Heritage, landscape and spatial justice: new legal perspectives on heritage protection in the Lesser Antilles

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Chapter 1 Introduction

Heritage and place are intertwined, and yet the Caribbean has always been treated as a place with no past, defined by its placelessness. Even the Antilles, the collective name for the Caribbean islands, is derived from Antillia, a non-existent island thought to have existed in the Atlantic Ocean in the fifteenth century.[1] Christopher Columbus expected to encounter Antillia when he crossed the Atlantic in 1492, a fact recounted in a 2017 tourist magazine.[2] The Caribbean was a paradise discovered and is forever rediscovered, each new iteration representing a blank screen upon which foreigners could project their definition of what it means to belong here.[3] It is not a place, and there are no people here, despite thousands of years of history, and a population of 40 million people of Amerindian, African, Asian, and European descent.

This context is significant for the protection of the cultural heritage of the region. Because a sense of belonging is often linked to a physical place, the protection of the landscape, that embodiment of the relationships between communities and their environment, is necessary for anchoring a sense of identity, national pride and communal ties. It is that perceived lack of cultural identity that served as the pretext for justifying 'civilisation' via colonisation. The Caribbean in particular has witnessed the rupture of these relationships, the displacement of peoples and cultural erasure, as Amerindian peoples were extirpated, and enslaved Africans and later indentured Asians were brought to develop and maintain plantation agriculture when the islands were converted to colonies for various European empires. Central to the colonial project was the consolidation of land to promote European interests, at the expense of humanity. Law is a key instrument for allocating land for these purposes, withdrawing resources and granting them to others, defining conquered spaces and inventing new places. Protecting a common heritage, history and identity is rendered difficult when communities have very little access to the source

[1] Malachy Tallack, 'Off the Charts', *High Life* magazine (June 2017) 62, discussing his book *The Un-Discovered Islands* (Polygon 2016).
[2] Ibid.
[3] Mimi Sheller, *Consuming the Caribbean: From Arawaks to Zombies* (Routledge 2003) 1 summed it up thus: Displaced from the main narratives of modernity, the shores that Columbus first stumbled upon now appear only in tourist brochures, or in occasional disaster tales involving hurricanes, boat-people, drug barons, dictators, or revolutions. Despite its indisputable narrative position at the origin of the plot of Western modernity, history has been edited and the Caribbean left on the cutting room floor.

of identity, the very landscape which records the past practices, rituals, memories and livelihoods of a specific local community, collectively known as cultural heritage.

This is problematic for the future of the Caribbean. As the region faces existential threats today in the form of climate change, globalisation and other drivers of unsustainable development, societies are in danger of destabilising when economic livelihoods are extinguished to make room for exclusive resorts and marinas, cultural practices are eroded as emigration increases, and visions for the future are undermined by the prospect of sea level rise, increased natural disasters and food and energy insecurity. Cultural heritage is the ballast that keeps societies on an even keel, because it is the repository of traditional knowledge and community memory that defines existence and informs a community's values. Protecting landscapes protects these practices associated with geographically specific cultural and natural resources.

More than ever, realising sustainable development requires an understanding of how and why communities value natural resources they interact intimately with, across the diversity of ecosystems, since very often this interaction is the key to ecosystem integrity and by extension quality of life in society.[4] Any intervention that attempts to protect cultural heritage must sustain the landscape and by extension the communities that ensure the evolution of that landscape. Law is an important instrument in achieving these ends, because cultural heritage law that is locally appropriate plays an important role in the preservation of such resources.

Landscape is therefore a particularly relevant concept for analysing the formation of place and sustainability of heritage in the Caribbean. Landscape is the prism through which the deficiencies of heritage law might be revealed; by examining the 'placelessness' of heritage law, the extent to which heritage law is effective can be assessed. The more place-based heritage law is, tethered to the community definition of a place, the less likely it is to fail to recognise social linkages to heritage resources, which would then contextualise its enforcement mechanisms in ways that are locally appropriate, relevant and sustainable. The aim of this research therefore is to conduct a legal geographical analysis of heritage laws in the Lesser Antilles with the intention of exposing the aspatialities, if any, that lead to inappropriate, inadequate and ineffective

[4] Janet Blake, *International Cultural Heritage Law* (Oxford University Press 2015) 129.

protection of cultural heritage. This requires a deep dive into the formation of the law itself, to explain the existing mechanisms and conventions produced to protect heritage.

1.1 Traditional approaches to cultural heritage law

Cultural heritage law varies from jurisdiction to jurisdiction, but in general has evolved in response to the changing concept of cultural heritage itself. Traditionally, heritage was defined as physical property, which does not incorporate concepts of duty to preserve and protect and was characterised by ownership.[5] Exploration of the past was driven by archaeology and its underlying curiosity about ancient civilisations, which also aligned with the impulses to exploit and dominate during the period of colonial expansion.[6] This was exacerbated by the antiquarian movement, which influenced some of the first legislation in the United Kingdom.[7]

Archaeological monuments within one's territory were considered valuable historical documents, national property to be protected by the state, with the aim of excavations to find and study these monuments so as to explain historical development, social relations, development of culture, and relations with other people.[8] The emergence of UNESCO, an intergovernmental body with a General Conference comprised of delegates of national governments, has seen the development of cultural heritage law in the form of Recommendations and Conventions that influences cultural heritage protection globally.[9] Law has thus developed from application of general law on finds and treasure trove to specific protective legislation on relics, sites and information to more holistic laws on cultural management.[10]

This is due to the Cultural Turn movement of the 1970s, during which insights from cultural anthropology led to shifts in thinking about meaning and representation, so that culture has assumed a wider meaning,[11] and by extension, manifestations of cultural heritage include almost

[5] Blake, *International Cultural Heritage Law* 128; Lyndel V Prott and Patrick J O'Keefe, ''Cultural Heritage' or 'Cultural Property'?' 1992 *International Journal of Cultural Property* 1(2): 307-320, 307.
[6] Patrick J O'Keefe and Lyndel V Prott, *Law and the Cultural Heritage. Volume 1: Discovery and Excavation* (Professional Books Ltd. 1984) 33.
[7] O'Keefe and Prott, *Law and the Cultural Heritage* 37.
[8] Ibid., 232.
[9] Ibid., 74.
[10] Ibid., 80.
[11] C Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books 1973).

anything made or given value by human beings that 'witnesses the history and affirms the validity of a particular view'.[12]

As Janet Blake observes, cultural heritage is thus a portmanteau term, with myriad meanings and interpretations. Today, it is the 'predominant term of art'[13] in cultural heritage law, because it encompasses notions of protection and preservation.[14] But while there is a clear conception of the subject matter, the legal definition remains a challenging one for legal scholars.[15] The definition of 'culture' appears to relate to the concept of shared values as expressed in a society's language, practices, objects,[16] and places, while 'heritage' is an inheritance received from the past, to be held in trust by the current generation to be handed down in at least as good a state to the next generation.[17] 'Property' is an inadequate term for these resources held in common, but continues to impact heritage protection.

Law's role in protecting cultural heritage has traditionally involved providing the regulatory framework for identifying heritage, addressed in law especially via inventories, and the recording and making of lists and schedules. Preservation and protection of heritage through the prevention of damage has been articulated in law through systems of designation or by regulating development; the philosophy of conservation in place, including attitudes to restoration and reconstruction can be addressed in legal standards; and appropriate sanctions against breaches of the law and the means –coercive or otherwise – to encourage compliance can be laid down in regulations. The integration of cultural preservation with other governmental policies such as planning and land use; financial aspects – sources of funding, tax regimes and economic development programmes; the specific powers and duties of government and non-governmental agencies in respect of heritage; and education and training in heritage-related fields are also areas in which legal intervention can be made. [18]

[12] Craig Forrest, *International Law and the Protection of Cultural Heritage* (Routledge 2010) 2.
[13] Blake, *International Cultural Heritage Law* 1. Blake notes that there are instances where cultural property is the more appropriate term, as in the settling of disputes concerning the trafficking of cultural objects.
[14] Prott and O'Keefe, ''Cultural Heritage' or 'Cultural Property'?' 307.
[15] Blake, *International Cultural Heritage Law* 6, and Lyndel V Prott, 'Problems of Private International Law for the Protection of the Cultural Heritage', *Recueils des Cours* V (1989), 224-317.
[16] Forrest 2.
[17] Blake, *International Cultural Heritage Law* 7 and Forrest 3.

At the national level, many types of cultural heritage law exist, such as specific legislation pertaining to an artefact or site. These laws may be divided between laws establishing rights and responsibilities for the heritage resource, and the administration for that resource via the creation of heritage institutional actors such as antiquities commissions, National Trusts, historical societies, museums and cultural foundations. Rules of property law also apply to heritage law, such as finders' law, and the law of treasure trove. Laws establishing national parks and protected areas can also contain archaeological sites. Land use planning and environmental laws also relate to heritage because heritage resources include the physical environment such as sacred sites and geological features. Other laws which apply include taxation laws, import and export regulations, and coronial legislation (relating to human remains).[19]

Absent in this framework is any acknowledgment of *where* the law is being applied, and whether this matters in the effectiveness of implementation. Spatial considerations, such as the geographic location, can be relevant to the content and application of such laws. In order to investigate how (where and why) legal or spatial practices, meanings or tactics are producing places or events, the various spatial, legal and/or social strands have to be untangled in order to identify what work law and spatiality are doing at any particular place and time.[20] These investigations tend to adopt one or more of three conceptual structures and points of concern, beginning with, how do spatial settings affect legal implementation and drafting, and vice versa? Secondly, what is the role of law in constituting place, and thirdly, how do lawyers and geographers engage with notions of jurisdiction and scale?[21] I focus on the first and second modes of inquiry. The first mode assesses the extent to which location influenced legal intervention. In most legal geographic studies, this requires an understanding of historical, social and spatial specificity of the location. The second mode focuses on how place making mechanisms such as private property are legally implemented.[22] Given the complex present day realities of the Caribbean, as post-colonial societies and small island developing states, how this context impacts the relationship between law and heritage deserves attention.

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[20] Luke Bennett and Antonia Layard, 'Legal Geography: Becoming Spatial Detectives', (July 2015) *Geography Compass* 9(7): 406-422, 409.
[21] Bennett and Layard 410.
[22] Ibid., 411.

1.2 The Caribbean context

The Organization of American States (OAS) conducted a region-wide survey of heritage-related legislation in the Caribbean in 2013. The overall analytical goals of the survey were to determine the extent and effectiveness of cultural heritage laws and policies in the region and particularly in the participating member states; to make an initial inventory of the skills, funding sources, and training capacities of all the regional cultural heritage sectors and each of the participating member-states; to document the stakeholders' responses regarding current sectorial performance, programmes, and particular challenges faced; and to make an initial analysis of the areas of gaps, overlaps, and potential for capacity sharing and to prioritise possible capacity-building projects in the region to meet these needs.[23]

The survey did not explicitly define cultural heritage but made reference to UNESCO instruments, most notably the World Heritage Convention.[24] There is reference to the 'collective memory and shared identity that cultural heritage embodies'[25] as well as the 'government's role in the protection of the historic landscape, artifacts, and archival records and its role in safeguarding time-honored art forms, crafts, and intangible traditions'.[26] Where heritage legislation is concerned, the analysis noted that laws protect '31 specific heritage types across four major categories: immoveable heritage (i.e. buildings, sites, and landscapes), moveable heritage (i.e. artifacts, documents, and archival material), intangible cultural heritage (i.e. performing arts, traditions, and rituals), and natural heritage'.[27] These categories align with UNESCO's classification system.

Findings concluded that the existing body of heritage legislation is ineffective, and that specific causes of ineffectiveness range from lack of political will, lack of capacity to carry out the law, and the deficiency of existing laws as currently drafted. An analysis of the responses indicated that there is no legislation that provides for an integrated approach of all heritage: moveable, immoveable, intangible, and natural. The rule across the region seems to be a

[23] OAS, 'Enhancing the Socio-economic potential of Cultural heritage in the Caribbean: Caribbean heritage survey analysis – regional needs and opportunities to support cultural heritage protection.' Prepared by Coherit Associates, May 2013, 6.
[24] Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 1037 UNTS 151; 27 UST 37; 11 ILM 1358 (1972).
[25] 'OAS Caribbean heritage survey analysis' 4.
[26] Ibid., 7.
[27] Ibid., 8.

compartmentalisation of specific legislation for each of these types of heritage resources, leaving the bureaucracy to manage potential inconsistencies, redundancies, overlaps, and gaps.[28] Nevertheless, the survey's findings, while useful, were not intended to overhaul the imposed legislative framework for heritage protection in the region. The survey was ultimately designed to identify legal, institutional and capacity obstacles to the promotion of heritage tourism, and assessed the heritage value of potential tourism attractions using external heritage benchmarks. It neither identified nor centred endogenous approaches to heritage protection in its analysis or recommendations.

1.2.1 Cultural heritage in the Caribbean

The findings of the OAS survey demonstrated the challenges of regulating heritage resources where the concept is defined in isolation from the cultural reality. In this research, cultural heritage is taken to be indistinct from the natural environment in which it is embedded. Traditional classifications such as underwater and moveable are not emphasised, and neither is the distinction between tangible and intangible, as this is in many ways impossible.[29] Much of the physical environment that we know today (with the exception of the extremely rare wilderness sites) has been moulded by human activities. Many human, social and cultural practices have developed in response to the physical environment. Moreover, environmental elements – be they mountain ranges or desert landscapes – also serve as symbols for national cultural identity. The cultural heritage and the natural environment are highly inter-related. [30]

This is especially true for small islands. Their limited land masses both constrain and enrich the interactions of its inhabitants who depend on natural resources for their very survival. Practically speaking, communities have intimate knowledge of their natural resources and the scarcity of land means sites are often re-engaged: it is no great exaggeration to consider an island a network of overlapping heritage sites. Seeing the island as palimpsest is practical because of the way in which land has been used over time, each historical period being overlaid by another.

This is also a trend that is likely to continue. As David Lowenthal observes, the notion that nature can and should be left to look after itself is no longer a tenet of ecology, given that

[28] OAS 'Caribbean heritage survey analysis' 27.
[29] See Blake, *International Cultural Heritage Law* 10 and Forrest 28.
[30] Janet Blake, 'UNESCO/World Heritage Convention– Towards a More Integrated Approach,' (2013) *Environmental Policy and Law* 43(1): 8-17, 8.

humanity is dependent on agriculture, architecture, antibiotics, water resources and sewage systems.[31] Nature untouched is an impossibility, as manipulation of the environment is critical to our survival. It is simply a question of 'meddling more carefully.'[32] The relationship between human societies and their physical environment – the 'environmental media' of air, water, sea and land – is a complex one that has been built up over millennia of mutual impacts and interactions. For this reason, to separate cultural heritage protection from environmental concerns is to create a false dichotomy. Cultural heritage practitioners also reject the 'hands off' approach as impractical as well as historically inaccurate.[33] Legal responses to heritage protection will therefore be influenced by rules regulating land use, specifically planning law, and environmental law (parks and protected areas legislation). These are the laws analysed in this research along with formal heritage protection legislation.

1.2.2 State of the art in Caribbean cultural heritage research

Scholarly studies on landscape protection in the Caribbean have emerged in the last decade, and have considered the landscape's role in influencing perceptions of land resources and land use (agriculture), but not its relationship with cultural heritage or the legal system.[34] Investigating the Caribbean's pre-colonial history has also generated a wealth of research and literature.[35] Nevertheless, very often communities are not emphasised, except as audiences in public archaeology initiatives, rather than heritage actors and creators, which would center them in the heritage discourse.[36] Re-examining the role of enslaved Africans in plantation life and their contributions to Caribbean society is an equally rich vein of research.[37] Here the role of these

[31] David Lowenthal, 'Natural and Cultural Heritage' (2005) *International Journal of Heritage Studies* 11(1): 81-92, 89.
[32] Ibid.
[33] Ibid.
[34] Jefferson Dillman, *Colonizing Paradise: Landscape and Empire in the British West Indies* (The University of Alabama Press 2015); Laura Hollsten, 'Controlling Nature and Transforming Landscapes in the Early Modern Caribbean' 2008 *Global Environment* 1(1): 80-113; Jill Casid, *Sowing Empire: Landscape and Colonization* (University of Minnesota Press 2004).
[35] William Keegan and Corinne Hofman, *The Caribbean before Columbus* (Oxford University Press 2017); Scott Fitzpatrick and AH Ross, *Island Shores, Distant Pasts* (University Press of Florida 2010); Basil Reid, *Myths and Realities of Caribbean History* (University of Alabama Press. 2009).
[36] Alissandra Cummins, Kevin Farmer and Roslyn Russell (eds), *Plantation to Nation: Caribbean Museums and National Identity* (Common Ground Publishers 2013).
[37] Mark Hauser and Douglas Armstrong, 'The Archaeology of not being governed: A counterpoint to a history of settlement of two colonies in the Eastern Caribbean'. 2012 *Journal of Social Archaeology*, 12(3): 310-333; Lydia Marshall (ed), *Archaeology of slavery: toward a comparative global framework* (Southern Illinois University Press 2015).

communities has been considered in terms of challenging conventional approaches to power on the plantation, but not in the context of the legal system or cultural policymaking today.

Sustainable strategies for heritage protection often focus on linking heritage protection to heritage tourism[38] and law is only addressed incidentally.[39] Colonialism as an environmental project is recognised, but legislation is not examined; where it is, the relationship with cultural heritage resources is not highlighted.[40]

The most comprehensive analysis of heritage protection in the Caribbean inclusive of legislation is Siegel and Righter's volume *Protecting Heritage in the Caribbean*.[41] Here heritage is broadly conceived as objects, processes, built environment and landscapes, in a region that is acknowledged in all its diversity, ranging from independent nation states to colonial territories, and reflecting a vast array of heritage strategies as a result. Challenges with legislation in terms of coverage of heritage resources and heritage actors, and gaps in addressing the activities of development projects, enforcement and public engagement are stressed. Siegel and Righter include contributions from practitioners in these islands to provide local, technical and insider perspectives on the state of heritage protection as well as current Caribbean heritage preservation challenges. However, emphasis is on heritage management rather than the role of law in heritage protection per se, and the contributors are not legal scholars or legal practitioners.

This research brings together these various strands of cultural heritage and landscape research by examining the relevant legislation using a spatial justice lens. This is the first comprehensive study of cultural heritage legislation in the Lesser Antilles to do so.

1.2.3 The Caribbean study area defined: The Lesser Antilles

The word 'Caribbean' reflects a diverse network of countries, ecosystems, populations and identities (see figure 1). Because this is a legal analysis, I have limited my attention to one legal system. The independent states of the English-speaking Caribbean share the common law

[38] Leslie Ann Jordan, 'Managing built heritage for tourism in Trinidad and Tobago: challenges and opportunities' (2013) *Journal of Heritage Tourism* 8(1):49-62. ·

[39] Patricia E Green, 'Caribbean Cultural Landscape: the English Caribbean potential in the journey from 'tentative listing' to being 'inscribed'', (2013) *Journal of Heritage Tourism*, 8(1): 63-79.

[40] Richard Drayton, *Nature's government: science, imperial Britain, and the 'improvement' of the world* (Yale University Press 2000); Richard Grove, *Green imperialism: colonial expansion, tropical island Edens and the origins of environmentalism, 1600-1860* (Cambridge University Press 2005).

[41] Peter Siegel and Elizabeth Righter, *Protecting Heritage in the Caribbean* (University of Alabama Press 2011).

tradition as a result of their status as former colonies of the British Empire.[42] I confine my study to the Lesser Antillean archipelago, the islands of which were historically governed together, and traditionally subdivided into the Windward islands (Dominica, Grenada, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago) and the Leeward islands (Antigua and Barbuda, and Saint Kitts and Nevis), with Barbados as the outlier (figure 2).

Figure 1 Map of the Modern Circum-Caribbean Region[43]

[42] Keegan and Hofman, *The Caribbean before Columbus* 5.

[43] Wikimedia Commons 9 April 2011, Kmusser/CC-BY-SA-3.0 <https://creativecommons.org/licenses/by-sa/3.0/legalcode>

Figure 2 Map of the eight Lesser Antillean nations analysed in this study[44]

1.3 Legal geography and spatial justice: Description of the conceptual framework

Using the discipline of geography to examine the law is a form of socio-legal scholarship. While cultural heritage law has relied on a traditionally positivistic 'black-letter' approach to law, in which legal provisions are solely authoritative, this is no longer the dominant methodological paradigm.[45] Socio-legal research is the examination of how law, legal phenomena and/or phenomena affected by law and the legal system occur in the world, interact with each other and impact those subject to this interaction. The 'socio' aspect addresses the societal context or impact of law and legal phenomena, rather than law in books. The 'legal' is more broadly defined than the text of the law.[46]

Considering law in isolation from society, politics and morality impairs our understanding of law itself. The socio-legal method, by situating law in its broader context, identifies a range of theoretical approaches available to garner new insights about the function of law, its processes and consequences, of which law and geography (legal geography) is but one. [47]

[44] Modified by S Byer, as permitted by Kmusser/CC-BY-SA-3.0 <https://creativecommons.org/licenses/by-sa/3.0/legalcode>

[45] Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge handbook of socio-legal theory and methods* (Routledge 2019) 3.

[46] Creutzfeldt, Mason and McConnachie (eds), *Routledge handbook of socio-legal theory and methods* 59.

[47] Sally Wheeler, in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press 2008) at <http//www.oxfordreference.com> accessed 15 November 2019

Legal geography draws attention to space in ways that can have significance for the former colonies in the Lesser Antilles. Law's neutrality treats space as inert, which can have devastating consequences for a way of life. This can be applied in colonial contexts – for instance, legal assumptions of terra nullius, justifying the granting of land to some people and the exclusion of others from that land. This is very relevant to the Lesser Antilles, given that its peoples were displaced and dispossessed of their resources as a result of this narrative. Understanding how the geographical concept under investigation – be it space, territory, place, networks or mobility – is being conceptualised by legal actors can explain decisions more fully, rather than focusing on highly abstracted legal doctrine alone, which prioritises 'legally relevant' rules and facts and disguises the realities of those decisions.[48] Understanding how abstract legal rules are applied in a colonial setting to deprive local communities of their resources, has implications for the way those resources are managed today and explains why vulnerabilities of the population are exacerbated by continued adherence to law that is seen as impartial and universal in scope. Law, even when it is the subject of legal reform in the Lesser Antilles, aligns closely with the doctrinal tradition and for this reason cannot deliver effective results. Legal geography challenges the so-called neutrality of these rules that assumes effectiveness and fairness. The law is not neutral, but spatially blind.

Legal concepts and rules thus do not exist in a vacuum, and have a geographical significance, as they determine the territorial boundaries of homes, courts, and nation states - law makes national, regional, local and private spaces.[49] Legal concepts such as property, jurisdiction, sovereignty and domicile all have a spatial (geographical) referent. Legal rules can be used to create space, delimiting geographic/normative areas within which people enjoy relative freedom to act, or by establishing relationships which give rise to obligations.[50]

The impact that law's complex interaction with space, either through attentiveness to, or dismissal of spatiality, has on the co-production of places, is the focus of legal geography. Legal geography investigates this co-constitutive relationship of people, place and law, or the social,

[48] Antonia Layard 'Reading Law Spatially' in *Routledge handbook of socio-legal theory and methods* 233.
[49] Antonia Layard, 'What is Legal Geography?' (*University of Bristol law school blog,* 11 April 2016) <http://legalresearch.blogs.bris.ac.uk/2016/04/what-is-legal-geography/> accessed 21 June 2017
[50] Kim Economides, Mark Blacksell and Charles Watkins, 'The Spatial Analysis of Legal Systems' (1986) *Journal of Law and Society* 13(2): 161-181, 167.

spatial and legal dimensions of existence.[51] Spatial settings are not always relevant; what is critical is whether aspatiality, or the absence of geography, 'is a defeat for citizens, localities, and place'[52], giving rise to spatial injustice, which is an important project within legal geography.[53] In such situations, legal localisation must occur - law must make room for local conditions, or forms of regulation must be rooted in local conditions of existence.[54] This aims to reverse the 'placelessness' in law, which has never been addressed in the Lesser Antilles before. Locational analysis of the law therefore contributes to the improved delivery of efficient legal services, and justice, by exploring the social and cultural elements of legality.[55] In this section, I highlight the milestones in the evolution of legal geography as an interdisciplinary approach, and summarise its key concepts and modes of inquiry.

While Luke Bennett and Antonia Layard note that scholars in the past have observed that cultural factors can influence certain legal provisions, what changed in the 1980s was the idea that law, people and places are intertwined, and that the impact of law is both felt and made locally. This co-constitutive approach 'became the leitmotif of legal geography',[56] and Wesley Pue's article on law's spatial blindness[57] was the 'opening salvo of what was to become the legal geography project',[58] because it identified the research gap that academics had been circling for decades. In a notable case, Pue critiqued the judge for ignoring the spatial setting - a raft on the high seas - as insignificant to the circumstances in which the crime occurred.[59] He saw this as evidence that the law treated location (space) as immaterial and that law's abstract logic was anti-geographic.[60] Pue argued that geography could demonstrate that the presumed rationality of law is in fact acontextual, such that legal relations and obligations are frequently thought of by

[51] Bennett and Layard 'Legal Geography: Becoming Spatial Detectives' 406, referring to WW Pue, 'Wrestling with law: (geographical) specificity vs. (legal) abstraction.' (1990) *Urban Geography* 11(6): 566–585.
[52] Layard, 'What is Legal Geography?' (University of Bristol law school blog, 11 April, 2016)
[53] David Delaney, 'Legal Geography II: Discerning Justice', (2016) *Progress in Human Geography* 40(2): 267-274.
[54] J Holder and CE Harrison (eds), *Law and Geography* (Oxford University Press 2003) 4.
[55] Economides et al 171.
[56] Bennett and Layard 408.
[57] Pue, 'Wrestling with law: (geographical) specificity vs. (legal) abstraction.' (1990) *Urban Geography* 11(6): 566–585.
[58] Bennett and Layard 406.
[59] The case was *R v Dudley & Stephens* (1884), 14 QBD 273, which proved to be one of the most contentious legal decisions in English legal history. The courts ruled that the killing and eating of a cabin boy by these sailors was a crime under English Law, even though the sailors would have died had they not done so, as they drifted helplessly aboard a lifeboat in the South Atlantic, 1600 miles off the Cape of Good Hope. See Bennett and Layard 406.
[60] Bennett and Layard 407.

the courts and other legal sources as existing in a purely conceptual space, with little recognition of the diversity of spatial definitions or the local material contexts within which law is understood and contested.[61]

In fact, law and geography are linked, as their categories are socially constructed. Law and space are relational, acquiring meaning through social action, rather than as objective.[62] Law and space influence the way power and social life are manifested, including the corresponding problematic and oppressive patterns that characterise them.[63] Space is not a backdrop to political and social action, but rather a product of such action.[64] Law configures space in ways that have consequences for justice and injustice in the world because it shapes relations of power. Injustice here relates to unnecessary social suffering, which may be distinguished from other forms of suffering that are not social or unjust. [65]

Legal geography examines systemic asymmetries of power – domination, exploitation, and marginalisation both in the world and with respect to access to law. Contexts include racism, colonialism, homelessness and environmental justice.[66] The legal geographical perspective is therefore indispensable for revealing the workings of power that conventional spatial blindness obscures and for 'identifying the whys, how and wheres of injustice that are otherwise invisibilized and legitimized'.[67] As Robyn Bartel et al have noted, ignorance of geography has political consequences, for if we do not ask questions about the location of law's impact, and therefore also who it impacts on, then its effects, such as environmental destruction or the dispossession and genocide of indigenous peoples, may be ignored.[68] This presents legal geography with a significant opportunity to contribute to the decolonisation of law.[69] These are all themes integral to the development of post-colonial states in the Lesser Antilles.

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[61] Nicholas Blomley and Joel C Bakan, 'Spacing out: Towards a critical geography of law' (Fall 1992) *Osgoode Hall Law Journal* 30(3): 661-690, 663-4.
[62] Blomley and Bakan 666.
[63] Ibid., 669-70.
[64] Ibid., 669.
[65] D Delaney, 'Legal Geography II: Discerning Justice' (2016) *Progress in Human Geography* 40(2): 267-274, 268.
[66] Ibid., 268.
[67] Ibid., 273.
[68] Robyn Bartel, Nicole Graham, Sue Jackson, Jason Hugh Prior, Daniel Francis Robinson, Meg Sherval and Stewart Williams, 'Legal Geography: An Australian Perspective' (November 2013) *Geographical Research* 51(4):339–353, 341.
[69] Bartel et al 344.

Legal geography has been further developed over the years, notably by Nicholas Blomley.[70] He sees the task for legal geography as threefold: identify the frozen legal and spatial representations and explore such implications; demonstrate the social construction (and thus the non-objectivity) of these representations; and analyse the material conditions under which challenging such dominant representations can be part of a wider struggle for progressive social change.[71]

The aim of legal geography is to expose the 'concealed, forgotten or prohibited connections between peoples and places.'[72] Legal geography is not just about bringing a geographical perspective to formal legal systems. So-called 'formal' laws interact with informal customs and lore, social conventions and norms, religion and dogma, as well as the economy, and in fact this formal law may derive much of its (often silent) ideology and values from pre-existing systems of lore and norms that are spatially located, influencing its development and implementation.[73] Attending to material conditions, limits and connections, legal geography is necessarily also attuned to historic context. For example, although the histories of many lands and nations colonised by Anglo-Europeans in the seventeenth century share important political histories, they also have, in geographical terms, very different material histories.[74] This is why the colonies of the Lesser Antilles in the Caribbean are dissimilar from Australia or India or Africa, despite inheriting the same common law tradition from England. By situating law in space, that is, within its physical conditions and limits, legal geography encourages place-based knowledge to form law's basis. This requires a paradigmatic shift, from 'the alienation of people and place in law and geography to their necessary connection'.[75]

The role of law in prescribing people-place relations is central to the success or failure of any society. Understanding and exposing the spatial assumptions inherent in law that are presented as neutral and abstract can introduce new possibilities regarding the production of more geographically sensitive and representative (spatially just) legal rules and practices.[76] For the small islands of the Lesser Antilles, this is necessary to their survival. Placelessness has

[70] Bartel et al 341.
[71] Blomley and Bakan 690.
[72] Bartel et al 343.
[73] Ibid., 346.
[74] Ibid., 349.
[75] Ibid.
[76] Layard, 'Reading Law Spatially' in Creutzfeldt et al, *Routledge handbook of socio-legal theory and methods* 241.

suppressed the growth of these societies throughout their history, lack of cultural identity serving as its indicator and rendering inhabitants in need to 'civilisation'. Landscapes reveal the opportunities and limits of our connection with the world, and recognising this dynamic in law's operation by integrating material conditions and consequences embraces sustainability of place and survival of its inhabitants.[77]

1.3.1 Distinguishing space and place in the law

Space is a geographical location,[78] and spatiality is the state of existing within or having some relationship with space. Legal geographers seek to investigate spatiality by showing how legal provisions and practices relate to space.

Legal geography brings specific attention to space and spatiality, to the interrelationships between people and environments, analysing how these operate across and between humans, places and non-humans, as well as core geographical concepts of place, networks, mobility, scale, relationality, distance and temporality.[79]

Place is a specific geographic location to which meaning has been ascribed, produced by the interaction of human relations, activated by movements, actions, narratives and signs.[80] Law can construct and stabilise places through the accumulation of property rights, contract law, planning law and natural resource law.[81] But in doing so, law can also alter and even extinguish place.[82] Law's oxymoronic character in both creating and dissolving place therefore underpins this analysis.

1.3.2 Landscape: Focusing legal geographical analysis

Many terms are used to describe the foundational conceptual devices legal geographers employ in their analysis of place.[83] The 'splice' was introduced by Nicholas Blomley,[84] which is similar

[77] Nicole Graham, *Lawscape: property, environment, law* (Routledge, 2010) 206.
[78] Layard, 'What is Legal geography?' (University of Bristol law school blog, 11 April, 2016)
[79] Layard, 'Reading Law Spatially' in *Routledge handbook of socio-legal theory and methods* 232.
[80] Bartel et al 340; Bennett and Layard 409; WJT Mitchell (ed) *Landscape and Power* (2nd edn, University of Chicago Press, 2002) x.
[81] Luke Bennet, 'How does law make place? Localisation, translocalisation and thing-law at the world's first factory', (2016) *Geoforum* 74: 182–191, 189.
[82] Ibid., 189-90.
[83] Layard and Bennett 415.
[84] Nicholas Blomley, *Law, space, and the geographies of power* (Guilford Press, 1994).

to Nicole Graham's 'lawscape'[85] and Andreas Philippopoulos-Mihalopoulos' 'nomosphere.'[86] These terms refer to instances or moments where legally informed decisions and actions take place (in the sense of both being performed as a legal event and of being spatially located and embodied). They are 'locally enacted encodings, which weave together spatial and legal meanings'.[87]

For the purpose of this research, landscape is the device used to represent such encodings, and to assess the formation, function, impact and effectiveness of heritage legislation. As defined by geographer Kenneth Olwig, landscape is generated through the practices of human residence and occupation, laid down as custom and law upon the physical fabric of the land.[88] These place-based rights give individuals a sense of identity and role in the community. Belonging is therefore couched in spatial terms.[89] Community identity arises from collective memory, historically associated with and emanating from the land, and the cultural sense of place identity also gives rise to legal rights and political institutions to represent and protect these rights. Historically then, landscape functions as the rubric for the relationship between land, law and people, and was 'constituted as an enduring record of - and testimony to - the lives and works of past generations who have dwelt within it, and in so doing, have left there something of themselves'.[90] Landscape therefore is the locus of heritage.

Landscape is particularly linked to the common law of Great Britain and its former colonies, as customary law adjudicated by representative legal assemblies is a tradition still found in the English legal system. The customary rights and regulation of such rights were originally shaped by the material landscape to ensure its sustainability.[91]

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[85] See Graham, *Lawscape*; Andreas Philippopoulos-Mihalopoulos, 'Introduction: in the lawscape' in Andreas Philippopoulos-Mihalopoulos (ed) *Law and the city* (Routledge-Cavendish: 2007) 1–20.

[86] David Delaney, *The spatial, the legal and the pragmatics of place-making: nomospheric investigations* (Routledge 2010).

[87] Layard and Bennett 410.

[88] Kenneth Olwig, *Landscape, Nature and the Body Politic: From Britain's Renaissance to America's New World* (University of Wisconsin Press, 2002) 226.

[89] Michael Herzfeld, 'Monumental Vacuity and the Idea of the West' (2006) *Journal of Material Culture* 11(1/2): 127–149, 128.

[90] Tim Ingold, 'The Temporality of the Landscape', (1993) *World Archaeology*, 25(2): 152-174.

[91] Olwig, *Landscape, Nature and the Body Politic*, 232; Kenneth Olwig, 'Virtual enclosure, ecosystem services, landscape's character and the 'rewilding' of the commons: the 'Lake District' case,' (2016) *Landscape Research* 41(2): 253-264, 256.

Because landscape embodies both the interaction between people, land and law, and provides evidence of that interaction, legal geographers from Blomley to Olwig have demonstrated that any landscape interested in justice has to pay close attention to theory, history and struggles over property.[92] As addressed earlier, the history and size of the geographic land masses that comprise the Lesser Antilles means that the physical environment incorporates both natural and cultural heritage. There are very few areas of unspoiled wilderness in the Caribbean due to the intensity and scale of plantation agriculture during colonialism, so access to land (which went hand in hand with the suppression of local peoples) and property law also anchor the analysis of heritage law.

1.4 Legal anthropology: Law's role as regulator of society

Anthropology and the law share a close relationship. Law is a core cultural element for anthropologists,[93] and has been embedded in cultural anthropology since its founding.[94] Anthropology has also been concerned with the themes of territory, boundaries, place, and landscape as these bear on questions of culture and, in this sense, it is the field that most closely relates to legal geography.

Legal anthropology, like legal geography, challenges law's centralist and formalist orientation, which is predicated on the state's exclusive authority to write and enforce laws. This is especially relevant where law is imposed as a tool of imperial authority, as was the case in the Lesser Antilles. Through its use of ethnography, attention to law in non-Western cultures and law in everyday life, legal anthropology expands understanding of what law is beyond doctrinal and statist conceptualisations, and where it is to be found, grounding law in society and its relationship to culture.[95] As Kirsten McConnachie put it, 'A simpler way of describing the relationship might be to say that anthropology asks a question that is often never considered by lawyers: what is law? And to what extent can the label of law be applied to non-formal

[92] Don Mitchell, 'Cultural landscapes: just landscapes or landscapes of justice?' (2003) *Progress in Human Geography* 27(6): 787-796, 793.
[93] John M Conley and William M O'Barr, 'Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law,' (1993) *Loyola of Los Angeles Law Review* 27: 41-64, 44.
[94] Irus Braverman, David Delaney, Nicholas Blomley, and Alexandre Kedar (eds), *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press, 2014) 10.
[95] Creutzfeldt et al, *Routledge handbook of socio-legal theory and methods* 122.

normative orders?'[96] Legal anthropology argues for a more expansive use of the term law to encompass those uncodified cultural and customary elements of dispute resolution that possess 'norm-setting and norm sanctioning powers'.[97] Legal pluralism thus challenges legal centralism, or the belief that law is in the exclusive control of the nation-state by recognising that dispute resolution and order maintenance can occur outside the formal legal system via "customary" and "traditional" systems.[98]

In her Huxley Memorial Lecture, 'Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999', Sally Falk Moore identified three major approaches to law within legal anthropology: law as culture, law as domination, and law as problem-solver.[99] Legal anthropology, in investigating law's primary function as problem solver, explores cross-cultural, non-western and alternative methods of dispute or conflict resolution, and also engages in an analysis of the cultural dynamics at play within western legal systems. Ultimately, the aim is to understand the general principles underlying the normative regulation of society, 'the social forces working to create and maintain ties of cohesion against the tidal pull of individual interests'.[100] How does society use law to heal divisions and resolve disputes? How does law order society and thereby facilitate control? Legal anthropology is qualitative in approach, discovering and describing the possibilities for ordering societies.[101] These tenets underpin the legal analysis herein.

1.5 Aims and objectives

This research analyses the origins and implications of cultural heritage law by employing a spatial justice lens. This new approach to cultural heritage makes use of legal geographical and legal anthropological methods to challenge the traditional and colonial-era legal framework for heritage protection in the Lesser Antilles.

[96] Creutzfeldt et al, *Routledge handbook of socio-legal theory and methods* 194.
[97] Ibid.
[98] Ibid.
[99] Sally Falk Moore, 'Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999' (March 2001) *The Journal of the Royal Anthropological Institute* 7:195-116.
[100] James M Donovan, *Legal Anthropology: An Introduction (*AltaMira Press 2008) vii.
[101] Conley and O'Barr 63-64.

This aligns with the objectives of the Nexus1492, of which this research was a sub-project. Nexus1492 was a transdisciplinary project which investigated the impacts of colonial encounters in the Caribbean, the nexus of the first interactions between the New and the Old World. Nexus1492's objectives were to provide a new perspective on the Columbian and subsequent colonial invasions by focusing on the histories and legacies of the Indigenous Caribbean, and to raise awareness of Caribbean histories and legacies, striving for practical outcomes in future heritage management efforts with implications for local communities, island nations, the pan-Caribbean region, and globally.[102]

These objectives are addressed in this research. Landscape and spatial justice offer new perspectives on cultural heritage protection, by reframing the impacts of colonialism as spatial, and considering the implications for heritage protection because heritage is place-specific. This research also considers how these insights can shape approaches to heritage, by ensuring that local communities that are the heritage creators are centred in strategies to protect heritage. This incorporates considerations of ownership and identity as integral to a functioning, thriving and resilient landscape. The task of the legal sub-project was to undertake an examination of legislation as a practical tool for heritage management, by examining colonialism's impact on Caribbean heritage legislation and practices. Geopolitical, historical, and contemporary factors were to be considered to identify cross-cutting issues that would improve the integration of policies on local and regional levels through best practices and capacity building. Specific attention was to be given to issues of cultural ownership and identity of Caribbean communities.

This legal diagnostic was one of two legal sub-projects; the other project addressing the role of international law in confronting the colonial past, specifically in relation to land rights, cultural heritage and restitution.[103] Other projects conducted under the aegis of Nexus1492 addressed heritage education, community approaches to the environment, and the role of modern Caribbean museums. [104]

[102] Nexus 1492 project, Leiden University <https://www.universiteitleiden.nl/nexus1492> accessed 2 January 2019
[103] Amy Strecker, 'Indigenous Land Rights and Caribbean Reparations Discourse', 2017 *Leiden Journal of International Law* 30(3): 629-646; Amy Strecker, 'Revival, Recognition, Restitution: Indigenous Rights in the Eastern Caribbean,' 2016 *International Journal of Cultural Property* 23(2): 167-190.
[104] Csilla Ariese-Vandemeulebroucke, *The Social Museum in the Caribbean: Grassroots Heritage Initiatives and Community Engagement* (Sidestone Press, 2018); Charlotte Eloise Stancioff, 'Landscape, Land-Change and Well-Being in Small Island Contexts: Case Studies from St. Kitts and the Kalinago Territory, Dominica', PhD diss., Leiden

The main research question for this dissertation asks whether law is an effective instrument in the protection of cultural heritage in post-colonial societies of the Lesser Antilles. A number of sub-questions address what mechanisms are available in international law for the protection of landscape; to what extent the Caribbean landscape has influenced the perception and protection of cultural heritage; the key features of heritage law in the Lesser Antilles today and their relationship with spatiality; and finally, how locally specific strategies can be embedded to transform the present framework.

1.6 Methodology

In the absence of case law dealing with heritage disputes in the Lesser Antilles, community challenges of the uses of public space provide evidence of conflict over ownership of heritage resources and landscape. This is useful for understanding the ways in which the public define, value and interpret these spaces, and demonstrate 'place-protective behavior'.[105]

To this end, this research has entailed a major review of primary and secondary sources, including legislation, treaties, historical records and journals, as well as interviews with heritage stakeholders in governments and civil society. Heritage policies, plans, and project documents were consulted to supplement understanding of the effectiveness of heritage law implementation and enforcement, as they constitute evidence of cultural issues, public sentiment, and conflict over the use and access to heritage resources. Draft heritage legislation is also considered as evidence of the law's development, as well as underlying public policy. Planning and policy decisions are used to demonstrate how law balances competing discourses and values.[106] These sources are investigated with an eye for how and when spatiality influences, frames or determines language, mechanisms and decisions. Which legal concepts recur, which gaps exist, and the

University, 2018; Eldris Con Aguilar, 'Heritage Education — Memories of the Past in the Present Caribbean Social Studies Curriculum: A View from Teacher Practices', PhD diss., Leiden University, 2019.

[105] Robyn Bartel and Nicole Graham, 'Property and place attachment: a legal geographical analysis of biodiversity law' (August 2016) *Geographical Research* 54(3): 267–284, 276.

[106] Deborah G Martin and Alexander Scherr, 'Lawyering Landscapes: Lawyers as Constituents of Landscapes', July 2005 *Landscape Research* 30 (3): 379-393, 382.

interrelationships with other factors, are clues for understanding law's relationship with space and how this may impact heritage protection.[107]

1.7 Outline of chapters

There are eight chapters in this dissertation, including this introduction. The following two chapters set the context for landscape and the law, preceding the legal analysis of Lesser Antillean heritage law in the remaining chapters.

In Chapter Two, I investigate the historical origins of landscape as the foundational concept in legal geography, discussing the existence and transformation of landscape in pre-industrial Britain and the consequences for the common law. I then train this conceptual framework on the Caribbean landscape as the substrate of Caribbean cultural heritage, to examine environmental and demographic factors present in the colonies and the effects on the landscape and early heritage law. I discuss the emergence of heritage law in the Lesser Antilles in circumstances of cultural erasure and environmental devastation (eco-imperialism), which ultimately shaped the legal rules that apply to heritage resources today.

In Chapter Three, I chart the evolution of landscape protection in international law, from its soft law origins in cultural heritage law to its development as a distinct sphere of law in its own right. I explore the interactions in cultural heritage law with respect to landscape and communities that have transformed its elitist perceptions, and influenced other areas of international law, such as international environmental law and human rights law. I look at challenges surrounding implementation of international landscape law in these various fields, and consider opportunities for protecting landscape regionally in the Lesser Antilles.

Landscape in the current domestic legislation of the Lesser Antilles is considered in Chapters Four through Six. The laws that regulate or impact the regulation of landscape are found in heritage protection legislation, planning legislation and conservation legislation (parks and protected areas) and are assessed via a spatial justice lens.

[107] Layard, 'What is Legal geography?' (*University of Bristol law school blog*, 11 April, 2016).

In Chapter Four, I examine contemporary heritage legislation in the Lesser Antilles, which includes heritage protection legislation, laws establishing heritage institutions such as national museums and National Trusts, as well as antiquities laws. In Chapter Five, I turn to planning law, examining the historical association between land use and heritage and consider whether heritage is perceived as a legitimate land use. In Chapter Six, I review the laws governing national parks and protected areas as modern public spaces. Where appropriate, I reference policies and draft laws from around the region that give an indication of the ways in which governments in the Lesser Antilles prioritise heritage resources and any guidance for aligning the implementation of heritage laws, such as cultural policies.

The effectiveness of these laws is demonstrated in Chapter Seven. Chapter Seven shares examples from the Lesser Antilles of conflict over landscape as public space that illustrate the ongoing challenges to represent community interests where private property is elevated in the law. Each example explores a facet of landscape protection, revealing common trends in application of heritage law. I conclude with key findings from the research and a discussion of the way forward in landscape and heritage protection in Chapter Eight.