercise in housing or in land law; in human rights law we do not make progress by theorising about what a "home" is – we make progress by protecting that which we know to be someone's home and go from there. The theoretical, in other words, should not necessarily be pursued to the detriment of the practical.

But this counter-argument to a pragmatic and yet willingly and openly theoretical approach brings me to one final theme emerging from the conference. We held a session that explored the relationship between academia and practice in relation to property law. On the panel were practising barristers, judges, and academics of various stripes. In the course of this conversation, Professor Susan Bright made an argument which has resonated with me since. She said, although more eloquently than I do here, that we need not always have a practical goal in mind in our scholarship. Instead, we can pursue topics solely because they stimulate our intellectual curiosity. This, in essence, is the very great privilege (and such it is) of being a scholar. This simple expression of the heart of scholarship is, I think, an important message in the era of impact funding, of extreme time pressure, and of practical need in the wider "property world". It is also an encouragement, even a permission, to breathe fresh life into one's own writing, to find new avenues just for their own sake.

Sometimes we can write and think about scholarly questions because they are interesting and advance our intellectual understanding even if practically they do not take us very far. Decontesting, or "bagging" (Pedersen, 2013, p. 123) understandings of property without giving these decontestations the status of "ultimate" or "fixed" expressions of what property is, for me at least, intellectually interesting and therefore, I believe, worth pursuing. And, as indicated at the outset, it may at least have one practical outcome, and that is to allow different legal disciplines to speak of property without causing outrage in other fields: environmental lawyers can consider how the hegemony of the property paradigm causes environmental problems; whilst at the same time land lawyers can discuss property rights as being defined and constrained by the rules of environmental law, planning law and the like.

With this "broad church" attitude in mind, it is pleasing to see the range of papers and issues addressed in this special issue. We begin with a more traditional "land law" paper, considering the role of legislation in land registration reform in New Zealand. It is clear from this paper that whilst the issues being addressed by the new Act are traditionally the preserve of private law, with the advent of land registration, the State is increasingly a pivotal actor in the transfer of private rights and interests in relation to land. With this comes a necessary compromise in terms of the strength of those rights versus the capacity of the public purse to cover losses where errors or fraud occurs in the relevant system. It is clear from Elizabeth Toomey's analysis that even a jurisdiction with extensive experience of a Torrens-style land registration approach encounters difficulties when the relatively simple (and even simplistic) principles which underpin title by registration come into contact with the infinite variety represented by the real world. As Toomey argues, the consequential reliance on judicial discretion in respect of interpretation of key statutory provisions can result in some curious outcomes. This is clear in English law too, where the various strands of the judicial approaches to registration do not come together to form a coherent picture.

Following Toomey's paper, we move to the realm of the landlord and tenant relationship. This area of law is currently enjoying more of the spotlight than it has done in a number of years, and while some of this is a result of on-going Law Commission attention, it is also a consequence of real world outcomes emerging from the high level of power given to landlords *vis-à-vis* their tenants by both contractual terms resulting from an inequality of bargaining power in a landlord's market, and through landlord-friendly legislative regimes. One consequence of this, arguably, was the terrible events of the Grenfell Tower fire. David

Sawtell's piece engages directly with some of the legal issues which emerge from that tragedy. And with this comes the important lesson that black letter analysis of how the law constructs the landlord and tenant relationship must not loose sight of the fact that these rules have a very real effect on tenants' homes, livelihoods and safety.

Similarly, it is important, as Tola Amodu emphasises, to bear in mind that legislative reform can also affect such legal relationships in unintended ways. In considering the Immigration Act 2014 and its attempt to transfer some liability onto landlords for the immigration status of their tenants, Amodu highlights that the outcome in some cases has been to pit the landlord and tenant against the government in an "unholy alliance". Case law shows that, in this specific instance, the government attempt to use private law as a tool for enforcement of public law norms failed. However, a wider integration of public policy into private rights comes from an increasing emphasis on motive and motivation for action, as seen in a very different sphere in the recent decision of the Supreme Court in *Franses* v. *The Cavendish Hotel*[1].

The public and the private clash in a different way in cases involving regulation of land use which results in diminution of the value of land, as Ti explains in his comparison of compensation approaches following regulation of land use in England and in Singapore. Whilst in both compensation is unavailable following planning policy-making and zoning, the justifications for the lack of compensation are different in the two systems. This comparative analysis encourages us to be aware of the fact that whilst non-compensation in such cases may be defensible in principle, the decision as to whether it not that is justified in any particular system is contingent on the wider legal system and its underlying principles, both from public and private law. Thus, whilst in Amodu's paper it is clear that private law ought not to be manipulated to achieve the ends sought by the government in that particular case, as both Sawtell and Ti emphasise, the public and the private – black letter law and social consequences – cannot be wholly separate either.

The special issue then culminates in Antonia Layard's piece which considers the trend for, and consequences of, privatisation of land in England. Her general conclusion chimes well with much that has been said here. Layard argues that, "[g]iven that the scale of the sell offs and the difficulties in closing the stable doors after the horses have bolted, the best approach now may be to work towards reducing the differences between the two spheres, rather than maintaining that land should necessarily be government- rather than privately-owned". In thinking about the differences between and connections through the public and private in respect of regulation of property, the lessons from the range of papers here should be kept firmly in mind.

To conclude, if the conference, and this special issue, have taught us anything it is that "property scholarship" is alive and well, but that it takes many different forms. Anyone arguing that what someone else does is "not" property scholarship is making a claim to the "truth" about property which is unwarranted. But that does not mean that we all need to be experts in each other's fields to call ourselves "property" lawyers: I do part of property law, I do not do the whole, but that does not mean that I do not do it. And that is why it was and is so inspiring to hear and read what others see as property, how they understand it, and where all these different concepts fit together. Similarly, property in the real world is not a wholly private, nor wholly public phenomenon, but a complex mix of the two contingent upon the wider legal context and shaped by national attitudes, judicial approaches and market forces.

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Note

1. [2018] UKSC 62.

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About the Guest Editor

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