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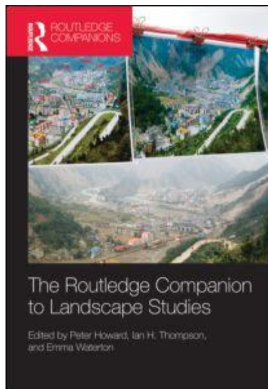

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The law of landscape and the landscape of law: the things that matter

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It could be argued that what connects law to landscape depends upon what one means by landscape. It could alternatively be argued that what one means by landscape derives from one's conception of law. If, in the first instance, one argues, for example, that landscape is some sort of material thing, or aggregation of things, then the legal issues of interest would be those laws concerned with the regulation of that thing, or those things. This is the sort of law with which ordinary lawyers ordinarily deal (Martin and Scherr 2005). If, on the other hand, ideas of law are foundational to landscape, then we will be concerned with law in a more abstract and elevated sense which, as will be seen, is closer to the ideas of law one finds enshrined in national constitutions or international treaties. The difference lies in the distinction made by the anthropologist Bruno Latour, following the philosopher Martin Heidegger, between a thing in the modern sense of a material entity and the original sense of thing as an ancient form of parliament, a moot, or meeting, where people gathered to discuss things and agree upon the laws that would govern them. Of this, Latour writes:

> Now, is this not extraordinary that the banal term we use for designating what is out there, unquestionably, a thing, what lies out of any dispute, out of language, is also the oldest word we all have used to designate the oldest of the sites in which our ancestors did their dealing and tried to settle their disputes?
>
> *(Latour 2004: 233; see also Latour 2005; Olwig 2002, 2007)*

Latour's point is that when discussing things in the physical material sense (e.g. the things that are the object of environmental science) it is important to understand that these things first gain meaning when mooted in social discourse and debate, not the least within the modern institutions (such as universities and research centers) and media that, like the ancient judicial thing, shape the basis for law and policy through that which Latour calls *Dingpolitik* (Latour 2005). This is, furthermore, hardly a moot point with regard to landscape, because the assembly of the judicial thing also was core to the organization and law of landscape in its original sense as a polity and the lands it governs (Olwig 2002).

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Landscape polities varied in size and composition and are known to have existed in northern Europe since Medieval times under a fluid variety of Germanic spellings, depending on time and place (e.g. *Landschaft*, German; *landskap*, Swedish; *lantscap*, Dutch; *landskip*, English). These tended to be relatively analogous in governance and name to the present-day townships of New England (which derived from old England), though a landscape polity often was larger than a township – the suffix *-ship* is cognate with *-scape*, and a town forms the core of both the township and the historical landscape polity. The equivalent name for similar polities in the Romance languages was some variant of *paysage* (French) or *paesaggio* (Italian), where *pays* meant land in the sense of the country of a polity, and *-age*, is relatively equivalent to *-ship*, meaning something like character, constitution, state or shape (Olwig 2002). Landscape is thus a place with the character of a land, and a landscape painting would be concerned to capture this character, much as a portrait would be concerned to capture the character of a person. It should be remembered, however, that prior to the rise of the central state, and land enclosure, the 'lands' making up a landscape need not have been spatially contiguous within the circumscribed space of a mapped territory, as we expect with modern regional governance and property demarcation (on the relationship between boundaries and property see Widgren 2005), but might have fuzzy boundaries as demarcated by mountains or swamplands. Lands belonging to the church, the king, and differing noblemen, might likewise be interspersed amongst the lands assembled through the assembly of a *thing* made up of free farmers. Such semi-autonomous polities have been officially supplanted in most places by regions or provinces under the rule of a centralized state with its maps, but they persist in popular discourse concerning law and governance (Mels 2005), as in the case, for example, of the European Landscape Convention (ELC) (Olwig 2007). Thus, the relationship between law and landscape depends upon what one means by thing and by landscape. To begin with, let us look at the relationship of law and landscape when landscape is conceptualized as a material thing, or an assemblage of aggregated things.

The thing about landscape as an assemblage of material things

The modern German meaning of landscape developed largely in the nineteenth century context of a plethora of small, often absolutist, states in which an educated bureaucracy took a leading role in making the transition from feudalism to absolutism to a modern democratic state. At this time the pre-existing historical *Landschaft* polities described above were displaced by modern central forms of regional state administrative law, and the notion of *Landschaft* changed accordingly from designating a polity to designating a regional territory and the things within it. The influential discipline of geography that arose in Germany at this time not only played an important role in this process, it also gained world prominence, particularly through the work of Alexander von Humboldt, giving the modern German geographical notion of *Landschaft* as a demarcated region, with a characteristic physical landscape and corresponding cultural landscape, a leading role in geographical thinking worldwide (Tang 2008). This geographical definition is congruent with such standard dictionary definitions of landscape as: 'the landforms of a region in the aggregate' (Merriam-Webster 1996: landscape). If this is what one means by landscape, then the related legal issues might involve material things of concern to geographers, environmental planners and natural scientists such as the regulation of agriculture, forestry, nature preservation, urban development, resource use, access, and so forth; the catalogue is endless. Not only is it difficult to limit the number and kinds of legal issues connected with landscape defined as a physical thing, it is also hard to find a single logical or scientific principle that links the different categories of landscape covered. Landscape, approached this

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way, involves a hodgepodge of often unrelated disciplines ranging from geology, climatology, soil science, ecology and physics, to sociology, cultural studies, political science, architecture, history and archaeology, etcetera, etcetera (for an example see Backhaus et al. 2008). The classical solution to the problem of dealing with such a multifarious subject, especially in the tradition of German *Landschaftsforschung*, is to diagrammatically map the different aspects of landscape into a structure of drawer-like boxes, and sub-boxes so that the lowest might be for geology, with topography above it, and the different categories of cultural landscape above this, and above it all boxes for various super-terrestrial spheres representing climate, the cosmic spheres, etc. There are also boxes for various groups of 'stakeholders'. Various arrows suggesting the interrelationship between the differing boxes then link all this. Like an office bureau desk with its chest of drawers, it then becomes possible to pull out each drawer like box as needed, as when, for example, one might want to compare soil quality, agricultural land use, field boundaries and the architectural form of rural buildings.

The sort of compartmentalized and categorized information described above is the kind of information that is especially of use to public officials who are charged with overseeing the laws and regulations governing the area of an administrative district. And, as might be suspected, much landscape research producing this sort of boxed and shelved landscape has also been designed to serve the needs of planners and administrators (e.g. Backhaus et al. 2008). It is thus also appropriate to use the analogy of the office bureau as a figure to explain the logic behind this approach to landscape, since *bureau* forms the root for both the French and German words for office, and for the French derived word for such public officialdom, i.e. *bureau*cracy. The German word for the office held by such officials is *Amt*, and it is also relevant to note that in the Danish–German borderlands of Schleswig-Holstein the territories governed by the central state were called *Amt* and the bureaucrat in charge of governing them was called an *Amtman*, whereas similar sized territories which were governed under locally evolved constitutions with a representative form of government (the *Ding* in German, *ting* in Danish, *thing* or *moot* in English) were called *Landschaft (*or *landskab* in Danish) (Olwig 2002). The *Amtmand*, who governed these districts on behalf of the state, was thus administering a territory according to a body of statutory state law in which such a bureau of multifarious landscape information would have been most valuable.[1] A comparable neighbouring *Landschaft* polity would be governed, on the other hand, according to a body of customary law adjudicated by a meeting (*moot*) of the *Ding* or *thing* (for a contemporary analysis of the '*Dingpolitik*' of such a *Landschaft*, see Krauss 2010, and for a contemporary analysis of the relevance of the historic concept of *Landschaft*, see Cosgrove 2004).

The above example of landscape as a kind of bureau, or regional frame (see Figure 22.1), which acts to assemble and aggregate highly diverse things for the use of regional administration and law suggests that the relation between this notion of landscape and the legal role of a regional state administrator was not coincidental. It could thus be argued that this approach to landscape arose concomitantly with the rise of the centralized state, and with its centralized and codified body of statutory law. It was thus this state that sponsored the development of the surveying techniques that made both modern cartography and the perspectival representation of territory possible, and these techniques, along with statistics, made it possible to map, depict and correlate the information that forms the basis for the kind of landscape approach that has been outlined above (Cosgrove 1988). Centralized administration required a landscape bureau, analogous to that described above, in order to efficiently administer the territories under its control, and it was under this administration's auspices that many of the means of classifying and categorizing landscape information that are familiar today, ranging from the map to areal statistics, first were developed. It was also this state that supported the legal structures necessary to use

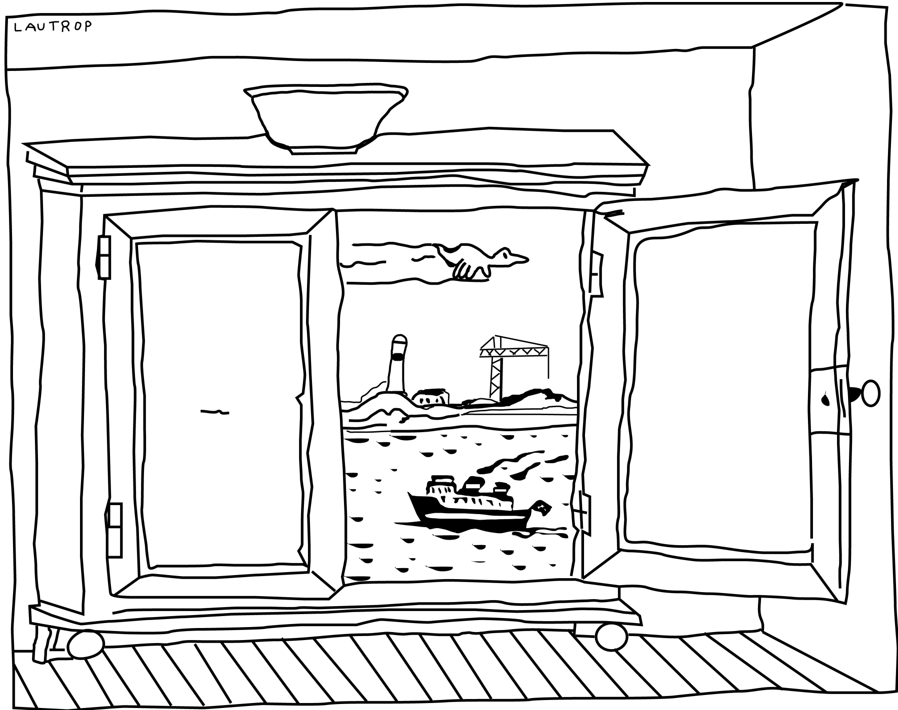

Figure 22.1 This editorial cartoon by Peter Lautrop, from the Danish newspaper *Information* (29 July 1991), is captioned 'Et landskab', in translation: 'A Landscape'. In Danish this caption involves a play on words, possible in many Germanic languages, in which the suffix (-skab) can both mean something like 'shape' or 'character', or it can also mean a bureau. The cartoonist is thus making an apparent comment upon the way the landscape is often treated (e.g. the bureaucrats) as something that can be stored and locked up in a bureau. The drawing is being reproduced with the cartoonist's permission.

these surveying techniques to transform feudal lands and commons into private property. It was, by the same token, this same state that used these techniques to transform historically evolved, quasi-independent territories, such as the above mentioned *Landschaft*, into centrally administered territories under the state as defined by the contiguous space of boundaries on a map.

The shift between the meaning of landscape as an assembled polity and its lands, to that of a spatially inscribed *Raum* framework in which an assemblage of material things is aggregated resembles the shift between *thing* as a legal assemblage of people and *thing* as an object, or assemblage of objects, described by Latour. Similarly, words meaning something abstract, like *office* or *Amt*, signifying 'a position of authority, trust, or service, typically one of a public nature' shifts towards a more concrete meaning as 'a room, set of rooms, or building used as a place for commercial, professional, or bureaucratic work' (NOAD 2005: office). The office, as a physical room for the official, is analogous to the *Raum* of the landscape as an administrative district in the political sense, or, in the ecological sense, the 'landscape scale'.

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Landscape scenery, civic humanism and aesthetics

In the modern German derived sense of landscape physical things are aggregated primarily within the space of a mappable region. There is another sense of landscape, however, which is arguably more particular to English, in which the things within the landscape are framed according to visual criteria. This idea of landscape is captured by another dictionary definition: 'a portion of territory that can be viewed at one time from one place' (Merriam-Webster 1996: landscape). Here, the emphasis is upon the definition of landscape via its viewing as scenery, as a landscape painting or within a landscape garden. This approach to landscape has, as will be seen, consequences for the way landscape is related to law, which distinguishes it somewhat from the German derived approach. This idea of landscape came out of developments in the art of perspectival visual representation that emerged particularly in Renaissance Florence and Venice in tandem with a philosophical movement known as 'civic humanism'. The decline of feudalism and the alienation of feudal lands, giving rise to a class of influential propertied individuals, was foundational to this new interest in the civic role of the individual as inspired by classical Greek and Roman ideals of the *res publica*. When land became the property of individuals, rather than feudal lineages, the legitimization of social influence and power shifted from the feudal lineage to the property from which the wealth of the commonwealth was seen to derive (Olwig 2005). The properties, or characteristics, of these privately owned properties thereby came to be of interest not only for practical purposes, as represented by the developing techniques of geographers, cartographers and statisticians, but also to painters, poets, gardeners and architects for aesthetic reasons (Cosgrove 1984). The classically inspired Palladian architectural ideal, with its pastoral landscape, as developed particularly in republican Venice, was of particular inspiration, as a symbol of civic governance, to eighteenth-century British private estate owners who were anxious to establish their legitimacy as the civic leaders of a Britain in which Parliament was playing an increasingly central role (Pocock 1975; Barrell 1986; Barrell 1987; Cosgrove 1993). The 'Palladian' landscape of Venice, and its British permutations, not only set new standards for park and garden design, they were also tied to new notions of civil society and republican government. In these cases we are thus not only dealing with detailed issues of law, but also with more lofty ideas of justice, human rights and rights of property.

The English landscape garden, with its extensive pastoral parklands dotted with mansions and follies in the Palladian style became emblematic of the ideals of civic humanism (Barrell 1987; Cosgrove 1993). The landscape was an idealized version of a shepherd's commons, but it was a commons symbolic, as the poet Alexander Pope noted, of the pastoral environment of a golden age, as described for example by Virgil, when the 'best' of men were shepherds (Pope 1963: 120). This idea of landscape grew out of both pictorial art and theatre, and it was related to philosophical thinking which saw politics and law as a kind of theatre in which the citizen was to perform (Olwig 2011). The idealized landscape of the landscape garden thus provided the necessary scenic setting for the achievement, at least in ideal, of a modern enlightened society based upon representative government and the rights of the individual, not the least the right to break with the feudal system and own and dispose of private property. It was thus hardly an accident that Thomas Jefferson, who framed the American democratic constitution, lived in a Palladian villa (of his own design) surrounded by a pastoral landscape garden park which he saw as being contiguous with the larger landscape of Virginia and America (Marx 1964). This, then, was a landscape symbolic of law, but of an ideal of law in a larger and more abstract sense than the kind of laws and regulations compartmentalized within *Landschaftsforschung*. This is the sort of law which is concerned with individual human and property rights as enshrined, for example,

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in the Bill of Rights attached to the US Constitution. It is, of course, easy to point out the glaring contradictions between the situation of a British Whig estate owner/parliamentarian, living off lands enclosed from the commons, or a rich slave owner with a large Virginian estate, like Jefferson, and the enlightened ideals which they expressed, but these ideals were nevertheless foundational for the laws guaranteeing the democratic liberties many people of lesser wealth now value today.

Though the scenic ideal of landscape emerged within the context of the Renaissance and the Enlightenment, when it was freighted with political and social symbolism, it persists today often in a context in which it has become a more purely aesthetic ideal linked to individual human well-being. In this context landscape scenery has become, somewhat parallel to the modern German idea of *Landschaft*, an assemblage of physical things. This assemblage, however, is united by the eye, as positioned in a particular place, rather than by a regional boundary. In this case the laws and regulations tied to this idea of landscape tend to be the concern of the landscape architect or spatial planner, and these might deal with the visual aesthetics of landscape and the protection of the view, e.g. zoning with regard to the size and materials of architecture, or, more abstractly, with the spatial structure of landscape elements such as openness (fields, meadows, heaths, parks), closed (forests, the built environment) and lines (hedgerows, green structure). There is even a body of research concerned with people's landscape preferences and the effect of visual surroundings on people's physical and mental health. Here, too, the catalogue of possible legal and regulatory issues is potentially endless.

Though the 'German school' areal notion of landscape, and the 'English school' scenic notion of landscape tend to lead to a differing emphasis concerning the legal regulation of things in the landscape, they are not incompatible, and present day landscape research often aggregates them within different compartments of an overarching landscape framework with its bureau-like boxes. This is because perspectival pictorial representation developed out of the techniques of surveying and cartography. From a top down projection the map allows for the bounding of space necessary to demarcate administrative regions and private properties, but when the projection is tilted towards the horizontal a perspectival, pictorial, image emerges. An underlying factor thus in present day law concerning landscape tends to be legal rights tied to an area of land that is understood at bottom to be property, be it that of the state or the individual (Blomley 2005; Mitchell 2005). Legal statues concerning landscape scenery thus also tends to involve the rights of certain property owners to a view, which can have considerable value on the real estate market. Likewise, the rights of 'stakeholders' in landscape analyses tends to be the rights of property owners.

Most languages today define landscape, at least in part, in scenic terms, but the older meaning of landscape as polity and its place often maintains a subaltern existence. This is in part because in the Romance languages the various equivalents of the French prefix *pays* designates a land in the sense of country, not in the sense of land surface, which is important to the modern idea of landscape as the things making up a scenic land surface. There would also, however, appear to be a revival of the idea of landscape as place and polity in the older sense of *Landschaft* (Cosgrove 2004), as expressed, for example, in the areal definition of landscape given in the ELC, and with regard to its concern for the value of landscape to human communities (Jones 2007; Jones and Stenseke 2011; Olwig 2007).

The common(s) landscape of customary law

The historical landscape as a polity and its place was not thought of as a thing, but as the assemblage of land, or the country, governed by the laws of a thing. An important aspect of this

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landscape was that its laws were not imposed from above as statutory law, but developed from below through the workings of custom. As Sir Edward Coke, who became England's chief justice in 1606, explained, there are 'two pillars' for customs: common usage and 'time out of mind'. Customs, for Coke, 'are defined to be a law or right not written; which, being established by long use and the consent of our ancestors, hath been and is daily practiced' (quoted in Thompson 1993: 97, 128–9). The function of the judicial thing was basically thus to formalize and (re)interpret custom in a memorable form as law. Though official polities analogous to the historical landscape as polity survive in places such as New England, Switzerland and the Åland Islands (the official name is *Landskapet Åland*), the legal traditions descending from the ancient judicial *thing* or *moot* have persisted more generally through the vehicle of customary law. This is particularly true in Britain where custom remains foundational to law, and not only Britain, but in most of the English speaking world. One reason for this persistence is the failure of the Stuart kings of England in their struggle to establish statutory law against Coke's defence of common law, and in their bid to quash the rights of parliament, which were based on custom, and establish a form of government resembling the absolute monarchies of continental Europe. On the continent, on the other hand, statutory law predominates and customary law leads a somewhat subordinate existence. The hidden power of custom and customary law, nevertheless, still has a significant effect in constituting and shaping a subaltern, unofficial, landscape as polity and place (Jones 2005).

The power of custom emerges through practice rather than, as in the case of statutory law, some form of cerebral rationality. It thus emerges through what people do, and if this practice is repeated enough to form a pattern practised by a number of people, then it can be termed the custom of a community of people. The power of custom is reinforced through social control sanctioned by morality, the word moral deriving from the Latin for custom, *mores* (see also Gudeman 2001: 28; NOAD 2005: custom). If there is a conflict concerning the character of a custom, then the matter can be brought before a *thing*, *moot* or *court*, where the things involved can be discussed and the matter can be resolved and formalized as customary law. It is in this way the people of land become *shaped* (a sense of *-scape*) as a community (Gudeman 2001: 27), a polity a commonwealth or *res publica*. Things are thus discussed and defined through the process that Latour calls '*Dingpolitik*', and which in his view now takes place through the medium of a large variety of institutions (Latour 2005). The power of custom thus lies in the fact that it is not generally articulated verbally, but generated through people's practice (Olwig 2008). Custom is an unspoken law that is enforced through social control legitimated by an unspoken morality which binds people together as a community. Custom thereby maintains an invisible character which, though it may be subaltern in relation to an official body of statutory law, maintains a power and effectiveness which the official body of law, and its enforcers, can have difficulty attaining (Gudeman 2001; Olwig 2005). When, however, custom is formalized as customary law through the workings of a court, and particularly when that customary law is regulated, as in Britain, through the workings of higher courts, then custom becomes part of an official body of common law. As Sir John Davies explained in 1612:

> For the *Common Law* of *England* is nothing else but the *Common Custome* of the Realm; and a Custome which hath obtained the force of a Law is always said to be *Jus non scriptum*: for it cannot be made or created either by Charter, or by Parliament, which are Acts reduced to writing, and are alwaies matter of Record; but being onely matter of fact, and consisting in use and practice, it can be recorded and registered no-where but in the memory of the people.
>
> *(quoted in Pocock 1957: 32–3, emphasis in original)*

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In this case the official law gains legitimacy through its origins in custom, but custom retains its subaltern power should the common law cease to reflect custom.

The fact that custom originates in practice means that it will tend to be bound up with people's doings in relation to things in their material surroundings as part of their daily activities, particularly where people's subsistence, reproduction and recreation depended largely upon the immediate environment (Mitchell 2005). This is why the environment of landscape polities was shaped in characteristic ways by their customs, thus creating the physical landscape as a thing which modern society identifies with differing cultural regions. This is not, however, just a historic phenomena, but also a contemporary phenomena where, for example, customary forms of land use or recreational practice can both have a significant influence in shaping the physical landscape and have great significance for people dependent on these resources. The problem is that the subordinate, unwritten character of custom can make it difficult for people in marginalized social or geographical positions to assert their legal rights when, for example, powerful interests seek to enclose common resources and literally alienate the common person (Olwig 2005; historical studies of this issue can be found in Barrell 1972; Thompson 1975, 1993. For contemporary analyses and studies see *Landscape, Law and Customary Rights* (Jones and Schanche 2004)).

Because the landscape of customary practice tends to both generate, and reflect, the activities of a community, it tends to manifest itself in relation to common resources, such as some form of commons, rather than in relation to private property (Mitchell 2005). Thus, whereas individual identities, such as those of civic humanism, were manifested in relation to the individually owned pastoral landscape garden/park lands (a symbolic commons), the landscape of custom manifests itself in relation to a working commons, which provides both sustenance and recreation (Brown 2005). A commons, however, need not be a shared concrete piece of land, such as a pastureland. Its meaning can be extended and abstracted in many ways, as Elinor Ostrom has done in her work in governmentality and economics (Ostrom 1990) and as Stephen Gudeman has done in the area of anthropology when he argues that:

> The commons is a shared interest or value. It is the patrimony or legacy of a community and refers to anything that contributes to the material and social sustenance of a people with a shared identity: land, buildings, seed stock, knowledge of practices, a transportation network, an educational system, or rituals.
>
> *(Gudeman 2001: 27)*

Whereas the use of private property is the prerogative of the private individual owner, and hence property rights, the use of the commons is dependent upon the mutual agreement of a community regarding the use rights of individual community members, which is the key thing. The two forms of landscape, the one rooted in property and aesthetics, and the other rooted in custom and the commons, can coexist. Thus, the same society, in the same period of time, can include both kinds of landscape, as when the Capability Brown-designed landscape of the Chatsworth estate abuts upon the landscape of the (former) commons of the Peak District, which has now become a National Park, where the workers movement, inspired by the heritage of the commons, achieved a use right to the land for recreational purposes. A commons is difficult to manage, or visualize, according to the framework of the landscape bureau or even that of landscape scenery. This is because it lacks the geometric logic of the field that has been enclosed as property, or laid out as a landscape garden. The operative principle is *use*, rather than ownership, and that use is governed by a highly complex amalgam of natural and cultural

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factors that can be determined in both cases by the logic of precedence which gives a 'prescriptive use right'.

Conclusion

The thing about the relationship of law to landscape depends upon how one defines landscape and thing. Is it via the '*Dingpolitik*' of the assembled people who make up the *res publica* that the material things in the landscape are assembled as the place of a polity, or is it the spatial or visual framework of a map or landscape image that aggregates an assemblage of physical things as a landscape? The answer to this question is constitutional to landscape and to the laws that make up its constitution.

Note

1 A contemporary example of such a bureau is: Büro für Landschaftsforschung und Kommunikation, Finkfeld 10b, 3400 Burgdorf, Switzerland.

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