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# PRIVATE NUISANCE, REGULATION AND PROPERTY RIGHTS: AN EVOLVING LEGAL STORY

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# Regulation and Private Rights

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*[P]lanning authorities are concerned with the **public interest** in development and land use, as that interest is defined in the planning legislation and any relevant development plans and policies. Planning powers do not exist to enforce or override **private rights** in respect of land use... Likewise, the question of whether a neighbouring landowner has a right of action in nuisance in respect of some use of land has to be decided by the courts regardless of any public interest engaged.*

*Coventry v Lawrence*, Lord Sumption [156]

- Are private and public interests so polarised in the legal interaction of regulation and ‘individual’ private rights?
- Need to consider (1) nature/process of planning system and (2) nature of property rights more closely

# Question

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- Question: how does environmental regulation interact legally with property rights, and vice versa (if at all)?
  - Focus on planning law as ‘regulation’ and private nuisance as illustrative doctrinal context
- Legally interdisciplinary issue
- Particularly interesting for environmental law
  - No set doctrinal/methodological frameworks for its analysis, largely because driven by complex environmental problems rather than constructed legal regimes and doctrine
- Note paper published in (2013) 76 MLR 1010

# Thesis

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Environmental regimes entailing considerable administrative discretion are now serving to contextualise and partly to constitute property rights in English law.

In particular, rights to use land are ‘democratised’ to varying degrees through the administration of environmental regulation, and are adapted to land use problems on an evolving basis.

In return, property rights affect environmental regulation, through legal protections for property interests.

*Unresolved issue: how, and what is the extent of this effect?*

# Steps to Test Thesis

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1. Environmental law – the regulation of land in particular – sets up unique sites of interaction with property rights
  2. ‘Regulatory turn’ in English environmental law: ever-evolving administrative regimes to control land use, in which competing interests are considered through legally directed, participatory processes  $\Rightarrow$  ‘democratised’ land use rights
  3. Mutual impact of property rights and administrative decisions in legal doctrine?
- NB focus on property rights to *use land*

# Unique Interaction: 'Land's Finitude' (Peñalver)

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*Land's finitude amplifies the importance of land-use decisions because, all things being equal, more land put to one use results in less land available for another. Combined with land's memory, this means that, once in place, existing land uses will frequently limit the scope of our land-use choices for a long time to come. Consequently, land remains the site of numerous conflicting demands, both among human beings (including human beings who have yet to be born) and between humans and other species.*

# Regulatory Turn in English Environmental Law

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- Modern environmental regulation (English and EU/Aus)
  - Complex administrative systems for environmental assessment, industrial permitting, development planning and nature conservation, all affecting/determining permissible land use
- *Coventry v Lawrence* [2013], Ld Sumption
  - ‘The main question is whether the current principles of law [on injunctions] are consistent with the public interest reflected in the *successive and increasingly elaborate legislative schemes of development control* which have existed in England since 1947.’

# Regulatory Turn ctd

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*... the lineaments of the law of nuisance were established before the age of television and radio, motor transport and aviation, town and country planning, a 'crowded island', and a heightened public consciousness of the need to protect the environment...*

*Hunter v Canary Wharf, Ld Hoffmann*

*Potentially unneighbourly uses, even if not subject to specific planning permission, are likely to have been subject to other regulatory control to ensure their acceptability within their particular environment.*

*Coventry v Lawrence, Ld Carnwath*

# Regulatory Turn and 'Democratised' Land Use

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- Administrative decision-making as site/mechanism for contextualising property rights and mediating symbiotic relationship of property rights with environmental regulation
- Open standards applied  $\Rightarrow$  space for considering a range of interests relevant to instances of land use, including the interests of property right holders
  - 'material considerations' in planning context
- Property rights, as constituted through environmental regimes, embody a notion of 'democratised' land use (Gray)/have a social aspect (Honoré)  $\Rightarrow$  land use decisions accommodate various interests, not purely individual, nor purely 'public benefit'

# 'Democratised' Land Use Decision-Making ctd

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- But not unfettered discretion: choices about land use as legally directed/structured administrative processes
- In particular, administrative decision-makers in environmental regimes as accountable in 3 ways, i.e layers of democratic input inform and control the constitutive impact of environmental regulation on property rights
  1. Parliamentary parameters and government policy directing/constraining decision-making
  2. Wide participation of interested parties/groups
  3. Property right protections (HRA, common law presumptions)
- Property right holders can assert interests internally

# Doctrinal Reflections of Symbiotic Interaction

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- Legal checks on incursions into property rights: statutory interpretation principle (no ‘taking’ of ‘property’ without compensation), HRA cases (A1 P1)

*The give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest.*

*(Grape Bay v AG Bermuda, 2000, PC, Ld Hoffmann)*

- Regulation (legislation of general application) not often a restriction on property rights that requires compensation
  - Planning law (*Belfast Corp v OD Cars*, 1960, HL)
  - Nature conservation (*Trailer & Marina*, 2004, HC)
- Requirement to comply with A1 P1 protection within administrative decision-making (*Lough v First SS*, 2004)

# Property Rights in Planning Regimes

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- In considering planning applications, authorities must have regard to the development plan, as material, and ‘any other material considerations’ (TCPA, s 70)
  - Confers and controls discretion
- Applications determined through participatory administrative processes on a case-by-case basis, also informed by government of the day’s political priorities on a wide range of social issues
  - ‘Public interest’ as the result of this complex decision-making, or promotion of ‘public benefit’?
- Property rights *of those applying for planning permission* are treated as **socially constituted and dynamic**, significantly democratised by taking into account various interests and policy goals through legislatively directed deliberation

# Doctrinal Impacts ctd: Private Nuisance

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- Until *Coventry v Lawrence*, some private nuisance cases seemed to suggest that greater legal recognition would be given to administrative decisions over land use resulting from widely inclusive and participatory deliberative processes
- Not concerned simply with land use rights of owner but of impact of environmental regulation on property rights of *neighbours* to regulated land
  - Historically, nuisance law mediated between different property rights to determine acceptable land use in a locality; more complex now that regulatory regimes (also) do the latter
- *Watson v Croft Promo Sport* cf *Lawrence v Fen Tigers* (CA)
- *Barr v Biffa Waste*: nature of administrative decision-making process is important?

# ***Coventry v Lawrence* [UKSC, 2013]?**

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- Lord Neuberger – planning permission cannot affect liability in nuisance where it allows a ‘nuisance’ (except evidentially in establishing reasonable use, although planning officers’ reasons can be dubious) but the grant of an injunction may be limited by the public benefit, which might be demonstrated through the planning process
- Lord Sumption – agrees on liability, but to ‘avoid anomaly and incoherence’ in the law, remedies should be used to ‘reconcile public and private law in the domain of land use where they occupy much the same space’ → no injunction where use of land has received planning permission
- Lord Mance – people have a right to enjoy their home without disturbance
- Lord Clarke – planning permission can be relevant to nuisance liability but highly fact dependent

# ***Coventry v Lawrence, Ld Carnwath***

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- Planning control is now a fundamental part of determining ‘established patterns of use’ of land in a locality, which generally represents society’s view of the appropriate balance of uses in a particular area, and provides the starting point for considering an alleged nuisance
- Planning and nuisance have overlapping functions in considering amenity impacts on neighbouring property owners → risk of pulling in opposite directions
- Residual role for nuisance law in ensuring that ‘new or intensified activities do not need lead to conditions which, within that pattern, go beyond what a normal person should be expected to put up with’
- *Process* of decision-making important, especially where conditions have been ‘carefully designed’ by LPAs to represent a fair balance of land use

# Where are we after *Coventry v Lawrence* [2013]?

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- Confused?
- Convinced that private rights triumph over public controls?
- Convinced that public law decisions will in fact shape (1) nuisance liability via evidence/hard work(?) of planning authorities in considering amenity impacts, or (2) outcomes through remedies (no injunctions to frustrate planning permission in most cases)
- Waiting for a case that does not involve a solitary (burned down) house in a field but a bustling urban environment that involves a complex mix of uses or is affected by a major planning change (expanding Heathrow?)?
- Thesis: symbiotic impact more obvious in remedies but perhaps also there/hiding in liability?

# In Conclusion

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- Property law and environmental law are connected in significant, often constitutive ways.
- Environmental law challenges property scholars to reflect on the impact of administrative decision-making on property rights, conceptually, doctrinally and in terms of its legitimacy. And to appreciate (accept?) that environmental law asserts a significant influence over the scope of property rights in key public law contexts.
- Environmental lawyers need to take seriously the nature and legal treatment of property rights in the application and analysis of modern environmental law. Perhaps even more so after *Coventry*?

**THANK YOU**

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