

BOOK REVIEW – JULY 2010

A Review of "PROPERTY AND THE LAW IN ENERGY AND NATURAL RESOURCES" by Aileen McHarg, Barry Barton, Adrian Bradbrook and Lee Godden (eds), Oxford University Press, Oxford, UK, 2010 ISBN 978-0-19-957985-3, pp 478

This is a skilfully assembled collection of essays resulting from collaborative research by the Academic Advisory Group of the International Bar Association's Section on Energy, Environment, Natural Resources and Infrastructure Law. The Group has been in existence for almost 30 years and this excellent collection boasts many famous names in the law.

As an American academic, Bruce Kramer, reminded us in 1994 (Washburn Law Journal, Vol 33, p 540 at 568), property law was the parent of oil and gas law.

Property law still remains one of the key components of energy and natural resources law, although the state now plays a greater role – co-existing with, but not displacing, property rights. Even where the state pursues a national model of resource and energy ownership with the vesting of resources *in situ*, it commonly uses legal instruments and legal titles with proprietary characteristics for this purpose.

This collection of essays explores the relationship between property law and energy and natural resources law in a range of national as well as supra-national and international legal settings: in civil law and common law systems; in market rules; in the law of customary and indigenous communities; and in public law and private law. It also examines private rights and common property situations and issues of competition for land use and resources.

Key questions that are discussed include: the control of, and access to fossil fuels, mineral reserves and water resources; the relative merits of public and private ownership of energy and water utilities; the role of constitutional and international law in asserting sovereignty over resources and energy; and conversely, the role of these institutions in protecting individual property rights; and the rights of cultural and ethnic groups.

The collection is divided into four sections. The first section deals with theoretical and conceptual

approaches and encompasses an overview of property law theory, an examination of public and private rights to resources, the creation of property rights under statute, and the treatment of property in international law. The second section showcases the various natural resource law regimes that exist in specific countries, which highlights the diversity of perspectives upon property in such regimes. The third section focuses on property in energy and resources and the interface with markets and regulation. The fourth section explores emerging property regimes and examines cutting-edge forms of property in natural resources, such as sequestered carbon.

The first section on property law theory I found, as a legal practitioner, to be of great value, in providing me with an intellectually sound frame of reference for dealing with contemporary issues of great practical concern, starting with how investors are to protect themselves from arbitrary state intervention and from third party claims.

Every so often, practitioners need to sit back and revisit fundamental questions such as: just what is property?

One of the editors, Barry Barton, suggests that formalist ideas of private law as an autonomous body of law, with its own internal logic, can produce consequences other than those intended by the legislature. The courts are sometimes more willing to resort to proprietary concepts to resolve disputes than the legislature intended.

One well-known contributor, Terence Daintith, explains how, in many jurisdictions, the traditional 'rule of capture' is the basis for determining property rights in relation to underground petroleum resources. The rule of capture is a property rights principle governing the competition between companies to extract oil and gas from a common reservoir. The rule is entwined with government regulation of well spacing and unitisation. Daintith posits that the rule has virtues that counterbalance its commonly mentioned ill-effects.

Another great value of this collection is the variety of intellectual insight provided by contributors from Africa, Asia and Latin America. For example, it is explained how, in countries with strong indigenous communities, the model of exclusive and tradeable property rights assumed by neo-liberal theory comes into direct conflict with communal and inalienable rights to land and natural resources.

The impact of national energy security requirements upon private property interests is another theme that reverberates through the collection.

There is of course a long-standing body of law that deals with questions of expropriation and compensation where government regulation impinges upon private property interests. There is much argument about the circumstances in which, and conditions upon which, such 'taking', or expropriation, of property is legitimate. With other contributors, Catherine Redgwell explains the interface between property in domestic jurisdictions and sovereignty under public international law.

Another great value of this collection lies in its analysis of the ever-increasing role of law in environmental protection and in the pursuit of the ideal of sustainable development. Led by one of the editors, Adrian Bradbrook, several contributors describe the clear trend in environmental policy towards the use of market-based regulatory instruments in order to tackle environmental harms. Such instruments often depend at their core on the creation of tradeable property rights.

Resources that can be described as common property resources, common pool resources, or are simply not subject to proprietary claims at all, are being made the subject of new forms of property right. The reasons are not difficult to find;

increasing population and wealth create demand and case scarcity where once there was none. Fisheries and water resources are leading cases in point. The collection highlights the commodification, or 'propertisation', of such resources such as market-based systems in the form of tradeable quota for fisheries and tradeable rights for water. Property ideas, the collection reveals, are the fundamental building blocks of such systems.

As the collection explains, property takes on myriad definitions, institutional expressions and legal forms in its complex interactions with the law of energy and resources. Thus any understanding of exactly how property and law operate in respect of energy and resources will require a fine-grained analysis, where long-standing assumptions of the role of property may need to be questioned. If, as the editors claim, property provides legal expression to the various choices that are made, even at times 'accidentally', about the manner in which energy and resources are managed, then the collection will contribute to building an understanding of the perennial importance of property and the dynamics of its evolution.

I end this review with an apology to the 26 contributors to this collection whose names I have omitted and whose learned insights I have failed, in the interests of brevity, to acknowledge. I can only say that this collection is a treasure trove into which every lawyer and student of law should delve if they aspire to become an energy and natural resources lawyer.

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