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Climate Law from the Interstices: Caribbean SIDS and Spatian Dimensions of TWAIL

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Introduction

Small island developing states (SIDS) are regularly invoked in international law, either as fragile biodiversity hotspots or negligible emitters bearing the burden of climate change. On the one hand, the conventional approach to climate change is to emphasize the catastrophic consequences of climate breakdown: natural disasters, sea level rise, climate migration and refugees; while on the other there are assurances to the global community that following the science, applying new technologies, minimizing risk through insurance, and developing climate finance mechanisms will be able to address the problem. These narratives either lean into the spectacular aspects of climate change (averting a human rights crisis) or highlight the technical and managerial aspects of the problem. They demonstrate little insight into the limits, norms and values reflected in the lived-in experiences and realities of the landscapes

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of the Global South. Moreover, this categorization of SIDS as destined to follow a doomed climate pathway entrenches an understanding of the environment and the Global South as monolithic and generic and forecloses possibilities for righting wrongs that are uniquely place-based.

TWAIL scholarship has been crucial for investigating and complicating international law, engaging race, environment, empire and capitalism; but the ways in which these factors coalesce within a particular geographic location, or space, remains undertheorized in international law. Legal geography posits that law and space are co-constituted, and many legal concepts need to be reconciled with space in order to ensure the effective delivery of justice. There is epistemic convergence between TWAIL and spatial justice, as scholars have acknowledged the relevance of local dynamics in relation to challenging the universality of international law, and the problematic consequences of a homogenous conceptualization of the environment given its roots in Empire.

Advancing the spatial dimensions of TWAIL therefore incorporates thinking of the Third World not just as 'subaltern epistemic locations', but as actual locations – physical places or landscapes – because their erasure was essential to the creation of the imperial extractive imaginary that underpins the environment in international law. Landscapes are geographically embedded ontologies, central to local livelihoods, practices and identities. They often reflect cultural values that are in tension with cornerstone legal concepts and mechanisms such as property because they transcend ownership. Spatial justice involves the protection of these landscapes, because when landscapes are functioning, communities, ecosystems and sustainable people-place relations thrive.

The absence of a normative framework for spatial injustice means that environmental (and climate) law can overlook the relevance of material circumstances, or emplaced histories, in shaping issues of marginalization and vulnerability. Developing countries are not interchangeable, and neither are small islands. Using the experience of Caribbean SIDS, I attempt to unpack and unsettle some of these climate narratives from a legal geographical perspective.

SIDS, Empire and the Geographies of Climate Change

Climate change is a challenge to international (environmental) law, and climate law as a subset of this field has not yet confronted the ways in which legal theory and mechanisms are detached from the reality of landscape change. This can be seen in the vocabularies concerning mitigation, adaptation, and even loss and damage for small islands. In focusing on managing hazards and minimizing risk, these mechanisms may be simply restoring islands to their present state of vulnerability, rather than

investigating underlying causes of that vulnerability. More specifically, they do not address the spatial impacts of climate change as they vary across the world, and even amongst small islands, which means that vulnerability is not assessed as the outcome of large-scale long-term landscape disturbance caused by imperial interests.

Climate change was triggered by former European empires during the industrial period, as profits generated from specific land uses (plantation monoculture) funded other land uses such as coal extraction. For the Caribbean as former plantation economies, climate justice, environmental justice and racial justice cannot really be considered in isolation as they intertwine in a long history of undermining place integrity. This is not the case for other small island groupings.

Small island states comprise less than 1 per cent of the world's population and are generally negligible carbon emitters yet are among the most vulnerable to climate change. There are 38 United Nations country member SIDS, as well as other dependent territories and UN associate member states. They represent a wide spectrum in terms of development, incorporating wealthy countries as well as least developed countries according to the UN designation. SIDS have been divided into three sub-groupings: (1) Caribbean, (2) Pacific and (3) Atlantic, Indian Ocean, Mediterranean and South China Sea (AIMS).

Pacific SIDS jurisdictions are politically and legally pluralist, often involving recognition of customary, civil and common law, together with mixed parliamentary and governance systems, and this is mainly due to the presence of Indigenous peoples, who retain their languages, customs and culture in spite of European colonization, which intensified in the 1800s. The Pacific has been a dynamic region in terms of climate justice and activism, highlighting the effects of climate-induced impacts on the environment, culture and spiritual connections with land. This is exemplified by Vanuatu's recent call for an advisory opinion on climate change from the International Court of Justice. Also exhibiting wide cultural and legal diversity is the AIMS region, which includes five main SIDS split between the African and Asian continents, some of which were actively settled and incorporated into vast and diverse trading networks over the millennia, others remaining unpopulated until the seventeenth century.

Caribbean SIDS may be further distinguished from these two categories. Caribbean states are mostly (though not exclusively) common law jurisdictions. The Caribbean has had some of the longest exposure to European empires, some becoming colonies in the 1500s, and often changing hands between empires. Climatic disturbance was observed among the Dutch, French and British Empires, and some of the earliest climate laws can be found in the Caribbean, when desiccation-based legislation informed by the latest science on the links between climate, deforestation and lack of rainfall led to the establishment of some of the first nature reserves in the

world. These laws were unsuccessful, as the intention was to use island ecosystems as models and laboratories to service the metropole's goals of maximizing extraction from colonized environments.

Constructing island 'Edens' or pristine nature in the law required the dispossession of Amerindian peoples and the destruction of their landscapes. Delegitimizing certain land uses continued with enslaved Africans who were brought as a labour force for Caribbean plantation agriculture and had no rights to the land, being treated as chattel property in the law. These legal practices concerning race, climate, environment and land were later replicated throughout the British Empire and inspired a speculative investment infrastructure that was the forerunner of financial capitalism. Given its size, the Caribbean's contributions to the formative developments around environment (biodiversity, forest management, national parks), trade and investment in international law are monumental.

Yet these emplaced histories are not part of the climate narrative. Caribbean islands are not treated as lived in places but vacuous 'paradises', part of the extractive imaginary, hyper visible only at their putative vanishing point.

Climate Change in the Caribbean: A Spatial Justice Perspective

If space is relevant to the effective functioning of law, then the Caribbean region has been defined by law's dismissal of space, experiencing displacement within, without, and 'in place'. By this I mean not only the physical ejection of the original peoples and the arrival of other displaced peoples from various nodes of the Empire (Ireland, Africa and India), but also the extension of this spatial logic to devaluing modern communities and their land use practices so that they are constrained collectively (and effectively dispossessed), even when they have not been removed from the land. This continues the attrition of place first begun with colonialism, except that land improvement projects no longer concern nature reserves and plantation agriculture but rather ecotourism and climate smart agriculture and aquaculture.

Displacement, environmental degradation, and climate change are not new issues for this region. Caribbean countries have lived with spatial precarity for half a millennium and are defined by it. These societies cannot claim ancestral ties to the land, as they are no longer Amerindian homelands, and land use and access have been complicated by the lack of 'legitimate' claims to the land beyond private property in common law jurisdictions. They are not settler but slave colonies, since land was not to be developed but exploited via slave labour, resulting in the extreme degradation of Caribbean landscapes. Despite these challenges, descendants of enslaved and indentured communities have developed embedded relations with their environments

and cultural practices that reflect alternative understandings of land that may not align with private or Indigenous property concepts.

If the law (through financialized capital, titling, and property rights) deactivates working landscapes so that they are no longer functioning places, then climate finance, which deploys market-based instruments based on the same extractive grammar, cannot provide spatially just solutions for the Caribbean, and will continue to undermine place.

Problematizing Migration: Decolonization or Displacement?

There is excellent scholarship on the issue of immigration as decolonization, as a means of subverting the imperialist dynamic and accessing colonial wealth locked within the international system. Climate migrants and climate refugees are also terms being employed to refer to people on the move as a result of climate-induced displacement.

While international law does trigger legal obligations for host countries when it comes to refugees, the term in the context of climate change is definitionally imprecise and there have been calls to avoid alarmist and apocalyptic framings, often premised on the inevitability of migration and relocation, which can politicize the category itself. The spatial justice lens also further complicates the approach to migration, climate change and international law.

Many people are impaired from leaving, or do not necessarily want to leave. In the Caribbean context, I have highlighted how communities have developed embedded relations with land, in spite of spatial precarity, because displacement is their reality – refusal to leave is not necessarily a sign of irrationality or ignorance. People have long had to strategize around land insecurity – sometimes they leave, sometimes they stay, sometimes they return. People can remain spatially embedded even when they are no longer physically located in a place. In the case of the Caribbean, would climate migration be considered climate justice, a win for human rights, or yet another round of displacement?

A sense of self comes from community, which is tied to a specific place. Thus far, landscape protection in relation to its significance for collective livelihoods, practices and identity has not been established within the current international framework. The exception to the rule would be the land rights violations of Indigenous peoples, where the rights to culture and property do incorporate custom and collective tenure beyond abstract notions of title. This is not enough to be able to claim the existence of place-based rights in international law that would extend to (non-Indigenous) Caribbean communities, though this is beginning to change. In addition, human rights violations have been conceptualized in individualistic terms, so there is

a clear need for alternative models on the cultural and social dimensions of human rights that take the Third World (and its landscapes) into consideration.

What would spatial empowerment for Caribbean communities look like? Is climate justice possible for this region without it?

Climate Law and Spatial Justice

Climate change is of global concern but its consequences manifest locally. Climate change has been decoupled from its legal geographical underpinnings – it was birthed during industrialization and financed through the profits accumulated via the exploitation of Caribbean landscapes, during which extractive land use had been legitimized in the law. At the same time, law's detachment from that physical world to facilitate extractive land use has created rights, obligations and duties that are unaligned with the complexities, social lifeways, and natural limits of particular places.

If the law is immune to place, what does this mean for place integrity and the people who shape and rely on these places for survival? Ignoring space means we ignore the informal, overlapping embedded interests that could be important to sustaining place, because they circumvent the individualistic, accumulating, extractivist modalities that originally enabled climate change.

Challenging law's universality as aspatiality, itself a product of imperialism which collapsed disparate places and cultures into the single space of Empire, means that spatial justice considerations dovetail with TWAIL's objectives, which 'seek to unpack and deconstruct colonial legacies of international law…[and] to decolonize the material realities of the peoples of the global South by, in part, constructing new and alternative legal futures.'

If law is not responsive to place, it will never be truly decolonized. More nuanced understandings of place and impacts on place are necessary in order to avoid presentist understandings of climate change, and to integrate emplaced histories and cultural dimensions of land into the law. The Caribbean example illustrates the consequences of a legal system that is defined in detachment from the environment and reconstructs diverse physical and cultural landscapes as abstract tradeable rights in the law.

Should displacement and migration prove to be inevitable for small island states, spatially just thinking may still play a role in assessing damage and prescribing remedies appropriate to these communities. Spatial justice can serve as a corrective to the law's dismissal of landscapes, to challenge the law's universality and demand justice that is heterotopian in character. Only then will small island states be treated as more than mere mascots for the climate crisis, and the reality of their particular and complex

people-place relations linked to a climate solution that is fair for each island and each region.

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