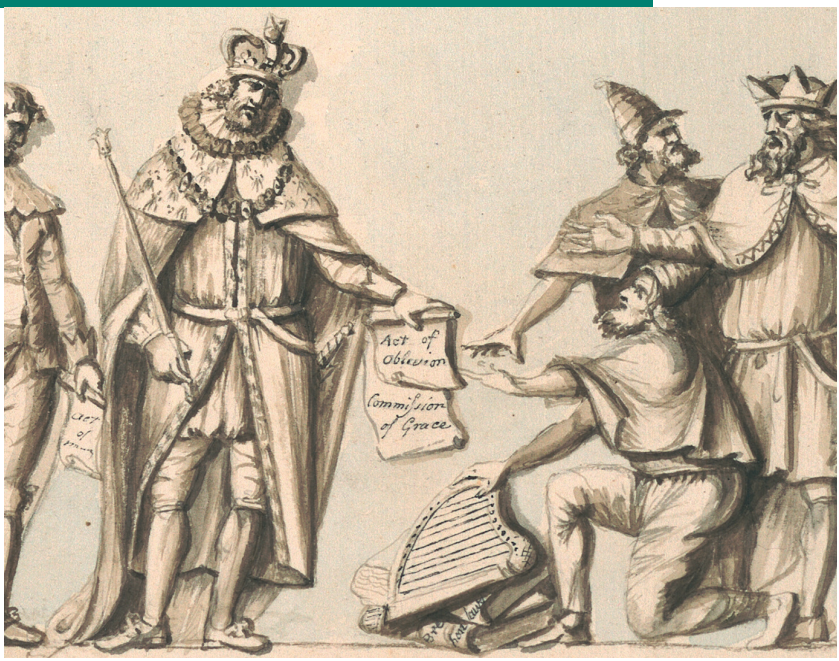
GLOBAL PERSPECTIVES
ON LEGAL HISTORY 25

DONAL K. COFFEY
STEFAN VOGENAUER (EDS.)

Legal Transfer and Legal Geography in the British Empire



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DONAL K. COFFEY, STEFAN VOGENAUER (EDS.)

Legal Transfer and Legal Geography in the British Empire

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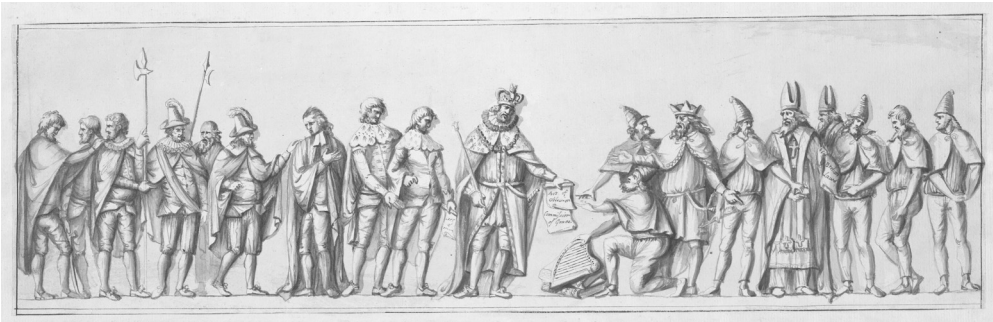
Contents

Part II
Landscape, Law, and Spatial Justice in the former British Empire



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https://iaa-apw.adlibhosting.com/ais6/Details/archive/110000624

Table of Cases

Inter-American Court of Human Rights (IACrtHR)

Ireland

Namibia

New Zealand

South Africa

Table of Legislation

Preface

Legal history has tended, until recently, towards a jurisdictional bias in favour of national considerations. This suffers, however, from a relatively ahistorical interpretation bias – the drafters of statutes, those responsible for their interpretation and those tasked with the development of the common law were often of a cosmopolitan bent, whether from ideological or practical consideration, which suggests a more thorough analysis of legal history requires a consideration of the comparative angle and influences. This can be seen clearly in relation to an imperial legal superstructure, such as the British Empire(s), where models of legislative and interpretative methods were self-consciously adopted and adapted to different jurisdictions. Moreover, the process of decolonisation disclosed similarities and divergences in the legal development of these territories.

The papers in this volume were part of the stream "Legal Transfer in the Common Law World" for the Legal Histories of Empires conference which was held in the National University of Ireland, Maynooth in June and July 2022. The impetus behind the stream was work carried out by the stream convenors at the Max Planck Institute for Legal History and Legal Theory, where Stefan Vogenauer is the Director of a research field looking at this area and Donal Coffey worked as a Senior Researcher from 2016 to 2020. The aim of the stream was to examine the state of art, and this book attempts to present a scholarly outlook on this incipient field. It does not make any pretence to an exhaustive consideration of the relevant issues, rather it aims to whet the appetite of the reader to pursue their own research, and to provide an outline of the different methods and approaches that may be profitably pursued in the development of research projects. The different areas of law covered – including *inter alia* public law, employment law, land law – demonstrate the vitality of the comparative method.

The image on the front cover of this book takes up the theme of the Maynooth conference, "Beyond the Pale". It is reproduced with the kind permission of the Irish Architectural Archive. It contains an image from the King's Inns archives, which was once one of a set of four bas-reliefs in the dome of the Four Courts in Dublin. The image depicts the abolition of

the Brehon law in Ireland and the publication by James I of the Act of Oblivion which ended the Nine Years' War in Ireland. The abolition of Brehon law, a legal system largely in use outside the Pale in Ireland, signified the full transfer of the common law to Ireland. The bas-relief itself was destroyed in the Irish Civil War that accompanied the end of the Irish War of Independence in 1922, but there are currently plans underway to recreate it.

The present volume takes us to Australia, Canada and the United States, as well as to the Caribbean, East Asia and East and South Africa.

Philip Girard's chapter traces the evolution of the law regulating employers' liability for injured workers in Quebec. The history of this area of law discloses a number of different influences between 1880 and 1931. It begins with a heavily French-influenced strand of theory, and ends with the triumph of the International Labour Organization's influence in the inter-War period. Girard's analysis also discloses interesting variations between how the case law developed in Quebec and before the more common law-inspired Supreme Court of Canada, and also the influence of Catholicism on the development of this area of law.

Matilde Cazzola's work looks at the evolution of the "protective principle" and its deployment through a comparative lens, with a particular focus on the United Kingdom and the Australian colonies in the 19th century. It draws attention to the manner in which the concept was enmeshed with the history of the Indigenous Australians' tragic encounters with colonialism, where it was intimately bound up with the "civilizational" mission which was used to ground imperialist projects, as has been frequently demonstrated in the fields of international legal history. Its relationship with the industrial schools of the metropole is clearly traced, demonstrating the interwoven histories of those subject to the principle.

Scott A. Carrière looks at the evolution of law in colonial Newfoundland, and in particular at the relationship between contract law, charters and Company States. Carrière demonstrates that these complex legal forms were also present in relation to Company States in what was to become the United States, in particular looking at the Hudson's Bay Company and the Massachusetts Bay Company. It includes an analysis of a form of "lawfare" practiced by the planters, most significantly against the Kirke proprietorship of the jurisdiction.

In Hong Kong, Christopher M. Roberts and Hazel W. H. Leung analyse the evolution of vagrancy law. They position it within the broader history of the expulsion of "undesirables" and note the contrast with other legal regimes such as Trinidad and Tobago, British Guiana and Tanzania. The authors explain the manner in which the concept of the "vagabond" became replaced with a particular concern with triads in terms of justification of calls for strong law enforcement powers. They note also the role that comparative developments in the United States and United Kingdom played in justifying the removal of vagrancy laws in Hong Kong, and the way in which this gave rise to a new offence of "loitering".

Finally, we are pleased to have a special section dedicated to legal geography and its connection to legal transfers in the common law world. The introduction by Amy Strecker and Amanda Byer provides a better thematic overview than we can hope to accomplish here, so the attention of the reader is directed to their chapter in the volume. For the purposes of legal transfer and legal history, generally, it seemed to us that there are useful insights to be gleaned from a comparison across different methodologies which are concerned with a similar normative framework between and within societies, and their relationship to the natural world.

We would like to thank our contributors. We are also grateful to the other organisers of the Legal Histories of Empires conference for their help in planning and delivering the event, in particular Shaunnagh Dorsett, Lyndsay Campbell, Pooja Parmar, David Doyle and Vanessa Gallagher. We hope that the reader of this volume will find the inspiration within these pages to contemplate legal transfer in relation to their own research and look forward to engaging with them in the future.

Donal K. Coffey and Stefan Vogenauer
Maynooth / Frankfurt am Main, 1 October 2024

Part I

Legal Transfer in the Common Law World: From the Early Modern Period until the Present

Scott A. Carrière

Law and Legalism in Corporate Newfoundland, 1583–1699

1. Introduction: Newfoundland and the Company-State

In 1699, the English Parliament enacted the "act to encourage the trade of Newfoundland".[1] The statute, which became known as King William's Act, consolidated the sporadic royal proclamations and charters that had to that point governed Newfoundland and its lucrative cod fishery.[2] Though England would not secure full control over Newfoundland until 1713 by the Treaty of Utrecht, the cod fishery – and control over it – was the primary driver of England's legal policy over the island for the preceding century.[3]

King William's Act represented the first major legal intervention by the English state in Newfoundland. The island's colonial status was perennially ambiguous. Notwithstanding a growing permanent population on the island since St. John's was established by royal charter in 1583, Newfoundland – an island larger than Ireland – was, as a matter of 17th century English law, merely a "fishing station".[4] This policy of ambiguity in turn fostered an environment that favoured the commercial interests of the fishery over the concerns of Newfoundland's colonial inhabitants.[5]

Prior to 1699, Newfoundland was dominated by "Company-States" – corporate entities endowed with sovereign powers from the monarch.[6]

1 10 & 11 William III, c 25 [King William's Act].
2 Pope (2004) 402. See also English/Curran (2020).
3 See e. g. Pope (2004) 2–3.
4 Simon (2005) 276–277.
5 Bannister (2003) 37, 93–94.
6 Stern (2011). Here, "sovereign power" refers to authority typically reserved for the state and state actors. As will be explained further in section 2. a), the notion that sovereign power would be exclusively exercised by state actors was not firmly established in the 17th century.

These non-state actors wielded substantial legal power as a means to profit from the cod fishery. As a model of colonial expansion, Company-States were not unique to Newfoundland, with its more familiar peers, the Hudson's Bay Company and Massachusetts Bay Company in the Atlantic and the East India Company in Asia.[7] In this period and context, the English state was content to exert its political – and legal – influence indirectly through these quasi-public/public entities. Because of the state's ambivalence in Newfoundland, at least until 1699, the charters that established and purported to regulate these entities were the only sources of (positive) law for company governors and Newfoundland's resident "planters".

In contrast to the imperious and acquisitive colonial policies that would emerge in the Atlantic world by the late 18th century as metropolitan London assumed more direct control over its possessions, Newfoundland's 17th century Company-States exercised their legal power judiciously. This restrictive view of their notionally broad authority was in line with their American peers to the north and south, but also influenced by the tension between profit and power. This economic tension, however, became the locus of interpretive conflict over the nature and extent of the power granted to Company-States from the sovereign. It also set the stage for friction between Newfoundland's various interests that were at least nominally subject to the Company-States' jurisdiction.

Newfoundland's Company-States exhibited a subtle sophistication in their deployment of legal power which, while consistent with colonial peers, was not fully responsive to all the interests on the island. This article takes a critical view to how Newfoundland's Company-States exerted their juridical authority in relation to the land and its resources – principally the cod fishery. Section 2 looks to the origins of Company-States in early modern Europe, and their legal character in the Atlantic world. Section 3 examines Newfoundland's Company-States in particular, and how they conceived of their powers as evinced through their constating documents. Section 4 interprets how Newfoundland's colonial players responded to this brand of legalism, and how their interactions fit into the colonial context of the north Atlantic in the 17th century in the lead up to the enactment of King William's Act.

7 Phillips / Sharman (2020).

2. Colonialism by contract: Legalism and the Atlantic charters

a) Sovereign charters and company-state governance in the Atlantic

By the early 17th century, European governance commonly featured the delegation of "sovereign" powers, responsibilities, and rights to political elites and institutions. This essentially medieval conception of governance held sovereignty as a bundle of distinct privileges that rulers could alienate and delegate.[8] As a normative system, it legitimated the exercise of sovereign power by non-state actors. Delegation of power was often accomplished by the issuance of a charter by the monarch or legislature that would function similarly to a constitution, specifying the legal nature and extent of the grant. The early modern emergence of the corporation, with its separate legal personality, permitted a new model combining sovereign prerogatives and economic authority with the capacity to attract private capital and assume risk against the prospect of substantial profit.[9]

At the same time, this period saw a rise in geopolitical competition amongst European powers. Phillips and Sharman note that the Habsburg domination on the continent spurred other rulers to seek control of extra-European resources. However, many (smaller) early modern European polities – notably England and the Dutch Republic – lacked the means to effectively exert power across vast expanses. They thus turned to "institutional experiments" by investing "private" ventures with sovereign and legal authority to pursue their interests with official state sanction.[10]

This empowerment was a fundamentally law-driven enterprise in the 16th and 17th centuries. Both the grantor of sovereign authority and the grantee were sensitive to the precise scope of power transferred through these charters. When the English Crown began issuing charters to groups and individuals in the Atlantic in this time, they purported to confer governmental rights and title to the land despite having no factual control of the territory.[11] As it was recognized that the Crown could not grant rights it did not hold, the charters bound the grantees to the limits they prescribed.

8 Phillips / Sharman (2020) 10.
9 Stern (2008) 2, 257, 283.
10 Phillips / Sharman (2020) 10.
11 Slattery (2005) 52.

Importantly, these early charters did not empower delegates to govern Indigenous peoples or seize their lands. In *Worcester v Georgia*, Chief Justice of the United States John Marshall explains the contemporary view:

> The extravagant and absurd idea that the feeble settlements made on the seacoast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The Crown could not be understood to grant what the Crown did not affect to claim, nor was it so understood.[12]

Thus, the Crown and its delegates had a legalistic understanding of the charters, recognizing their descriptive and normative limitations. For example, the charter for Virginia, granted April 10, 1606, conveyed various exclusive rights on the London and Plymouth Companies, but which were contingent upon the founding of a settlement. This charter is silent on conquest of Indigenous peoples, but permits the grantees to defend themselves. Moreover, the charter's grants of exclusive rights of settlement and trade are apparently enforceable against other English subjects and Europeans, but not Indigenous peoples.[13]

These charters initiated a cognizable legal framework for England's colonial participants in the Atlantic. For the grantees, their claims to jurisdiction were premised on what – specifically – the Crown delegated. Claims against grantees were predicated on the (interpretive) scope of that jurisdiction. For the growing number of corporate entities granted sovereign powers – i. e., would-be Company-States – mapped onto this legal framework was the commercial imperative. It was into this legal, commercial, and political environment that Newfoundland's companies – and Company-States – were born, notably the London and Bristol Company (1610), the "Province of

12 *Worcester v Georgia*, 31 US 515 (1832).

13 Charter of Virginia, 10 April 1606, Lillian Goldman Law Library, The Avalon Project, https://avalon.law.yale.edu/17th_century/va01.asp [Virginia Charter]. This "internal" conception of legal limitations, both explicit and implicit, is consistent with even earlier grants by both the English and French Crowns. Slattery highlights that Elizabeth I's letters patent to Sir Humphrey Gilbert and Walter Raleigh in 1578 and 1584, respectively, conferred rights that were contingent upon settlement of lands not "actually possessed" having not been "planted or inhabited". Slattery (2005) 67; Slafter (1903) 95, 97; and Tarbox (1884) 95, 98.

Avalon" (1623), and later the West Country companies under the "Western Charter" (1634).

Given their broad legal authority, how would these companies act as they established themselves in the Atlantic world more broadly, and in Newfoundland specifically? What influence would the commercial imperatives of these companies have? What impact would the written charters have on conceptions of legal rights by those subject to them?

The remainder of this section will briefly canvass how some of these legalities came to be addressed in Newfoundland's peers, providing necessary background and a comparator for the legal experience of Newfoundland's colonial participants. In particular, how Company-States in Hudson's Bay and New England considered the extents of their jurisdiction and claims against them in a hybrid model of secular governance and commercial profiteering.

b) Hudson's Bay Company, jurisdictional limitations

Though founded somewhat later than its early modern contemporaries, the Hudson's Bay Company (HBC) was singular in its success as a Company-State if measured by how long it retained its sovereign privilege – at least nominally.[14] The HBC received its charter May 2, 1670;[15] it was not until some 200 years later, when the HBC's territories were incorporated into the Dominion of Canada in 1869, that it lost its sovereign legal character.[16] However, the early years of the company's history, which coincide with the subject of this article, show how company officials were sensitive and responsive to the legal character of their sovereign grants.

The charter granted the HBC proprietary rights according to accepted English legal principles, with land held "as of Our Manor of East Greenwich in our County of Kent, in free and common Soccage".[17] While the charter

14 Phillips / Sharman (2020) 94–95.

15 HBC History Foundation, The Royal Charter of the Hudson's Bay Company (2 May 1670), https://www.canadiana.ca/view/oocihm.21022 [HBC Charter].

16 Rupert's Land and North-Western Territory – Enactment No. 3: Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union, dated the 23rd day of June 1870 (1870); An Act for the Temporary Government of Rupert's Land and the Northwestern Territory when united with Canada (1869) 31 & 32 Vic, c 3.

17 HBC Charter 3.

supported the HBC's commercial endeavour of acquiring furs for trade in Europe, the Crown also placed some emphasis on the potential for settlement of the company's domains.[18] In 1690, Parliament enacted an Act for Confirming to the Governor and the Company Trading to Hudson's Bay Their Privileges and Trade, which essentially affirmed in legislation the grant of power conferred by the King only 20 years prior.[19] E. E. Rich has suggested that the push for this legislation was a desire by the HBC to derive its privileges from a legal source more reliable than the royal prerogative.[20] As Paul Nigol notes:

> Despite the fact that the charter gave the company an adequate claim to its political and economic powers, the additional legislation of 1690 confirmed the company's legal basis when its governors secured commission by royal warrant with powers to maintain English sovereignty on the bay.[21]

In other words, early in the HBC's existence, there was a legalistic view to the nature of its power rather than brute political (or military) force on the ground.[22]

Critical scholarship demonstrates that, while the HBC had been granted broad legal powers by its 1670 charter and 1690 supplemental legislation, it exercised this authority judiciously. The charter vested the company with judicial power over civil and criminal matters, to be executed "according to the Laws of this Kingdom". Importantly, this clause extended to "all persons that shall live under" the company's governance.[23] As the HBC's grant covered all the lands drained by rivers flowing into Hudson's Bay, their claim nominally stretched from Labrador to the Rocky Mountains.[24] It was, in theory at least, open to interpretation that this grant was wide enough to include Indigenous peoples in its ambit.[25]

Company officials were, however, guided by practical and normative concerns on whether, or even how, to exercise jurisdiction over non-Euro-

18 HBC Charter 3.
19 2 Wm & Mary (1690) c 23.
20 Rich (1960) 57.
21 Nigol (2005) 150–151.
22 *Contra* Phillips/Sharman (2020) 10–11.
23 HBC Charter 5.
24 Foster (2005) 68.
25 Slattery (1991) 197–217.

peans since for most of its history, the company exerted only marginal territorial control over the lands that were nominally subject to its authority.[26] Moreover, given the HBC's economic model of trading with Indigenous groups for furs, the company was incentivized to maintain good relations with them. Hamar Foster notes that in the early years of the HBC's enterprise – when it was focused on the fur trade rather than settlement – the company was loathe to extend its jurisdiction beyond its own operations and employees.[27]

The charter *did* clearly grant the HBC legislative and judicial authority over its staff and officials. The criminal branch of the HBC's jurisdiction was primarily concerned with employee discipline. For example, the HBC passed ordinances concerning desertion, and perhaps unsurprisingly, unauthorized trading by employees.[28] On the civil side, Foster notes the HBC operated a "government by debt"; the company would advance Indigenous trappers and freemen traps and supplies that were in turn paid for in furs sold well below market rates. The system was backed by the company's monopoly since employees and freemen were not permitted to conduct private trade.[29]

Thus, while early company policy had been to restrict its jurisdiction to its own employees, it was not for want of legal authority *per se* – at least as expressed in the text of its constating instruments. However, the legalities surrounding the HBC's power were of primary concern to company officials. But these sensibilities were in turn influenced by the commercial imperatives

26 This stance became more fraught, however, as the HBC's role evolved from commercial outfit in the 17th and 18th centuries to civilian government in the 19th, when its first legally-trained officers were tasked with reconciling London's colonial policy with the unique legal order that had by then arisen in Rupert's Land. Gibson (1995) 253–254. See also Foster (2005) 71.

27 Foster (2005) 70–71. Foster also notes here that the rationale for legitimating the extension of charter jurisdiction to Indigenous peoples was subject to change with the context: "But when the point of the exercise is not the fur trade but settlement, the situation changes. Colonists generally knew little about the laws of the tribes among whom they had come to live and were likely to feel insecure if they did not extend their own laws, geographically, as far as resources would permit – which in the early years of most colonial projects was not much farther than the immediate vicinity of the settlement. Eventually, and usually without Aboriginal consent, this extension would include not only offences by Aboriginal people against settlers but also – where a threat to the security of the colony was perceived – offences by Aboriginals against other Aboriginals."

28 Foster (2005) 70; and Nigol (2005) 152.

29 Foster (2005) 71. See also Reid (1991) 154–158.

of the company – i. e., what was expedient in terms of legal exercise to maximize the commercial potential of the HBC's privileges. In other words, the HBC's use of legal power was inextricably tied to its economic context.

The HBC presents one extreme of the Company-State experience. As noted, the company never took their official role of colonial administrator seriously in the sense of fostering civilian settlement in Rupert's Land, at least until the early 19th century. That is, the early modern iteration of the HBC never had to contend with the intricacies of claims against its authority by those "who shall live" under its jurisdiction.

c) Massachusetts Bay Company, charter as constitution

While the HBC maintained its charter powers in an environment where those living "under" its control were relatively few, the experience in what would become New England was markedly different. The Massachusetts Bay Company (MBC) was chartered on March 4, 1629, with the object of establishing an English colony in its namesake.[30] The wording of the MBC charter was, in substance, nearly identical to the Virginia charter of 1606; it was one of many municipal and trading corporations given a charter by the English Crown. Like the HBC, the MBC was chartered, "as of his Manor of East Greenewich in the County of Kent, in free and comon Soccage".[31]

The venture, or colony, turned out to be a success, and through the 1630s boasted a population of some 20,000.[32] By contrast, the HBC's "resident" population in Rupert's Land was only about 60 through the 1670s, and all were employees.[33] For whereas the HBC exercised its charter powers (and limitations) with a view to commerce, the MBC's charter objective was self-government.[34] In general, these chartered companies (and Company-States) were administered from boardrooms in England, including the HBC, under the watchful eye of the Crown. The MBC founders had other ideas. They

30 Charter of Massachusetts Bay, 4 March 1629, Lillian Goldman Law Library, The Avalon Project, https://avalon.law.yale.edu/17th_century/mass03.asp [MBC Charter].
31 MBC Charter, para 1.
32 Ashley (1908) 52.
33 Rich (1960) 119; Newman (1998) 129, 157.
34 Bowie (2019) 1418–1421.

took the innovative approach of taking both their charter – and the company's corporate governance – to New England. From there, residents could govern themselves.[35]

Nikolas Bowie has argued that the MBC founders' "innovation" of practising government-by-charter in the 17th century paved the way for American enthusiasm for written constitutionalism by the end of the 18th century.[36] Bowie notes that the types of arguments that became enmeshed in New England's social and political culture were the legalistic ones articulated by the MBC in a host of 17th century litigation that challenged the MCB's charter.

Nearly from its outset, the MBC was a project of Puritans looking to emigrate from the persecution of Stuart England.[37] By the end of 1629, the year the MBC charter was granted, the company hatched a plan where shareholders and directors emigrating to New England would buy out those remaining in England. Henceforth, only New Englanders could become shareholders – by becoming "members of [one] of the churches" there.[38] Through the MBC's corporate structure, the government (i. e., the directors) would exercise authority on behalf of the electorate (i. e., the shareholders). But within a few years, as the population of religious dissidents from England surged, the Crown's advisors attempted to dissolve the corporation by suing it in court, alleging that the corporation's founders had taken actions inconsistent with the charter's text.[39] While the threat of dissolution was not uncommon to early modern corporations, the threat was more existential to the New Englanders: the MBC corporate "government" was unique in that it met in New England, and was the only authority with whom its constituents regularly interacted.

The Crown's challenge was in the form of an information in the nature of *quo warranto* – essentially calling up the corporation's leadership to source,

35 Ibid.

36 Bowie (2019).

37 Bremer (2003) 147–157; Weisbrod (2002) 28. Bowie also highlights that these founders were centrally concerned with proper governance, in contrast to the absentee aristocracy that oversaw Virginia and the apparent "misgovernment" that ensued there. See Bowie (2019) 1419.

38 Minutes of May 18, 1631, in: Shurtleff (1853), Records of the Governor and Company of the Massachusetts Bay in New England, 1, Boston, 86–87. Bowie (2019) 1420.

39 Bowie (2019) 1402; A Quo Warranto Brought Against the Company of the Massachusetts Bay by Sir John Banks Attorney-General (1635), in: Hutchinson (1769) 101.

in law, the basis for the actions alleged to be contrary to the charter in 1635.[40] In the years leading up to the *quo warranto*, the Crown's growing concern over its charter led the MBC leadership to ensure it strictly complied with the charter's terms. The MBC insisted on the charter's "bicameral" law-making structure between the shareholders and directors; kyboshed a legal code that was arguably "repugnant" to English law; and took action against community members who spoke against the charter.[41] Bowie notes:

> Because no one wanted to take a position that would lead the company to violate its charter and hurt its legal standing in the quo warranto proceeding, participants in all sorts of domestic debates explicitly cited the text of the charter to defend their positions regarding taxation, voting rights, the separation of powers, religious disagreements, and other disputes. That said, these interpretations of the charter's text were more sophisticated than mere recitals of the charter's words. Methods of interpreting the charter were as varied as methods of constitutional interpretation in the present day, when people interpret constitutional provisions with reference to their original public meaning, the general principles they reference, or how their meaning has evolved over time.[42]

However, in 1637, the Court of King's Bench entered a default judgment against the MBC in the *quo warranto* proceedings and ordered the charter be "Seized into the King's hands".[43] But, the New Englanders resisted, and enforcement of the *quo warranto* proved slow enough that circumstances intervened in the form of the English Civil War from 1642–1651.

Interest was revived when, in 1646, a group of political dissidents in New England petitioned the company and Parliament, complaining that the company had erected an "Arbitrary Government" that violated specific provisions of its "Generall Charter".[44] The MBC responded in kind, writing to Parliament at length, explaining how its government and institutions were constructed according to the express provisions of the charter.[45] The company drafted a chart of all the "lawes and customes as are in force and use in this jurisdiction, shewing withall (where occasion serves) how they are war-

40 Bowie (2019) 1423–1424.
41 Bowie (2019) 1426–1427.
42 Bowie (2019) 1428.
43 Minutes of the Proceedings in the King's Bench (Easter Term 1637), UK National Archives Class 1/9, Doc. No. 50, at 127a.
44 Child (1647) 8–9.
45 Bowie (2019) 1434.

ranted by our charter".[46] The Parliamentary Commission tasked with investigating the competing petitions was entirely mollified by the MBC's explanation, and it wrote, in 1647, that it would not "incourage any Appeales from your Justice: nor to restraine the boundes of your Jurisdiction, to a narrower Composse, then is helde forthe by your Lettres Patentes".[47]

And so ended the challenge to the MBC's charter, but Bowie highlights that the two decades of paying close attention to the charter had cemented a political culture premised on a view that government without written limits is an "arbitrary" one. In 1641, the MBC published the *Body of Liberties*, a written code of laws that protected, among other things, inhabitants' right to a trial by jury, right to counsel, freedom from excessive bail, and freedom from cruel and inhumane punishment.[48] At the same time, the MBC's leadership continued to justify their actions by reference to the charter – such that their authority was tied to some fundamental, written text.

So, New England's early modern Company-State experience was one where the MBC charter served as a model for good – or at least non-arbitrary – governance. Under the MBC model, both the government *and* the governed had a legally-sanctioned voice in the direction of the Company-State.[49]

3. Newfoundland's early modern charters

Newfoundland presents something of a hybrid case to Rupert's Land and the HBC, and to New England and the MBC. Like Rupert's Land, Newfoundland's colonial *raison d'être* in the 17th century was commercial; just as the fur trade was dominant in influencing the economic, legal, and political culture of the Canadian west, cod was king in Newfoundland. Like New England, however, Newfoundland's population was not insignificant,[50] and

46 A Declaration of the General Court Holden at Boston, Concerning a Remonstrance and Petition Exhibited at Last Session of This Court by Doctor Child, Thomas Fowle, Samuel Maverick, Thomas Burton, John Smith, David Yale, and John Dand (4 September 1646), in: Hutchinson (1769) 196, 199–200.

47 Dunn (1996) 702–704 (entry of May 25, 1647) (reporting a letter from the Warwick Commission).

48 Bowie (2019) 1435.

49 Bowie goes on to note that this state of affairs continued through until the MBC's ultimate dissolution later in the 17th century. See generally, Bowie (2019).

50 Simon (2005) 276–277.

necessitated some form of official coordination between the steadily-growing resident populace and the seasonal fishers arriving each year, typically from the West Country. And, like in both of its temporal and geographic peers, chartered companies were the *de jure* and *de facto* governments, i. e., Company-States.

It is difficult to overstate the historical importance of the cod fishery in Newfoundland: from the early 1500s, when European fishermen began seasonal fishing off Newfoundland's shores,[51] to the early 1990s, when it collapsed altogether, the cod fishery singularly shaped the island's society.[52] Notions of permanent settlement on the island only became fashionable toward the end of the 16th century and beginning of the 17th when the English Crown began chartering similar ventures elsewhere in the Atlantic (like Virginia and Massachusetts Bay).[53] The commercial logic of settlement on Newfoundland – or rather, creation of a resident fishery – was to preempt or monopolize the fishery against the seasonal fishery, particularly the competition from the West Country. And, while economic and social diversification was in mind for some of the first ventures, the fishery was always the primary focus.

a) The Newfoundland Company

On May 2, 1610, James I chartered the London and Bristol Company, which came to be known as the Newfoundland Company. This charter bears many of the hallmarks of its early modern peers, for example, the lands purported to be granted by the charter are held, "as of our mannor of East Greenewich in the County of Kent in fre and Comon socage".[54] However, the grant is conspicuous for several textual idiosyncrasies.

For one, the charter acknowledges the apparent "vacancy" of the island from Indigenous inhabitants as both a convenience and a justification for the imposition of English sovereignty:

51 Pope (2004) 15.
52 Hamilton/Butler (2001) 1–2.
53 See section 2. c).
54 Patent Roll (2 May 1610), 8 James I, Part VIII, No. 6, Charter of the London and Bristol Company, Earl of Northampton and Associates, 1701 [1610 Charter].

> we being well assured that the same lande or Countrie adioyning to the foresaid Coastes […] remayneth soe destytute and soe desolate of inhabitance that scarce any one savage p'son hath in manye yeares byn seene in the most partes thereof And well knowing that the same lying and being soe vacant is as well for the reasons of foresaide as for manye other reasons verie coodious for [u]s and our domynions.[55]

Of course, this pretence was untrue – at least in 1610. Newfoundland's Indigenous inhabitants, principally the Beothuk peoples, were well-known to Europeans who frequented Newfoundland, relations with whom were at least partially a driver of the push for permanent English settlement there. Under the seasonal fishing model, caches of equipment were left in Newfoundland during the winter months for storage; for the Beothuk, these caches were a valuable source of iron.[56] Thus, permanent settlement could limit potential losses of capital and equipment by fishing operations, while also providing opportunities for friendly trade.[57] However, the pretence of vacancy also informed the charter's claims against other Europeans, asserting English sovereignty by virtue of *possession* of theretofore *vacant* lands,[58] which was typical of other similar grants.[59]

The 1610 charter also contained an exceptionally broad grant of institutional and law-making power. The Newfoundland Company was empowered

> to make ordayne and establishe all manner of orders lawes direcons instrucons formes and ceremonies of goument and magistracie fitt and necessarie for and concerning the goument of the saide Colonye or Colonyes […] and […] to abrogate revoke or chang not onlye within the p'cinctes of the said Colonye or Colonyes but alsoe uppon the Sea in goeing and coming to and from the said Colonye or Collonyes as they in their good discretions shall thinke to be fitt for the good of the Adventurers and Inhabiters there.[60]

Not only did the charter grant jurisdiction to the Newfoundland Company over settlements and maritime matters, but over both "[a]dventurers" and "[in]habiters". In other words, the Newfoundland Company could, at least notionally, make laws applicable to both its "residents" as well as seasonal

55 1610 Charter, 1701.
56 Pope (2004) 73–75.
57 The Beothuk actually extended their territory in Newfoundland through the 1600s, until the friendly relations ended, and were all but exterminated by the English by 1680. Pope (2004).
58 1610 Charter, 1701.
59 See e. g. MBC Charter; and Virginia Charter.
60 1610 Charter, 1705.

"adventurers". The references to "government" and "magistracy" also appertain to the following provisions of the charter, which create a governorship for Newfoundland to be appointed by the company.[61]

This wide grant of power is reiterated later in the charter, affirming the company's jurisdiction to make and enforce civil, maritime, and criminal law, including capital offences. Specifically, the company shall

> [w]ithin […] Newfound lande or in the waye by the Seas thither and from thence have full and absolute power, and authoritie to correct punishe p'don governe and rule all Subiectes of [u]s […] as shall from tyme to tyme adventure themselves in any voyage thither or that shall att any tyme hereafter inhabite […] Newfound lande […] according to such Orders Ordinances constituccons direccons and instruccons as by the saide Councell as aforesaide shall be established, and in defecte thereof in cause of necessitie according to the good discretions of the said Governors and Officers respectivelie as well in cases Capitall and Crimynall as Civill both marine and other.[62]

More curious, however, is in how consistent the company's ordinances must be to English law. The MBC, HBC, and other contemporary charters contained the limitation on law-making that such ordinances "be not contrarie or repugnant to the Lawes and Statuts of this our Realme of England".[63] By contrast, the Newfoundland Company's charter provides that laws be "as neere as conveniently may be agreeable to the lawes statutes goumentes and policie of this our Realme of England".[64] The wording, and its contrast to the text of other grants of power suggests a somewhat more permissive environment for the company to make and enforce its rules.[65]

61 Ibid.

62 1610 Charter, 1708.

63 MBC Charter; HBC Charter, 3.

64 1610 Charter, 1708. The HBC Charter combines some of the language of both clauses: "the said Laws, Constitutions, Orders and Ordinances, Fines and Amerciaments, be reasonable, and not contrary or repugnant, but as near as may be agreeable to the Laws, Statutes or Customs of this our Realm."

65 Interestingly, the distinction between repugnant or inconsistent law to "near as may be convenient" mirrors modern Canadian doctrine concerning the reception of English (or British) law to Canada. The modern standard is that English law predating the date of reception (or introduction of law to a place) may be applicable to the extent it is "suitable to the conditions existing in the [jurisdiction]". *Re Simpson Estate*, 23 Alta LR 374 at 383, [1927] 4 DLR 817 (SC AD). See also Ziff (2005). Modern courts in Newfoundland have used these principles to establish that certain medieval property rights do not, nor ever could, exist there. *Franklin v St. John's (City)*, 2012 NLCA 48 at para 33.

Lastly, while the Newfoundland Company was not authorized by its charter to make war or conquer territory, it was permitted to defend itself with force and take action against other Europeans for "unjust or unlawfull hostilitye".[66]

Thus, the Newfoundland Company had all the trappings of legal power associated with other early modern Company-States. Economically, the charter gave the company a monopoly in agriculture, mining, fishing, and hunting over the area of Newfoundland that would later become known as the Avalon peninsula.[67] For all its theoretical power, however, the Newfoundland Company was a financial flop. The company initially backed John Guy, an experienced merchant, as the would-be colony's first governor who, in 1610, founded "Cupids" or "Cupers" Cove with 39 colonists. The colony's first couple of years had middling success; but, in 1613 it was extorted by pirates, and in 1615 Guy quit the venture over a wages and property dispute with the company.[68] Guy was replaced by John Mason, who Peter Pope suggests was chosen for a perceived ability to deal with pirates, but notes Mason was not adept at managing the fishery – the primary purpose behind the settlement – which further undercut the company's profits. Mason withdrew to New England in 1621,[69] but by then, most of the Newfoundland Company's investors had cut their losses, and their grant had been largely sold to William Vaughn by 1616.[70]

As will be shown in the remainder of this section, the breadth of the Newfoundland Company's charter was never replicated in subsequent grants for the island. By the 1620s, it was likely clear that a resident fishery, even if established, would not be able to outcompete, let alone monopolize, the seasonal fishery, even with extraordinary legal power over the latter. Unlike

66 1610 Charter, 1709.

67 Naylor (2006) 56.

68 Pope (2004) 50–51.

69 Interestingly, Mason became a central figure in the *Quo Warranto* against the MBC. Mason had acquired a land grant near Salem by the time he left Newfoundland, which had been dubiously expropriated by the MBC under a conflicting grant. He and his partner in New England, Sir Ferdinando Gorges, petitioned the Privy Council for assistance in the matter, beginning the investigations that would result in the *Quo Warranto*. See Bowie (2019) 1413–1414, 1421–1422.

70 Pope (2004) 51–52.

the fur trade in what would become Rupert's Land, the cod fishery was firmly established in Newfoundland at the time of the grant, and the interests of the West Country merchants who dominated the seasonal fishery were firmly entrenched. That is, the commercial environmental that had to that point developed was not amenable, or practicable, to sole control by a singular entity.[71] Thus, future grants began to distinguish in law jurisdiction over the island and its inhabitants and jurisdiction over the fishery and its transient workforce. So, while later grants would actually maintain much of the Newfoundland Company's broad authority over "planters" and local enterprise, they would lack the economic clout of a legally-sanctioned monopoly over the fishery.

b) The Calvert and Kirke proprietorships

Much of Vaughn's interest was later acquired by Sir George Calvert by 1621, the future Lord Baltimore (and future founder of the Maryland colony whose principal city still bears that name). Calvert had been James I's secretary of state, who would also create him the first Baron Baltimore of the Irish peerage; he was wealthy and influential. He seems to have conceived of a colony as a refuge for English Catholics to escape persecution – having declared his own reversion to Catholicism by 1625 – supported commercially, of course, by the cod fishery.

James I granted Calvert a charter in 1623. The grant recognized Calvert's acquisition from Vaughn, but unlike the Newfoundland Company's charter, Calvert's grant only covered the Avalon peninsula (the name given to the region by Calvert which still exists today);[72] and his colony, based in a settlement at Ferryland, was styled the "Province of Avalon".[73]

Calvert's grant differed substantively from the Newfoundland Company's – as well as the HBC's and MBC's. Rather than being granted in "free and common socage" of the manor of East Greenwich, Calvert's title was "in

71 The same was true with respect to competition by other Europeans. However, while later grant-holders would lack the economic power of a monopoly from the Crown, they were empowered to collect a tax on foreign fishers operating in English-controlled waters. See section 3. b).

72 Girard (2017) 44.

73 Browne (1890) 17.

Capite by Knights service", a feudal tenure in the form of the palatine jurisdiction of the Bishop of Durham.[74] Similar to the Newfoundland Company, Calvert was empowered to appoint judges and magistrates. He also had the authority to enact laws, although with the more familiar proviso they not be contrary or repugnant to the laws of England – as well as a more unusual stipulation. These laws were to be made, "with the Advice, assent and approbacon of the Freeholders of the said Province or the greater part of them", whom Calvert was to "Assemble in such sort, and forme as to him shall seeme best".[75] Calvert could, however, make laws unilaterally in the case of urgent necessity if they were published. These limitations notwithstanding, Calvert's office of proprietor included "[t]akeing away Member or Life" if the "quality of the Offence" required it.[76]

Calvert's efforts at "plantation" were of mixed success. The early years of the Ferryland settlement proved successful enough that, upon his resignation as secretary of state in 1625, Calvert personally visited the Avalon colony and overwintered in 1628–29. He remarked in his letters of Newfoundland, "this wofull country"[77] … "[t]is not terra Christianorum".[78] Discovering that winter lasted well into May, he quit Newfoundland for Chesapeake Bay. Upon his death in 1632, his son, Cecilius, appointed a resident governor to oversee the remaining colonists.

However, in 1637, the Privy Council declared that Calvert had "abandoned" Avalon and granted a new patent to Sir David Kirke, an adventurer and veteran of the expedition that captured Quebec in 1629.[79] The Kirkes would make further moves to expropriate the Calverts' title; the Calverts resisted, and the ensuing legal battle carried on for generations, fluctuating with the ebbs and flows of English politics.[80] The Kirkes, who had just the

74 See Ziff (2018) 73–74. Calvert's palatine authority in theory segmented his province from the rest of the English state, making him responsible for all sovereign responsibilities subject only to the King's will as well as implicitly making the grant hereditary.

75 Matthews (ed.) (1975) 46.

76 Matthews (ed.) (1975) 47.

77 Browne (1890) 19–20; Codignola (1988) 53.

78 Krugler (2004) 102.

79 Nicholls (2010).

80 Kirke also took several actions that angered resident planters and migratory fishers and arguably transgressed his charter, for example by opening taverns (see sections 3. c) and 4. a), below). Before he could be investigated for charges brought against him on these matters, the English Civil War broke out in 1642. The Kirkes were Royalists, and when

right cultural background and court connections to exploit Newfoundland commerce,[81] would come out on top and come to dominate the island until the end of the 17th century.[82]

Kirke's patent, the "Grant of Newfoundland", expanded Calvert's territorial authority from Avalon to "that whole continent Island and Region […] commonly known by the name of Newfoundland".[83] It granted "the sole trade of the Newfoundland, the fishing excepted". It made him the "true and absolute Lord and Proprietor" of it. Kirke's grant was also made in knight's service, though without palatine authority. Regardless, Kirke's jurisdiction was broad, able to make laws with the assent of the freeholders and to appoint magistrates. However, while Kirke's grant expanded dominion over the whole of the island and its *inhabitants*, he was forbidden from exercising any authority over the migrant fishers. Moreover, his patent prohibited Newfoundland's inhabitants taking up the best fishing places in advance of the arrival of the migrant ships.[84] Settlement was barred within six miles of the shore, fishing rooms were not to be occupied before the arrival of the summer fishing crews, and a 5% tax was to be collected on all fish products taken by foreigners.[85]

The Grant of Newfoundland essentially made Kirke a monopolist. Pope notes that his "Newfoundland Plantation" was run less like a corporate

the war concluded with a Parliamentary victory, the complaints against Kirke were revived. In 1651, a panel of commissioners was sent to Ferryland to seize Kirke and bring him to England to stand trial. His lands were acquired by the Commonwealth of England, but Kirke repurchased them after being found not guilty in 1653. His wife, Dame Sara Kirke, returned to Newfoundland to oversee the Kirke holdings, but Cecil Calvert, George Calvert's son and the second Lord Baltimore, brought new charges against Kirke over the title of the lands around Ferryland. Kirke likely died sometime in 1654 awaiting trial in the Southwark jail. Kirke's sons had regained control of the colony by 1660, when the Stuart Restoration reopened consideration of the Avalon's, and Newfoundland's, ownership (or overlordship). Charles II restored Calvert as proprietor, but he never took up residence, content to merely collect rents and providing no government to resident planters. This *status quo* would remain until the gradual establishment of naval government in the closing decades of the 17th century. Moir (1979); Pope (2004) 256–257.

81 Girard (2017) 45.

82 Pope (2004) 57–59.

83 Matthews (1975) 85–86.

84 Matthews (1975) 88, 93.

85 Newfoundland and Labrador Heritage (2000).

colony, and more of a node in a wider trade network. Kirke's vision was sophisticated; he dominated the local markets and diversified the economy to servicing the fishing fleets and resident boat-keeping.[86] In short, Kirke profited from his charter, and from Newfoundland, unlike the Newfoundland Company and Calvert before him. Kirke, however, lost the governorship of Newfoundland in 1653, when Cecil Calvert launched new legal actions against him. Charles II "restored" the Proprietorship of Newfoundland to Calvert in 1661, who never took up residence, and governance of the island, such as it was, withered until the gradual establishment of naval government at the conclusion of the 17th century.[87]

c) The 'Western Charter' of 1634

The Western Charter of 1634 was promulgated after Calvert's exit from Newfoundland and before Kirke's grant was made. West Country merchants, who dominated the migratory fishery had lobbied the Privy Council to protect their interests in light of the apparently growing power of the resident proprietorships.[88] In this way, the Western Charter is not a charter or grant in the same way as this article has so far discussed, but rather created – or supplemented – Newfoundland's juridical environment.

The primary legal effect was to declare that migrant fishers were generally not subject to the authority of the local "governor", but rather the King himself. The Western Charter provided a series of prohibitions directed at the seasonal fishery: it prohibited the casting out of ballast into the harbours, the overuse of wood, interfering with the nets, flakes or fishing gear of others, and the setting up of taverns.[89] This charter also split the criminal jurisdiction of the island in several ways, but without creating any local enforcement capabilities. Murder and theft over fifty shillings committed in Newfoundland were to be tried by the Earl Marshal in England; other

86 Pope (2004) 55, 134–36.

87 See note 80. Pope (2004) 256–257.

88 Girard (2017) 46.

89 Matthews (ed.) (1975) 71–75. The Western Charter also affirmed the "auncient" custom of the first captain to arrive at a harbour for the season being appointed the "admiral" of the harbour and given access to the best fishing infrastructure. These "fishing admirals" would become the focal point of the legislative intervention of King Williams's Act. See generally Bannister (2003).

offences committed on land in Newfoundland could only be brought before the mayors of Plymouth and various West Country ports, while those committed on sea had to be brought before the vice-admiralty courts in Southampton, Dorset, Devon or Cornwall.[90]

The Western Charter essentially set up a parallel jurisdiction operating in and around Newfoundland alongside the proprietorships – Kirke's in particular. The "division" that the charter created, between residents and transients, as well as the source and enforcement of laws that applied to those groups, would set up much of the legalistic conflict that would dog the island's denizens through the 17th century – and beyond.

4. Charter legalism in Newfoundland

Newfoundland's early modern charters formed the basis for the (positive) law on the island in the 17th century. Philip Girard convincingly argues that these legal sources generated important ideas and practices in Newfoundland that would come to outlast these documents.[91] But within the 17th century, these texts informed critical relationships among Newfoundland's colonial players, guided by a legalistic understanding of their terms and meaning. The cod fishery loomed large in these interpretations as the lodestar for colonial activity in Newfoundland. Commercial interests tended to set the battle lines; but law was the weapon the parties employed and law set the terms of how Newfoundland's stakeholders would interact.

a) Government and people, a Newfoundland Company-State?

Newfoundland and its charters present a unique model of early modern corporate governance, especially in light of the island's peers to the north and south. The Newfoundland Company and the proprietorships that followed possessed the essential trappings of Company Statehood. They were empowered to treat with Indigenous nations, defend themselves from attack, and make laws for the benefit of the King's subjects there as well as appoint officials to carry out their will. They were thus *de jure* governments at least, capable of establishing systems and institutions for the island.

90 Matthews (ed.) (1975) 71–75.
91 Girard (2017).

However, these provisional Company-States left little in the way of institutions.[92] No assembly of freeholders was ever established, and no magistrates or other "law enforcement" officers were ever appointed in this period. For Girard, much of this institutional absence is explained by Newfoundland's relatively slow population growth in the 17th century.[93] It is certainly true that Newfoundland's population growth was uneven as between the resident and migratory populations; by 1680, seasonal populations were between six thousand and ten thousand, whereas the permanent population was around 1,700.[94]

It would be incorrect, though, to suggest that with such a small population, there was no need or desire for some government. During his administration, Kirke did exercise his authority: he held courts, and was generally able to enforce his decisions – at least over the south Avalon from Ferryland.[95] After Kirke lost the "governorship" in 1653, local government, such as it was, weakened substantially. And, when the Calverts were restored to the proprietorship, the semblance of any government largely disappeared apart from the collection of rents – to the chagrin of the planters.[96]

However, even without a "charter" assembly, the planters still used the law to check the power of their local magnates, including Kirke himself. It was the planters under Kirke's proprietary jurisdiction who, in concert with West Country merchants, charged that Kirke and his associates were acting contrary to his charter, reserving to himself the best fishing rooms, and opening taverns – a direct contravention of the Western Charter.[97] While these complaints, made around 1638, were sustained through the English Civil War, they were resurrected in 1651, and led to Kirke's custody and eventual death in England.[98]

A notable juristic gap was the lack of a local magistracy, or other means of law enforcement. As highlighted in section 3, the various iterations of New-

92 Girard (2017) 41.
93 Girard (2017) 48.
94 Pope (2004) 62–64. Pope notes that the "overwintering" population fluctuated with catches as well as the threat of war; many fishers would opt to stay in Newfoundland over the winter to avoid impressment into naval service.
95 Pope (2004) 255.
96 Pope (2004) 256.
97 Moir (1979).
98 See note 80.

foundland's Company-States had the power to create local law enforcement as well as mete out punishment. Local punishment became somewhat circumscribed by the Western Charter, which provided for extradition to England for severe offences, even when committed on the island. Girard observes that Newfoundland's decentralized pattern of settlement made *de facto* control by *de jure* authorities difficult, if not impossible,[99] which makes the lack of delegated legal authority curious, especially in light of concerns from planters and residents noted into the 18th century with the formalization of the naval government that began at the end of the 17th century.[100] Jerry Bannister also notes that the island did not have any programme of jail construction until the 1720s, when the matter was taken up by the naval commodore, who assumed the "gubernatorial" mantle around that time.[101] Moreover, the Western Charter did not furnish the fishing fleet with any powers for law enforcement on the island.

In this domain then, it cannot be said that Newfoundland's Company-States lacked sufficient jurisdiction to govern according to the needs and wishes of its "citizenry". Rather, they – particularly the Kirkes and Calverts – exhibited an unwillingness to exercise legal authority in a way that would dilute their personal power, wealth, and influence. The proprietorship structure, combined with a smaller population, permitted this sort of personal fiefdom, in contrast to the contemporary MBC, with its experiments in democratic governance. In this way, Newfoundland's government tracked the "arbitrary government" reviled by the New Englanders. But, like the New Englanders, Newfoundland's planters found ways to use the extant charter law to their advantage, just as their colonial overlords did.

b) Residents and transients, parallel or limited jurisdiction?

As noted, the logic behind some form of settlement in Newfoundland – and necessitating the legal powers for successive sovereign charters – was to preempt the migratory cod fishery sailing each spring from England (and elsewhere in Europe). Notwithstanding the commercial failures of the New-

99 Girard (2017) 52.

100 Bannister (2003) 72.

101 Bannister (2003) 70–76. Bannister also notes that King William's Act exempted the fishing authorities from statutes concerning the construction of jails.

foundland Company and George Calvert, the migratory fishery, based in the West Country remained cautiously concerned by the presence of a growing permanent population on the island and its potential to cut into their lucrative trade. The West Country merchants then turned to the law as an instrument of protecting their interests, which came in the form of the Western Charter. As noted in section 3, the Western Charter of 1634 prohibited planters from living closer than six miles from the shore.

A theory behind this provision was to reduce conflict between the local and migratory fishery.[102] It is true that it reinforced in law the fact that Kirke's grant (made three years after the Western Charter) was not backed by a monopoly or other special privilege in the cod fishery, thus providing West Country merchants some legal leverage over the "Governor". It also effectively barred planters from participating in the migratory fishery at all, given the obvious utility of lands adjacent to the shore for the island's main industry. Pope observes that this provision was near-universally ignored, with no planters living more than a short walk from the ocean.[103] Here, formal limits of law were in place concerning the primary industry for which settlement was intended to serve, just as in Rupert's Land and the HBC. However, whereas in Rupert's Land, protection of the HBC's economic interest through keeping good relations with Indigenous groups depended (in part) on a restrictive interpretation of its charter jurisdiction, the practicalities of settlement and making a living in Newfoundland forced the planters to ignore the charter law.

The provision was amended several times in the 17th century. In 1653, the Council of State (which had replaced the Privy Council during the English Commonwealth) modified the Western Charter to recognize planters' rights to waterfront property.[104] A second Western Charter was promulgated in 1661 that affirmed the 1653 amendment,[105] but the "six mile rule" was brought back in 1671 when Charles II amended the 1661 text.[106] This back and forth in policy meant that planters had no means to effectively protect their title as a matter of law, and periodically making squatters of freehold-

102 Pope (2004) 132–133.

103 Pope (2004) 194.

104 Council of State (1653), Laws, Rules, and Ordinances Whereby the Affairs and Fishery of the Newfoundland Are to Be Governed, CO 1/38 (33iii) 74–75, in: Matthews (ed.) (1975).

105 Charles II in Council (1661), Western Charter, CO 1/15(3), in: Matthews (ed.) (1975).

106 Charles II (1671), Order, CO 1/26 20–26, in: Matthews (ed.) (1975).

ers. Indeed, there was no formalization or regularization of title in Newfoundland until well into the naval administration in the 18th century. Bannister highlights, for example, a customary form of title that arose out of this system known as a "grant" whereby the governor or his surrogate would issue a written grant acknowledging an estate in land. This prerogative title worked in tandem with other property forms such as occupancy and those derived from statute, augmenting and complementing English law to suit the needs of Newfoundland.[107] While King William's Act would later recognize a form of property in coastal parcels known as "ship's rooms" that were occupied prior to 1685, Girard notes that this property was treated as chattel, not realty, and was not codified until the Chattels Real Act of 1834.[108] Regardless, this system of "customary title" accords with the social practices the 17th century planters developed as a response to the impracticality of the "six mile rule" made for the benefit of the transient fishing industry of the West Country.

In addition to these property complications, the interaction between the Western Charters and the proprietorship (i. e., the Company-State) effectively divided criminal jurisdiction and enforcement as between the local and the transient fishing populations. By setting out that the migrant fishers were subject to the Western Charter's provisions alone, it created parallel jurisdictions, one for the planters under the proprietorship, and another for the fishery.[109] But while the Western Charter carved out serious crimes from adjudication in Newfoundland, it made no provision for enforcement;[110] the power to appoint judges and magistrates rested with the terms of the proprietorship, although as noted above, no such officials were ever appointed in the 17th century. This state of affairs stands in contrast to the

107 Bannister (2003) 123–24. See also English (1995) 74. English notes that land tenure would remain an issue for governance on the island, with little attention paid to the extensive coastal lands that were beyond the reach of the governor and his courts until title recognition was formalized in the early 19th century.

108 Girard (2017) 53.

109 Girard (2017) 46.

110 It is arguable, however, that Kirke's criminal jurisdiction extended to the capital matters separated by the Western Charter: his grant came after the Western Charter, and still permitted the taking of life if circumstances warranted.

HBC Charter, which empowered its governors to "judge all persons belonging to the said Governor and Company that shall live under them".[111]

5. Conclusions

In early modern Newfoundland, law mattered. Law – in particular sovereign grants either brought or exercised from across the Atlantic – was the basis for the entities purporting to populate, govern, and exploit the island. Importantly, it was also the basis of official, and unofficial relationships between the groups that were to live and visit there. And, while unique in their approach to the exercise of legal power, Newfoundland's 17th century Company-States – as well as their subjects – deployed legal power with a degree of sophistication that was both novel, and yet typical, of Newfoundland's colonial peers. And similar to these peers, this sophistication was, all times, informed by the economic considerations of the cod fishery. This extraordinary transfer of positive law and conceptions of its interpretation left an indelible impression on the legal character and culture of the island in the 17th century and beyond.

Newfoundland's 17th century Company-States, which generally took the form of (essentially medieval) proprietorships in the hands of individuals, exercised their broad powers judiciously. The choice of how – or even whether – to exercise or enforce the full ambit of the available law was aligned with the chooser's interests in the cod fishery. For Kirke, his gubernatorial authority was a means to establishing Newfoundland as a trade hub, with him at the centre; he chose not to dilute his power through officials, or summon his fellow planters to check his laws. For the West Country merchants, the reality of the cod fishery meant that enforcement of the "six-mile rule" would be practically impossible.

Law was also how people and groups in Newfoundland struck back against authority. The advent of the Western Charter was designed as a juridical tool for cabining the authority of Newfoundland's local government, such as it was, and stymying the commercial influence the planters could hope for regarding the fishery. And the planters, left without an

111 HBC Charter 5. Although the charter also provides for extradition to England, Girard notes this provision was not used until the 18th century. Girard (2017) 46.

assembly to air their concerns, turned to the charters' text to impugn the actions of their authorities.

These conceptions of jurisdiction and the deployment of law as a tool of power in the context of Atlantic Company-States was consistent with the HBC and MBC in Rupert's Land and New England respectively. In other words, a consistent juridical model of how charter law, initiated in the metropole, came to apply on the edges of England's domains. Together, these examples demonstrate that the colonial project, at least in the 17th century, was tenuous, and rested more on the paper held by its players, than the "glory" of empire.

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Matilde Cazzola

Aboriginal Protection and *parens patriae*: Indigenous Youths, Juvenile Delinquents, and the Reformatory Principle in Australia and England*

1. Introduction: Problem youth, protection and the law

On November 9, 2022, the Supreme Court of the United States heard *Haaland v. Brackeen*, a case brought by the states of Louisiana, Texas and Indiana together with some individual plaintiffs, who sued the Federal Government arguing that the Indian Child Welfare Act of 1978, a law regulating adoptions of Native American children, violates the Constitution. Prior to 1978, as part of a long history of (often forced) Indigenous child removal, a significant number of children were taken from their families to be adopted by non-Native custodians.[1] Recognising how disruptive these adoptions were to Native Nations, the Indian Child Welfare Act set federal standards for the placement of Indigenous youths with the purpose of fostering Native adoptions and thereby keeping the children connected with their culture. In deeming the Act unconstitutional and a violation of equal protection, the three aforementioned states, Brackeen and others are doing much more than just taking a position on the adoption of Native children, however important that issue is. Rather, they are promoting a different interpretation of the relations of the United States with Native Nations, which since the Constitution of 1789 have been under the centralised authority of Congress. At stake in the decision of *Haaland v. Brackeen* are, therefore, crucial issues of sovereignty and equal protection, which are, in turn, deeply intertwined

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1 Ellinghaus (2006).

with jurisdiction over Indigenous children and still ongoing attempts at subjecting them to assimilation policies.[2]

This article explores the connections between childhood and protection by examining the legal history of the British settler empire. Christina Twomey has recently argued that "a comprehensive genealogy" of the origins and rationale of British imperial protection still needs to be written.[3] This essay aims to contribute to reconstructing this genealogy by interrogating the legal foundations of Aboriginal protection through the lens of 18th- and 19th-century imperial practices of rehabilitation of "problem youth". In particular, this work centres on two case studies related to England and colonial Australia. The first case study concerns the reformatory established by the charitable association, the Philanthropic Society, in London in 1788 to rehabilitate juvenile delinquents and the children of vagrants and convicts; the second concerns the residential working school for Indigenous youths promoted by Assistant Protector of Aborigines, Edward John Eyre, at his protective station in Moorundie, South Australia, in the early 1840s.[4] After outlining the history and principles of Aboriginal protection in the early 19th century in section 2, section 3 discusses the treatment of Indigenous and criminal youths within the context of Eyre's Protectorate and the Philanthropic Society's institution. Section 4 locates these experiments in juvenile rehabilitation within the same comparative framework by examining the legal justification for reformatories in both the metropole and its colonies, whereas section 5 investigates the ancient English legal doctrine of *parens patriae* and its late 18th-century developments, proposing that this doctrine is one of the sets of legitimations underpinning the policy of Aboriginal protection in the British colonial "Antipodes". Finally, section 6 concludes by contextualising the interplay between *parens patriae* and Aboriginal protection within the wider framework of legal transfer in the common law world.

2 Reed/Singer (2022); Armitage (1995) 41.

3 Twomey (2018) 11.

4 The term "Aborigines" was imposed during colonisation to refer to First Nations peoples and is therefore outdated and problematic to describe current events. It is used here only because it is commonly employed in the historical sources discussed.

2. For whose protection? Saving Aboriginal peoples and defending settlement in colonial Australia

Legal historians are increasingly investigating protection as a broad and flexible legal framework historically used to describe and justify both "external" relations among empires, states and other polities in the international context and a distinctive "internal" means of promoting social order in a community.[5] The Protectorates of Aborigines represent this latter internal variety of protection.[6] In 1835, outraged by the violence perpetrated by European colonists and the high death rate of Indigenous peoples across the British settler empire, the abolitionist MP Thomas Fowell Buxton called for the establishment of the parliamentary Select Committee on Aborigines.[7] The Committee's significant work product, the Report of the House of Commons Select Committee on Aboriginal Tribes (British Settlements) issued in 1837, addressed the problematic legal status of the Australian continent, where British sovereignty had been declared without invoking the right of conquest or negotiating any treaty or cession; consequently, Indigenous Australians maintained an "incontrovertible right to their own soil" and had to be considered "within the allegiance of the Queen and entitled to Her protection".[8] The main characteristics of this "protection" were identified in the Report: alongside official recognition of Indigenous peoples' land rights and the assimilation of their condition to that of British subjects, protection entailed the primacy of the executive government (a power vested in the Governor, who was responsible before the Crown) over colonial legislatures (which represented the interests of white settlers); the illegitimacy of private land sales, and the duty of the Crown to oversee land transactions between settlers and Indigenous peoples; the invalidity of treaties between Europeans and local tribes, given the "entire disparity" of the contracting parties; and the importance of fostering the alleged improvement and "civilisation" of Aboriginal peoples.[9]

5 Benton et al. (eds.) (2017) 1–9.

6 Dussart / Lester (2014); Curthoys / Mitchell (2018); Furphy / Nettelbeck (eds.) (2020).

7 Elbourne (2003); Nettelbeck (2019) 13.

8 Select Committee on Aborigines (1837) 4,126; Evans Grimshaw / Philips / Swain (2003); Evans (2005) 38; Edmonds / Nettelbeck (eds.) (2018); Nettelbeck (2019) 92; Furphy / Nettelbeck (eds.) (2020) 7; Ford / Rowse (eds.) (2013).

9 Nettelbeck (2019) 30–42; Select Committee on Aborigines (1837) 116–126.

In terms of concrete outcomes, the Report inspired the founding of the Aborigines Protection Society in 1837 and, from 1839 onwards, the establishment of Protectorates of Aborigines across the British colonial Antipodes. The Report also sketched the duties of Protectors, Crown-appointed officials tasked with ameliorating the condition of Aboriginal communities and safeguarding them against despotic and arbitrary practices by providing them with legal advice and promoting their conversion to Christianity and training in labour; being often empowered as magistrates, Protectors were also expected, as noted by Amanda Nettelbeck, to bring Indigenous peoples both under the protection and "within the pale" of colonial laws.[10] Shortly after the Report issued, Protectorates of Aborigines, staffed by Chief and Assistant Protectors, were opened in Port Phillip (from 1851 in the colony of Victoria), South Australia, Western Australia and New Zealand. Scholars of Aboriginal protection have recently noted how, in practice, to "protect the Aborigines" meant reforming them as "governable colonial subjects", with the ultimate purpose of reconciling the European settlement of those territories with the survival of Indigenous peoples, whose extermination was not only morally disturbing to metropolitan administrators but also economically unfruitful for fledgling colonial societies.[11] After all, the very same Report of 1837 had stressed the urgency of finding "some outlet for the superabundant population of Great Britain and Ireland" and deemed the violence perpetrated against Indigenous peoples "an impediment in the way of successful colonization"; as "savages" were "dangerous neighbours and unprofitable customers" for the colonial state, it was in its own interest to deal with "civilized men rather than with barbarians".[12] The safeguarding of Aboriginal peoples against abuses and extinction and the defence of the material security of settlers were two faces of one and the same project of protecting the peace of colonial society and promoting its expansion.[13]

The colony of South Australia occupies a special position in the history of Aboriginal protection. With the aim of practically implementing the plan of

10 Belmessous (2013) 98–100; Nettelbeck (2019) 4–6, 11–13, 30–32; Laidlaw (2021) 1, 32; Ford (2017) 176. On the role and duties of Protectors, see: Cannon (ed.) (1978) 373–375 (Lord Glenelg to George Gipps, 31.01.1838).

11 Dussart / Lester (2014) 90–92; Nettelbeck (2019) 4, 30–31; Laidlaw (2021) 176.

12 Select Committee on Aborigines (1837) 104–105, 59.

13 Ford (2017) 186; Dussart / Lester (2014) 34; Buti (2004) 49–50.

systematic colonisation of Edward Gibbon Wakefield and concurrently fulfilling the wishes of the late Jeremy Bentham, in 1834 the South Australian Association successfully lobbied Parliament into passing an act opening the South Australian territory, which was described as "waste and unoccupied land", to European settlement.[14] In 1836, the South Australia Company, which had replaced the Association, took charge of promoting emigration and land sales in the new colony, and their initiative soon drew the attention of those British administrators influenced by Evangelical principles and who wished that South Australia would become the site of a colonising process not incompatible with the survival and welfare of Indigenous peoples.[15] As early as 1835, the Undersecretary of the Colonial Office had requested that the South Australian Colonization Commission, established by authority of Parliament, implement measures aimed at ensuring justice for and promoting the safety of Aboriginal peoples, thereby inducing the Commissioners to include the office of Protector in the establishment plan for the colony.[16] The optimism that the colonisation of South Australia could result in a benevolent settlement, not infringing on the rights and survival of Indigenous peoples, has to be contextualised within the peculiar history of the colony, the only one which never officially received convicts and where, therefore, Indigenous Australians were regarded by settlers as a potential workforce.[17]

The first issue of the *South Australian Gazette*, published in June 1836 to provide would-be settlers with useful information regarding the physical features of the territory, the regulations concerning emigration and the form of government of the new colony, included virtually no mention of the Indigenous population, except for a short piece entitled "Government and Protection of the Colony". After reassuring readers that "the protection of the colony has not been overlooked", the article informed them that, on the one hand, a Protector of Aborigines would be appointed to "cultivate the good-will of the natives, and improve their social condition" and, on the

14 Attwood (2020) 65–95; Laidlaw (2021) 211–212. On Bentham and colonial Australia, see: Llewellyn (2021); Schofield (2022).

15 Curthoys / Mitchell (2018) 48–102.

16 Nettelbeck (2017) 32; Nettelbeck (2019) 60–62; Nettelbeck (2020) 80–84; Laidlaw (2021) 211–215; Belmessous (2013) 96–97; Evans (2005) 17–18.

17 Mitchell (2011) 29. On the need for labourers in South Australia, see: Dare (2008).

other, "a sufficient force" would provide settlers with "whatever protection is necessary" against the "natives" themselves.[18] The purpose of "protection" was, therefore, twofold: Indigenous Australians had to be safeguarded against the destructive effects of European colonisation and, at the same time, they represented a threat against which colonists had to be defended. Six months later, the first Governor of South Australia, John Hindmarsh, proclaimed the birth of the newly founded colony before the first group of settlers in Holdfast Bay. As reported by the second issue of the *South Australian Gazette*, Hindmarsh declared that Indigenous persons were under "the same protection as the rest of His Majesty's subjects".[19] It was thereby under the auspices of protection that the experimental colony of South Australia was inaugurated.

3. London and Moorundie, 1788–1844: Reformatories and residential schools

In 1839, to comply with the requests of the Colonial Office, the first Permanent Protector, Matthew Moorhouse, was sent to South Australia.[20] Shortly after, to serve under and assist Moorhouse, Edward John Eyre (1815–1901) was appointed Assistant or Sub-Protector of Aborigines and Resident Magistrate at the station of Moorundie, along the Murray River 130 kilometres from Adelaide, an area which had recently witnessed bloody clashes between Indigenous peoples and European pastoralists.[21] Notorious in British imperial history for the massacre following the Jamaican Morant Bay Rebellion in 1865, Eyre – an English emigrant to Australia who initially farmed sheep in New South Wales, subsequently became explorer, and was known for his friendly intercourse with Aboriginal Australians and his humanitarian concerns regarding their rapid extinction – started his imperial administrative career in this frontier locality, having been tasked by the then Governor of South

18 Anonymous Contributor (1836) 4.
19 Hindmarsh (1837) 1.
20 Nettelbeck (2019) 119–120. Moorhouse immediately issued the instructions for the new Protectors; see: Moorhouse (1839) 4.
21 Hall (1996) 137–142; Hall (2002) 23–41; Evans (2005) 20–21; Nettelbeck (2016) 34.

Australia, George Grey, with creating the conditions for peaceful settlement by Europeans and the social "amalgamation" of Indigenous peoples.[22]

The core of the protective governance that Eyre established in Moorundie was the system of rationing, which entailed the periodic distribution of flour rations to the Indigenous population and would be systematically implemented throughout the Australian continent during the 19th century.[23] Unlike some of his contemporaries, who claimed that rations should be contingent on labour, Eyre stressed the duty of Europeans to "compensate" Indigenous peoples gratuitously for having dispossessed them of their lands and resources.[24] Even if the 1837 Report recommended that Aboriginal peoples be exempted from the colonial application of the 1824 British Vagrancy Act, Indigenous Australians were indeed equated with vagrants by European missionaries and administrators, their "vagrancy" being the result not only of their nomadic mode of subsistence but also of the temptations of robbery and crime resulting from European dispossession.[25] The system of rationing would redeem them from their alleged vagrancy by, on the one hand, tying them to the rationing station and inducing them to settle and, on the other, pauperising and making them dependent on the colonial government for survival and therefore obliged to reciprocate white philanthropy by complying with the laws of settler society.[26] After being induced to abandon their supposedly vagrant lifestyle, these "native" paupers would be progressively instructed to become "deserving", meaning industrious, and thus increase the population of the Indigenous labouring poor representing "an additional inducement [for colonists] to locate" by "sav[ing] [them] in great measure the expense of European servants".[27] As Eyre proudly

22 Lester (2015); Nettelbeck (2017); eadem (2019) 120–123; Eyre (1985) 10–11 (Grey to colonial secretary, 30.10.1841). On Eyre's earliest years in Australia, see: Eyre (1984).

23 Dickey (1986); Rowse (1998).

24 Eyre (1985) 21 (Eyre to colonial secretary, 10.01.1842); Eyre (1845) vol. I, 40–41 and vol. II, 316; Foster (1989); Evans (2005) 48–49.

25 Select Committee on Aborigines (1837) 118; Nicolazzo (2020) 3–14, 179; Twomey (2002) 97–99; Nettelbeck (2019) 30.

26 Eyre (1845) vol. II, 460–463, 483–485; Mitchell (2004); Rowse (1998) 4–8, 19–26, 31–32; Mitchell (2011) 109–121; Evans (2005) 49; O'Brien (2008) 151–163; Dussart/Lester (2014) 20–21; Foster (1989) 73–74.

27 Eyre (1845) vol. II, 464, 488–489; Eyre (1985) 20, 45–47, 68, 75 (Eyre to colonial secretary, 10.01.1842; 7.12.1842; 20.01.1844; 28.02.1844); O'Brien (2008); Foster (1989) 73; Nettelbeck (2020) 86.

reported to Grey in December 1842, "the way is now paved for a quiet occupation by the settlers".[28]

According to Eyre, rationing had to be established alongside another system specifically focused on Indigenous youths, which he implemented in 1843.[29] Like many of his contemporaries, he thought children were more vulnerable to corruption but also more teachable; therefore, through "industrial education", they could be directly turned into "useful" poor labourers, without needing to pass through the degradation of indigence to which their adult parents were fated.[30] Eyre wanted to remove these children from their families and confine them to boarding or residential working schools, with separate lodgings for boys and girls, where they would be instructed in Christianity, the English language, the techniques of agriculture, various trades (from tailoring to shoemaking and carpentry) and menial tasks according to a sexual division of labour. Therefore, Eyre opined that their education should "consist in a very small part of reading and writing" in order to check and contain the emancipatory effects of schooling. Moreover, a system of rewards would be implemented as a beneficial "stimulus to exertion".[31] Most interestingly, Eyre repeatedly stressed the necessity of severing connections between schoolchildren and their families, believing that adults exercised a "contagious" influence over their offspring, from which British colonial authorities had to "reclaim" them.[32] For this reason, he distributed extra flour rations to those Indigenous persons who let their children be boarded and lodged, and he sought to prevent parents from removing their sons and daughters from school after agreeing to let them attend and from camping in their vicinity where they could maintain contact. Parents were only rarely entitled to visit their children under the strict supervision of a schoolmaster. Once their schooling was over, young Aboriginal peoples were to be hired by settlers as apprentices and, at the end of their indenture, would be encouraged to marry among themselves.[33] Eyre

28 Eyre (1985) 45 (Eyre to colonial secretary, 7.12.1842).
29 Evans (2005) 49–50; Eyre (1845) vol. II, 436–437.
30 Eyre (1845) vol. II, 422; Swartz (2019) 11, 59; Twomey (2002) 106–110. Protector Moorhouse also established a "native location" where he introduced the monitorial system implemented in English schools; see: Barry (2008) 41.1.
31 Eyre (1845) vol. II, 436–438, 441–443, 489–492; Evans (2005) 46–49; Swartz (2019) 2, 23.
32 Eyre (1845) vol. II, 489–491.
33 Eyre (1845) vol. II, 481, 488–490; Evans (2005) 49; Mitchell (2011) 119–121.

believed that these colonial boarding schools would thus function as social laboratories for the creation of a compliant Indigenous workforce of labourers and domestic servants.[34]

As argued by Jamie Scott, the precedent for the residential industrial schools for Indigenous youths established across the British settler empire, from North America to the Australian colonies, can be found in the metropole and, more particularly, in the debates around juvenile delinquency which surrounded the founding of the Philanthropic Society in London by social reformer Robert Young in 1788.[35] The Society's central aim was to sever connections between young vagrants and delinquents and their families' criminal life by relocating and confining the youths to what Young called the "Reform" or "School of Practical Morality", where they would be trained in useful labour and transformed into industrious and compliant poor workers.[36] During its earliest years, the Society rented several cottages, which were turned into workshops for spinning, shoemaking, tailoring and carpentry; here, the young "wards" were entrusted to masters and mistresses in charge of overseeing their training. Girls were accommodated in separate lodging and trained to become menial servants and housewives. The Reform thus became a fledgling village of industry.[37] Young's initial plan to admit only children up to 5–6 years old was soon reconsidered in light of the need for labour, and his ambition to make the facility self-supporting led him to raise the age of the wards to 14–15 years old.[38] Everyday life within the Reform was characterised by order, discipline, cleanliness, hard work, religiosity and rewards for merit to foster emulation as well as "badges of disgrace" to deter bad examples. Disobedience, idleness and attempts to escape were punished through isolation and whipping. In terms of mental improvement, Young remarked, the wards were not to be taught to read and write but were rather to be induced to "unlearn" the pernicious habits which they had been inculcated by their families.[39]

34 Swartz (2019) 4–10, 239.
35 Scott (2005) 114.
36 Young (1790c) 14; Whitten (2010) 29; Sanna (2020).
37 Young (1789) 26–34; Whitten (2010) 113; Sanna (2020) 95–98.
38 Young (1790a) xiii; Sanna (2020) 92, 100.
39 Young (1789) 34–35, 49; Young (1790a) 52–56, 61; Sanna (2020) 117–129, 155, 161–165.

The writings of Robert Young and the reports of his Society featured the same discourse of "reclamation" of children from the "contagion" of their vicious parents that would later inform the plans for industrial schools for Indigenous youths promoted by Eyre and other colonial administrators across the British Empire.[40] Indeed, the Philanthropic Society coincided with the new late 18th-century institution of the reformatory: combining aspects of a school, a workshop and a prison, here, the rhetoric of education overlapped with a reality of hard labour and punishment.[41] For Young, the combination of industry, reward and discipline amounted to a veritable "system of moral government", which would accomplish the "metamorphosis" of the inmates "from highway robbers into diligent apprentices".[42] This system would, moreover, initiate a process of reformation that would progressively extend to the entire poor population. By "reclaiming" those children who were "the natural inheritors of vice", the Reform would also indirectly exert a beneficial influence on their natural parents, who would be allowed to visit their sons and daughters from time to time, provided they became industrious and respectable and were equipped with a "ticket" certifying good conduct; nonetheless, parents would never be left alone with their children.[43] For these adult vagrants and convicts, in turn, Young devised a system of agricultural colonies, which he called the "British Settlement" or the "Asylum for Industry", where these people, whom he considered the "waste of society", would be employed on the "waste" lands of the country.[44]

Therefore, confinement of the wards to the Philanthropic Reform was not an end in itself but was instrumental to their socialisation, with the aim of making them fit for society. Their labour was not only important as a productive exertion to make the institution self-supporting but also as a reforming and moralising activity *per se*.[45] Moreover, this project of social rehabilitation would, according to Young, play a crucial preventive function by delivering British society from crime by destroying its "seeds". Notably, he

40 Young (1790a) 39, 63; Shore (1999).
41 Rothman (1971); Schlossman (1995); Scott (2005) 119; Schlossman (2005) 22–30.
42 Young (1790d) 2; Young (1790a) xiv.
43 Young (1790a) 25.
44 Young (1789) 32–34.
45 Sanna (2020) 92–93.

wrote that his Reform was established upon "principles of police [rather] than of charity".[46] In the late 18th century, especially with Patrick Colquhoun (a supporter of the Philanthropic Society), the "police" referred no longer only to the preservation of order but also, and more importantly, to the prevention of crimes.[47] Having been created to reform children who were otherwise doomed to become "the most important object of police" as "enem[ies] to those laws on which the general good depends", the Reform amounted to a "plan of preventive police"; it was meant to "save" young delinquents from a criminal life and ensure a "saving" to the public sphere by reforming *in nuce* thieves and prostitutes.[48] Interestingly, the Philanthropic Society soon established semi-official cooperation with police stations, jails and courts, as police officers and magistrates began placing young offenders in the Society's custody as an alternative to incrimination, incarceration or transportation.[49] However, despite this alliance with the representatives of law and order, the legal justification for confining youths to the reformatory was far from unquestioned.

4. Separation, confinement, reclamation: By what authority?

As argued by several legal historians, it was in England that the juvenile delinquent was "invented" as a distinct legal figure.[50] Robert Young's Philanthropic Society played a pioneering role at both the theoretical and practical levels in fostering this innovation by stressing for the first time the necessity of creating an *ad hoc* institution specifically devoted not to preserving the lives of poor children and promoting their employability, as other societies had done, but rather to rehabilitating actual and potential lawbreakers.[51] While delinquent juveniles had previously been kidnapped and transported to the colonies as convicts or impressed into the Army or Navy, the establishment of the reformatory entailed the optimistic expectation that a combination of isolation, education, industrial training and punishment

46 Young (1790b) 3; Young (1789) 2.
47 Andrew (1989); Neocleous (2000); Whitten (2010) 65.
48 Young (1789) 22; Philanthropic Society (1792) 4; Young (1790c) 27.
49 Young (1790c) 10; Philanthropic Society (1797) 17; Owen (1964) 120–121.
50 Radzinowicz/Hood (1986) 133–229; Magarey (1978); Shore (1999); Shore (2011a).
51 Philanthropic Society (1792) 5; Rothman (1971) 206–212; Schlossman (1995) 363–365.

could transform them into hard-working and law-abiding subjects.[52] However, when these youths were not orphaned or deserted, or when it was not their parents who voluntarily placed them in the Philanthropic Society's custody, their "reclamation" could be legally problematic. According to Young, any subscriber to the Society could select prospective wards by undertaking "painful researches" in the slums and dragging recalcitrant children into the reformatory; the Society started electing specially appointed "visitors" in 1790.[53] However, as an anonymous commentator in the press pondered, "by what authority is it that they exert any power, or is it merely by persuasion that they take away the children from their parents?"[54] Before 1806, when it was incorporated by Act of Parliament, the Philanthropic Society lacked legal personality, and the youths were, in turn, legally the property of their parents, no matter how indigent they were.[55]

Robert Young was aware of this legal predicament. He knew that parental authority represented a "most serious obstacle […] apprehended to the present undertaking" and that, in order to "attach [the youths] to the Society's protection", the Philanthropic Reform had to step in with its own forcible "interposition of authority". If parents refused to comply with the confinement of their children to the Reform, Young suggested that "the sword of justice" be employed "to sever the cords of parental authority, which are only used to drag the child to ruin", by means of "an inquiry into the conduct [of such parents] [which] will not fail to subject them to legal penalties as vagrants, if not as criminals".[56] What Young wished was to make a "blank" of the youths, an experimental field completely cleared of any "interruption from custom […] or from law": being "not under parochial jurisdiction, […] [and therefore] not bound by its laws and customs", the children should also be considered liable to be "separated from parents who had no means of supporting them but dishonest ones".[57] As a "collective body", the state should act as the "common parent" of these "unprotected youth[s]", a "parent at once affectionate and wise, [who], while it supplies the

52 Suranyi (2015) 132–159; Sanna (2020) 7–15, 91–92; Andrew (1989) 59, 110–122, 183–195; McGillivray (2004) 53.
53 Young (1789) 49–51; Whitten (2010) 59; Sanna (2020) 195–198.
54 Anonymous Contributor (1789a) 3.
55 Whitten (2010) 117; Sanna (2020) 189, 205, 212–215, 238.
56 Young (1789) 31–32.
57 Young (1790a) 22–23, 63.

wants of its child, […] compel[s] it, to perform its duty too";[58] in turn, once confined to the Reform, the youths would become the "children of the state" to be "receive[d] in trust" by the Society.[59] As veritable disciplinarian trustees, in 1792 the Society's managers erected a three-and-a-half-meter-tall wall around the Reform to both isolate the inmates from any external intercourse and prevent their increasingly frequent attempts to escape.[60]

The activities of the Philanthropic Society broke new ground in the history of juvenile justice in Britain. The *Report of the Committee for Investigating the Causes of the Alarming Increase of Juvenile Delinquency in the Metropolis*, published in 1816, recommended the opening of "public establishments" for the reformation of young offenders.[61] It was in the second half of the 19th century that reformatories proliferated and were officially recognised as part of the British criminal justice system. In 1847, the Juvenile Offenders Act provided that delinquents under 14 were to be tried summarily for lesser offences in a special court. In 1852, the House of Commons Select Committee on Criminal and Destitute Children was appointed, whose discussions led to the passing of the Reformatory School Act of 1854 (also known as the Youthful Offenders Act), which stated that offenders under 16 would be eligible for a pardon, provided they were allocated to a reformatory (certified by the Inspector of Prisons) for a period of 2 to 5 years. In 1857, the Industrial Schools Act allowed magistrates to order the consignment of neglected youths to a boarding school.[62] The extent to which parental consent had to be sought or could be overlooked was still an open issue. In 1861, the Select Committee on the Education of Destitute Children created the category of "children in need of care and protection" and sanctioned the idea that the state was empowered to act *in loco parentis* with children of "unfit" parents.[63] Official debates and statutory enactments were followed by the strengthening of the reform school movement. At mid-century, social activist Mary Carpenter campaigned for the recognition of both young offenders and the children of negligent and criminal parents as

58 Young (1790a) 38, 68; Young (1790e) 9.
59 Young (1789) 14.
60 Sanna (2020) 105, 112–113.
61 Committee for Investigating (1816) 19.
62 Whitten (2010) 243–253; Shore (2011b); Godfrey/Cox/Shore/Alker (2017) 28–32.
63 Swartz (2019) 135–136, 203–204.

"children of the state" who should be removed from their families and confined to reformatory and industrial schools, respectively, where a power of "forcible detention" should be legally granted to schoolmasters to prevent the youths from running away.[64] The 1860s witnessed the flourishing of the child rescue movement, whose proponents (most famously, Thomas Barnardo) searched the slums to snatch abandoned and delinquent youths and established "homes" for their segregation and treatment. These "rescuers" promoted child removal as a necessary response to familial failings, which virtually made these youths "worse than orphans"; such a designation substantially weakened their status as parental property.[65] Child rescue was launched by the charity sector (including agents of the Societies for the Prevention of Cruelty to Children established in the early 1880s) before being conducted by government agencies at the end of the century; in 1889, the Prevention of Cruelty to Children Act explicitly allowed for public interference in the parent–child relation.[66]

The practice of child removal was occasionally enforced in Britain during the 19th century, but it was across the British settler empire that it received long-lasting and systematic implementation; in colonial Australia, Indigenous children were forcibly separated from their families throughout the 19th and well into the 20th century.[67] The private seizure of Aboriginal children for sexual exploitation or employment as servants by white colonists characterised the history of the Australian colonies from their very beginnings.[68] But the idea that this practice could be institutionalised "in the best interests" of the youths was probably first expounded in a series of articles signed by the anonymous writer "Philanthropus" and published in the *Sydney Gazette* in 1810; these articles suggested that Indigenous children be "taken from their parents in a state of infancy" and adopted by European families to be instructed in Christianity and labour.[69] According to Anne O'Brien, Philanthropus was the pseudonym of Reverend Robert Cartwright,

64 Carpenter (1851) 342; Yeo (1996) 124–125, 145.
65 Hillel/Swain (2010) 17–35.
66 Swain (2002) 134–136; Swain (2016b) 28.
67 Robinson/Paten (2008) 501–502; Raynes (2009); Swartz (2019) 204; Swain (2002) 133; Haebich (2000).
68 Haebich (2000) 80–87.
69 Philanthropus (1810) 3.

who in the late 1810s advanced a plan for a "native establishment" in Cowpastures, New South Wales, centred around a school for the training of Indigenous children.[70] To turn these children into "the most useful instruments in this work of civilizing their savage kindred", it was necessary, in Cartwright's view, to keep them separated from the "bad example" of their families, "similar to what it has done *[sic]* for our Orphan Institution".[71] In 1814, the first industrial school for Indigenous youths, the Parramatta Native Institution, was opened in New South Wales, which also engaged, albeit often unofficially, in child removal.[72] At his protective station in Moorundie in the early 1840s, Assistant Protector Edward Eyre also advocated the systematic separation of young Aboriginal peoples from their parents. Although he never explicitly demanded *forced* child removal, Eyre nonetheless argued that no "real or permanent good will ever be effected, until the influence exercised over the young by the adults be destroyed, and they are freed from the contagious effect of their example"; otherwise, "the good that is instilled one day is the next obliterated", resulting in several Indigenous youths "return[ing] to their savage life" after many years spent working for settlers as servants.[73]

The industrial schools that Eyre promoted were *de facto* reformatories, being specifically aimed at "protect[ing] the school-children from the influence of their relatives, who are always encouraging them to leave or to practise *[sic]* what they have been taught not to do", by "placing them under the guardianship of the Protectors".[74] Just like Robert Young, Eyre maintained that the educational mission of his reformatory was to "undo" and "disassociate [the children] from their natural ideas, habits and practices".[75] This was why he wanted Indigenous parents to be denied any recourse were they to later change their minds after letting their children attend school; otherwise, the youths would never drop "their natural taste for an indolent and rambling life".[76] Missionaries to South Australia similarly advocated the

70 O'Brien (2008) 157.
71 Watson (ed.) (1917) 264–265 (Robert Cartwright to Lachlan Macquarie, 6.12.1819).
72 Robinson/Paten (2008) 506; Mitchell (2011) 10. For a chronology of institutions for Indigenous children, see: Haebich (2000) 229–230.
73 Eyre (1845) vol. II, 422, 430, 440.
74 Eyre (1845) vol. II, 440, 492.
75 Eyre (1845) vol. II, 454; Haebich (2000) 146.
76 Eyre (1845) vol. II, 436, 489.

"entire separation" of Indigenous children from their parents as essential to advancing the "moral and spiritual welfare of the Aborigines". They recommended that "native" orphans be placed under the "absolute care" and "permanent control" of the Missionary Society, and maintained that the consent of youths older than 10 was enough for them to be removed from their families, and that once parents had agreed to the separation of children under that age, their authorisation could not be withdrawn. In light of the supposed "low state of moral feeling possessed by the natives", missionaries were positive that this measure "would not involve […] the infraction of any essential law of humanity".[77] But adult Aboriginal peoples were of course outraged by this practice; as Eyre himself reported, "I have often heard the parents complain indignantly of their children being thus taken; and one old man who had been so treated […] used vehemently to declare, that if taken any more, he would steal some European children instead, and take them into the bush".[78]

It was within this context that, in 1844, Governor George Grey passed the Ordinance to Provide for the Protection, Maintenance, and Up-Bringing of Orphans and Other Destitute Children of the Aborigines (SA), which empowered Protectors to remove not only orphaned and abandoned youths but also every Indigenous or so-called "half-caste" child whose parents agreed to their separation and tie them to settlers with apprenticeship contracts; the Ordinance also turned Protectors into the "legal guardians" of these children.[79] Also in 1844, the Aboriginal Girls Protection Act (WA) made it an offence to remove Indigenous girls from school or service without the consent of a Protector or their employer.[80] These were the first of a series of infamous measures allowing for the non-consensual separation and forcible detention of Indigenous youths in colonial Australia.[81] In 1865, a few years after one "Philanthropist" had recommended to "take the native whilst young – let him be no longer subject to those pernicious influences […] – give him an industrial education" in the *Moreton Bay Courier*,[82] the Industrial

77 South Australian Missionary Society (1842) 3.
78 Eyre (1845) vol. II, 438.
79 Grey (1844) 1–2; Robinson / Paten (2008); Price (2020).
80 Swain (2016a) 196.
81 Haebich (2000) 149–150.
82 Philanthropist (1860) 2.

and Reformatory Schools Act (QLD) equated the offspring of Aboriginal mothers with children of criminal parents and juvenile offenders, allowing for their removal merely on the ground of their Indigenous descent.[83] In 1869, the Aborigines Protection Act (VIC) established a Central Board for the Protection of Aborigines and empowered the Governor to approve regulations for, among other issues, the custody and education of Indigenous children.[84] In 1874, the Industrial Schools Act (WA) equated Indigenous youths with orphaned and "necessitous" children and institutionalised the practice of child removal (subject to parental consent, at least in theory).[85] Western Australia had recently been the site of the educational experiment of Annesfield, the institution founded by the teacher Anne Camfield, who had repeatedly stressed the importance of a plan of "compulsory education" of Indigenous children. To counteract the reluctance of parents in "giv[ing] up their children for civilization", Camfield advocated "a law obliging" them to send their children to school, by means of which "compulsion" would be "made lawful"; after all, she wondered, "where is the unlawfulness of compelling them to be civilized?"[86] In 1886, two Aborigines Protection Acts (WA and VIC) allowed for, respectively, the indenture of youths of 21 years old (or of an undefined "suitable age") and the removal of "half-castes" to Aboriginal missions and reserves.[87] In 1897, the Aboriginals Protection and Restriction of the Sale of Opium Act (QLD) authorised the removal to reserves of "any Aboriginal" regardless of their age, thereby equating all Indigenous persons with children under guardianship.[88] In 1905, the Aborigines Act (WA) made the Chief Protector the legal guardian of all Indigenous children and empowered authorities to confine them to "Aboriginal institutions" and, in 1907, the State Children Act (WA) equated neglected children with children of the state.[89] Most of these acts were subsequently replicated in other colonies (later states).[90] Similar to the British metropole,

83 Swartz (2019) 214; Robinson / Paten (2008) 507–508.
84 Nettelbeck (2019) 166; Buti (2004) 52.
85 Swartz (2019) 211–217.
86 Camfield (1863) 306–307; Camfield (1864) 390; Swartz (2019) 180–184.
87 Robinson (2016) 133; Swartz (2019) 218; Buti (2004) 52; McMillan / McRae (2015) 233–244.
88 Robinson / Paten (2008) 512; Buti (2004) 59; Haebich (2000) 171–172.
89 Swartz (2019) 218; Haebich (2000) 220–225, 231–233.
90 Buti (2004) 60.

therefore, in colonial Australia commonalities between orphaned, neglected, deserted, vagrant and criminal children were emphasised, with "Aboriginality" becoming a synonym for all of these conditions.[91]

5. *In nomine patriae*: Protection and the reformatory principle

The legal justification for reform schools (and their prerequisite, the practice of child removal) rested upon the doctrine of *parens patriae*. This medieval principle, an outgrowth of royal prerogative applied and developed by the chancery courts, held that the Crown, as a common custodian for its subjects and all matters of public concern, was vested with the constitutional power of guardianship over all property subject to charitable trusts as well as that belonging to persons with a disability, such as orphans, minors and insane or incompetent persons.[92] Included in this doctrine was also the notion that the Crown, by virtue of its prerogative, could interfere in familial relations when the welfare and property of minors were jeopardised.[93] Therefore, in its medieval and early modern formulation, the tutelage granted by *parens patriae* specifically addressed those orphaned and propertied children whose estates had to be protected against usurpers, and did not extend to the children of the poor, who, under the 1562 Statute of Artificers, could be separated from their parents to be apprenticed and put to work in a trade (and thereby compelled to support themselves instead of being provided for).[94]

As scholars like George Curtis have noted, however, *parens patriae* underwent a significant rethinking in the late 18th century. The notion originally related to dependent and not delinquent classes, but at that time, concurrently with the establishment of reformatories, the application of *parens patriae* was extended to include criminal classes, encompassing no longer only orphans with property but also all poor children of criminal and allegedly "unfit" parents as well as juvenile delinquents.[95] The "bending" of the

91 Schlossman (1995) 365; Swain (2016a) 199; Haebich (2000) 136–137.
92 Schlossman (1995) 366; Curtis (1976); McGillivray (2004) 40–44; Swain (2016a) 194; Custer (1978).
93 Schlossman (2005) 8–9.
94 Carter (1697) i–ii; Blackstone ([1768] 2016) 426–427; Swain (2016a) 195.
95 Curtis (1976) 898–901.

doctrine of *parens patriae* to incorporate troublesome youths had two main implications: first, the protection granted by the Crown as the "parent of the country" no longer implied only guardianship but also reclamation and reform; second, "those to be protected" were not only the children in question but also other members of society and their possessions, which had to be guarded against the machinations of criminal youths once they reached adulthood. Thus, in the late 18th century, the application of *parens patriae* expanded: the Crown – and, by extension, the state – was no longer in charge of only the endangered classes but also, and more importantly, of the (potentially) dangerous classes, with the ultimate purpose of promoting the safety of society that their existence jeopardised.[96] The "best interests" of society, now equated with those of the child, had to prevail over the rights of parents over their offspring.[97] Once these youths were removed from their families and confined to a reformatory, the doctrine of *parens patriae* was complemented by the authority provided by the system of apprenticeship, by virtue of which parents transferred their *patria potestas* to a master, who was thereby empowered to both teach and punish their young apprentices, who were in turn bound to obey and serve their master until the expiration of their indenture.[98]

As stated in an article advertising the activities of the Philanthropic Society in 1789, the reformatory would introduce the inmates into "a new life, in which it is difficult to say, whether themselves, or the community at large, are the most interested".[99] Neglected children were wronged by their parents as much as they were potential wrongdoers; they were victims of their families as well as embryonic threats to social order.[100] According to the author of *Inferior Politics; or, Considerations on the Wretchedness and Profligacy of the Poor* (1786), the "public" had the "duty" to "save" and take "under [its] protection" these "wretched" youths, by standing in lieu of all those vicious parents "who violate the trust reposed in them" by society and "pervert […] that authority which the laws have too long allowed them to abuse".[101] A few years later, the advocate of the "rights of the poor", Thomas Bentley, called for

96 Grossberg (2003) 213, 219, 233.
97 Buti (2004) 4–18.
98 Sanna (2020) 239–244; Wallis (2020) 247–281.
99 Anonymous Contributor (1789b) 1.
100 Swain (2016b) 37.
101 Luson (1786) 68; Grossberg (2003) 216.

"an act of government" by which "all poor children" not raised "in an industrious, honest, quiet, well-behav'd manner" would be "taken away from [their] parents", committed to some "places provided by the government", and there "instructed […] at the public expence *[sic]*"; their negligent parents, in turn, should be either "immediately punished" or – like Aboriginal parents in Moorundie – "afterwards remembered in the distribution of parish rewards or allowances".[102] Similar ideas would later re-emerge in discourses related to Indigenous (often understood as synonymous with troublesome) youths across the British settler colonies. For example, in 1847, in Upper Canada (where the establishment of residential schools for Indigenous youths was enthusiastically promoted by the colonial government), the Superintendent of Education, Reverend Egerton Ryerson, after praising "education" as "the most effectual preventative of pauperism […] and crime", remarked that, if parents were not able or willing to provide their children with such teachings as "will fit [them] to be honest and useful member[s] of the community", "the State is bound […] to protect" both "the child against such a parent's […] inhumanity" and "the community at large against any parent […] sending forth into it an uneducated savage, an idle vagabond or an unprincipled thief". Negligent parents, Ryerson continued, "wrong[ed] their child" but even more seriously "wrong[ed] society, by inflicting upon it an ignorant or vicious barbarian".[103] Hence, against parental neglect, the government should protect both children and society.

As noted by Shurlee Swain, among others, the legal doctrine of *parens patriae*, appropriately complemented by the restraints of the system of apprenticeship, also represented the legitimation of the practice of child removal and the segregation of Indigenous youths into industrial schools in colonial Australia.[104] Indigenous parents were considered not only unsuited to prepare their children for the duties of colonial society (similar to vagrant and criminal parents in Britain) but also to be perpetual children themselves; with their suitability for the parental role being thus discredited, their sons and daughters were implicitly reduced to neglected or "worse than orphaned" youths.[105] Assistant Protector Eyre infantilised Indigenous peo-

102 Bentley (1791); Sanna (2020) 205.
103 Ryerson (1847) 9–10, 181; Scott (2005) 116–117.
104 Swain (2016a) 206–208.
105 Swartz (2019) 12.

ples by repeatedly describing them as "children of the wilds"; similar to inconsiderate minors, he wrote, they were "improvident in preparing for the necessities of the morrow" and completely "unaccustomed to impose the least restraint upon their appetites".[106] Likewise, teacher Anne Camfield maintained that "adult natives are like children, they do not consider the future" and were "as babies in comprehending the advantages of education".[107] In their view, then, the colonial government should arrogate to itself the right to act *in loco parentis* to "rescue" their offspring. Notably, similar to metropolitan developments, Indigenous youths were considered in need of protection as well as potentially troublesome; being perceived simultaneously as endangered and dangerous, they required not only tutelage but also reformation. The practice of Indigenous child removal entailed, therefore, not only the purposes of preservation and conservation but also those of rehabilitation and correction, as young Aboriginal peoples had to be "reclaimed" to be made "fit" for colonial society to ensure that, once grown up, they would not jeopardise the security of settler property and the unfolding of European colonisation. Once again, the tutelage of Indigenous peoples and their welfare was of secondary importance to the protection of the peace of colonial society.[108]

But the relevance of *parens patriae* appears to extend beyond the practice of child removal and the establishment of colonial reformatory schools. This chapter suggests that this notion can, perhaps, also represent a lens through which to reconsider the entire policy of Aboriginal protection in colonial Australia. According to Annabel Brett, the language of protection derived from the Roman private law concept of *tutela* or guardianship and, in medieval England, was a function of the Crown associated with the attainment and preservation of the King's peace.[109] In British imperial history, the first official formulation of protection in relation to colonised peoples dates to 1763 and describes the Crown's responsibility to "protect" Native American Nations and their territories.[110] In 1824, Protectors of Slaves were appointed in Trinidad, tasked with supervising relations between slaveowners and the enslaved and shielding the latter from the personal discretion and arbitrary

106 Eyre (1845) vol. I, 93, 107, 278, 288, 389 and vol. II, 156; Hall (1996) 144.
107 Camfield (1863) 307; Camfield (1865) 489.
108 Ford (2017) 186; Nettelbeck (2019) 81.
109 Brett (2017) 93–95.
110 Benton/Ford (2016) 86; Fenge/Aldridge (eds.) (2015).

violence of the former by adjudicating disputes between them and administering punishments.[111] As recently demonstrated by Christina Twomey, this institution was inspired by the legal precedents that Britain found as it conquered new colonies from the Spanish, the French and the Dutch during the Napoleonic wars.[112] The earliest imperial predecessor of British West Indian Protectors was the Protector de Indios appointed in the Spanish American colonies in the early 16th century. Midway between a religious and a legal officer, the Protector should shelter vulnerable Indigenous peoples from abuse and hear their complaints; according to Charles Cutter, this office was descended from a medieval Iberian appointee tasked with watching over the interests of orphans and poor children, and thereby it implicitly equated colonised populations with legal minors.[113]

Notably, the 19th-century developments of British imperial protective policies appear to have retraced the same "expansive" trajectory of *parens patriae*, from dependent to troublesome classes and from tutelage to reformation, with a new emphasis on the need for correction alongside the traditional plea for defence against mistreatment. In Trinidad, Protectors of Slaves were also appointed to oversee the work performed by the enslaved in order to "ameliorate" plantation slavery and progressively foster the transition from unfree labour to abolition.[114] If the purpose of Protectorates was to incorporate humanitarian ideals into the apparatus of the colonial state, those ideals were informed by what Thomas Laqueur has referred to as a "sense of property" in the recipients of protection, which called for not only policies of relief and defence from evil but also measures of improvement and the promotion of virtue and welfare.[115] Protection thus became instrumental in reinforcing the legitimacy of the British superpower by recontextualising the empire as a pedagogic enterprise for the benefit of the enslaved and the colonised; this occurred in the same years when, in the wake of the extension of suffrage, a public system of education for the white working classes was being promoted both in Britain and across its settler colonies.[116] Insofar as colonised populations were equated with children, alternately

111 Benton et al. (eds.) (2017); Nettelbeck (2019) 20–21.
112 Twomey (2018) 10–15.
113 Cutter (1986) 6–8.
114 Ford (2017) 179; Dorsett (2014).
115 Benton et al. (eds.) (2017) 1–9; Laqueur (1989) 179.
116 Chesson (1877); Swartz (2019) 5, 19–39, 200–203.

understood as defenceless and potentially troublesome, children themselves were increasingly presented as no longer the property of their parents but as a state responsibility and a vehicle for advancing societal interests.[117] State and empire were expected to propaedeutically prepare these "minors" for their duties as members of society and imperial subjects; their foremost duty was, in turn, the expectation that they would attain the status envisaged by the protectors as their intrinsic potential.

In line with this 19th-century expansion of the meaning of protection, the Aborigines Protection Society maintained that their mission was to "protect the defenceless" and "promote the advancement of the uncivilized" as two complementary faces of one and the same project.[118] After all, as already noted in section 2, since the publication of the 1837 Report, it was ultimately unclear who had to be protected against whom in colonial Australia. Whereas endangered Indigenous peoples, envisaged as "untutored children" afflicted by an intrinsic "incapacity to defend themselves", had to be safeguarded against violence and encroachment by white settlers, conversely, colonists and their properties needed to be defended against "native" trespasses and transgressions.[119] There was, however, a third, narrower object of protection that seems to be relevant for the purpose of this chapter: as stressed by several contemporary observers, those in need of tutelage were particularly the most vulnerable among Aboriginal peoples, namely children and women, who had to be shielded from the violence perpetrated by the adult males of their own families and tribes.[120] This was a common trope to uphold the British "civilising mission" and was likewise cited to justify the treatment of Indigenous Australians.[121] Governor George Grey, for instance, argued that "in the savage state we find the female sex, the young and the weak defenceless" and therefore in need of the protection granted by the British colonial authorities.[122] Similarly, Sub-Protector Eyre repeatedly mentioned cases of infanticide, ill-treated women and "aged and helpless natives" doomed to abandonment;[123] according to Eyre, the supposed lack of com-

117 Schlossman (1995) 363; Swain (2002) 134; McGillivray (2004) 38.
118 Aborigines Protection Society (1838) 12; Rainger (1980) 707.
119 Select Committee on Aborigines (1837) vii, 2–3, 105.
120 Swartz (2019) 214.
121 Stoler (2006).
122 Grey (1841) vol. II, 218.
123 Eyre (1845) vol. I, 40–41, 89 and vol. II, 207–208, 316–324, 378–387, 441.

passion of Aboriginal peoples revealed, through contrast, both the morality of white Victorian manhood and the humanitarianism of the British nation.[124] He maintained that colonial authorities had to "free" the "young and the weak" from the "degrading thraldom" represented by those "harsh and violent customs of their own" and "afford [them] that protection from the oppression of the strong and the old which they so greatly require".[125]

This same aspiration was also behind Grey's and Eyre's persistent calls for the admissibility of Aboriginal evidence in court without the sanction of an oath, which would enable Indigenous persons to let their complaints be heard against not only white settlers but also – and, according to Grey and Eyre, more importantly – other "natives" in *inter se* matters.[126] Despite the glaring abuses regularly inflicted upon Indigenous peoples by colonists, Eyre seemed to think that it was imperative to "protect a native from the violence of his fellows" so that "the younger and the weaker might confidently look to the White Man as a protector – able and willing to shield them from the brutal violence of the elder and stronger".[127] The unsworn testimony of Indigenous peoples was legalised in South Australia in 1844, the same year the Ordinance for the "protection" and training in labour of Indigenous children was passed.[128] The idea that the most vulnerable among the "natives" had to be afforded protection against the older and stronger of their own families was, after all, also the rationale underpinning the system of industrial schooling that Eyre intended to promote for Indigenous youths. Residential schools encapsulated the twin goals of protection, namely preservation and correction: to "protect" Indigenous children meant to amend and reform them in a distinctively parental manner, with Protectors standing in the stead of their "unfit" – when not actively dangerous – natural parents. The removal and reclamation of these youths was integral to the process of assimilation of Indigenous people into colonial society that ranked first among the aims of Protectorates.[129]

124 Eyre (1845) vol. II, 316, 458; Hall (1996) 144.
125 Eyre (1845) vol. II, 384–388; Eyre (1985) 49 (Eyre to colonial secretary, 1.02.1843).
126 Grey (1841) vol. II, 369, 374; Eyre (1845) vol. II, 184, 202, 493.
127 Eyre (1845) vol. II, 500; Eyre (1985) 61 (Eyre to colonial secretary, 5.05.1843).
128 Nettelbeck (2019) 56.
129 Twomey (2002) 141.

This function of reclaiming and rehabilitating can be seen as the first feature connecting Aboriginal protection to *parens patriae*. As discussed earlier, the idea of reformation became attached to the original meaning of both notions between the late 18th and the early 19th centuries: as with *parens patriae*, Aboriginal protection was not limited to the mere tutelage of subjects supposedly affected by some form of incapacitation and threatened by forces beyond their control but was also aimed at preparing classes perceived as simultaneously endangered and dangerous for their social obligations, making them fit for society. Moreover, imperial protection, like *parens patriae*, emanated from the royal prerogative of the Crown. Significantly, the 1837 Report started circulating concurrently with the accession to the throne of Queen Victoria, who soon began being portrayed as the motherly protector of "her" Indigenous subjects across the empire.[130] The Report emphasised the key protective position occupied by the Crown: every policy related to Indigenous peoples and their lands had to issue from or be sanctioned by the monarch, and Protectors of Aborigines embodied transnational values of amelioration and guardianship precisely because they were Crown-appointed officials.[131] In the following years, the child rescue movement at home as well as the several provisions passed by Parliament at mid-century to protect British youths from parental abuse and labour exploitation also became attached to the person of the Queen.[132] In addition, as already mentioned, in its original formulation, *parens patriae* suggested the protection not just of minors and incapacitated persons but also of their possessions.[133] Similarly, to "protect the Aborigines" meant to defend their persons but also watch over their property, namely their lands. In fact, the 1837 Report adopted the humanitarian perspective which viewed Australian lands not as *terra nullius* but rather as the legitimate possession of their original inhabitants, whose property rights had to be guarded against infringement.[134] At the same time, however, these rights had to be overseen from above, as Aboriginal peoples were considered ignorant of how to best use their territories.

130 Nettelbeck (2019) 18; Carter / Nugent (eds.) (2016).
131 Mitchell (2011).
132 Clarke Hall (1897) v–viii; Swain (2016b) 27–29.
133 Curtis (1976).
134 Select Committee on Aborigines (1837) 4; Reynolds (1987); Mitchell (2004); Lester (2015) 493.

In the imperial context, the power of guardianship of the monarch, ultimately involving responsibility for the custody and education of their subjects, was passed on to Crown-appointed Protectors as holders of a "power in trust" to be administered "in the best interests" of the colonised.[135] In the words of Undersecretary for the Colonies James Stephen, as veritable "trustees to native peoples", Protectors were tasked with all of the legal duties that, according to Antonio de Paulo Buti, belonged to legal tutors and curators, from representation and defence (in court) to discipline and punishment (by virtue of their magisterial powers) and from maintenance (through the distribution of rations) to education (in the residential industrial schools).[136] Through the authority and the person of the Queen, imperial Britain presented itself as the "guardian" of the colonised and assigned the trusteeship for their amelioration to special protective appointees.[137] In spite of the institutional difference between the two contexts in the public responsibility towards children and other supposedly "incapacitated" subjects – which gradually became the domain of the executive through government boards in Australia, whereas in England it traditionally rested with the chancery courts – both systems appear to be traced back to the same justificatory principle. In fact, even when the Australian colonies were granted representative institutions and responsible governments from mid-century (and Aboriginal affairs and protection were thenceforth transferred from the Colonial Office to settler colonial legislatures and self-governments), the guardianship element of Australian protective policies did not disappear but was instead emphasised.[138] In a process that culminated in the year of the Diamond Jubilee of Queen Victoria with the passing of the Aboriginals Protection and Restriction of the Sale of Opium Act, all Indigenous peoples were progressively reduced to perpetual "wards" of the colonial state, and protection itself was reconfigured into the large-scale application of *parens patriae*.[139]

135 Grossberg (2003) 216.
136 Dussart/Lester (2014) 227; Buti (2004) 28–35.
137 Nettelbeck (2019) 14, 93.
138 Curtis (1976) 899; Belmessous (2013) 101; Nettelbeck (2019) 166; Furphy/Nettelbeck (eds.) (2020) 4.
139 Robinson/Paten (2008) 511–512; Laidlaw (2021) 280–281.

6. Conclusion

In his famous *Lectures on Colonization and Colonies* at Oxford, Herman Merivale contended that the "correlative [of the] protection" of Indigenous peoples was their "acknowledged inferiority, and consequently tutelage", and that while the "existing generation" had to be "abandon[ed]" to its inescapable "fate" of extinction, the laudable effort of "educat[ing] the young" had a hope of success only if "the children [are] rescue[d] from the fortunes of their parents" by "separat[ing] families by violent measures".[140] By referring to Aboriginal protection through the notion of "tutelage" and juxtaposing the optimistic project of "education" with the mission of "rescue" and the unfortunate but seemingly necessary recourse to "violence", Merivale's lecture encapsulates the ways in which protective governance in the British settler empire not only took on diverse and even contradictory justifications, but also revived ancient metropolitan legal notions, reframing them within a newer, humanitarian imperial framework. By proposing that the origins of Aboriginal protection can be traced back to medieval England, this chapter suggests that, after travelling through the time of English legal history (and changing significantly from its original formulation), *parens patriae* travelled across the space of the British Empire, as metropolitan attempts at addressing the issue of juvenile delinquency seemed to offer a precedent for the policies to be implemented to "improve" other groups of supposedly troublesome subjects on the other side of the globe. Also due to the overlapping of personnel between the various philanthropic and humanitarian associations committed to child reformation at home and Aboriginal protection abroad, it is possible that *parens patriae*, back in vogue in late 18th-century England thanks to the reformatory movement, was among the legal resources to inspire the architects of the Antipodean Protectorates.[141] If one assumes *parens patriae* as foundational and constitutive to Aboriginal protection, the boarding schools where Australian boys and girls were segregated and "treated" in the interest of resocialising them as dependent, harmless and "useful" colonial subjects appear as quintessential microcosms of the British imperial protective policy, and the "stolen generations" that they

140 Merivale (1861) vol. I, 522, 525.
141 Whitten (2010) 135, 146–147.

collectively embodied were no aberration to that policy but rather its inevitable by-product.[142]

In 1844, Edward Eyre left South Australia for Britain, bringing two Indigenous children with him. One of them was Warrulan, the 10-year-old son of Tenberry, an Aboriginal chief and crucial ally of Eyre at the Moorundie station who had entrusted the former Sub-Protector with the care of the boy in order for him to receive an education in Britain.[143] At the beginning of 1846, Eyre brought Warrulan (whom he called "my little *protégé*") to Buckingham Palace, where the child was introduced to Queen Victoria and Prince Albert, who appeared very pleased to meet such a well-behaved representative of "their subjects in the Antipodes".[144] This episode can be regarded as the fulfilment of protection rethought through the lens of *parens patriae*, with the intermediary – the former Assistant Protector Eyre, who was also the legal guardian of the boy – presenting the source of every protection – the Crown – with the beneficiary – Warrulan, the living evidence of the presumed success of that policy in colonial Australia.[145] Significantly, when, shortly thereafter, Eyre had to leave Britain having been appointed Lieutenant-Governor of New Munster, New Zealand, Warrulan was transferred to the guardianship of Dr Thomas Hodgkin, the founder and secretary of the Aborigines Protection Society.[146] After years of industrial education in Britain, Warrulan died from pneumonia in Birmingham in 1855, too early to be finally able to go back home to South Australia, as he ardently wished, but soon enough to remain unaware of the communication sent by the new Sub-Protector in Moorundie, Edward Bate Scott:

> I write to tell you, for the information of the native (Warru-loong), who is in England, that his father and eldest brother are dead, and so are all of his uncles, cousins, &c. &c., and every member of his […] tribe […]. I may also add, […] that the tribe beforementioned was once (thirteen years since) a powerful one, and composed of many able warriors. You can also tell Warru-loong that all the native tribes belonging to this portion of the Morray *[sic]* […] are reduced in numbers.[147]

142 Scott (2005) 117; Twomey (2002) 112.
143 Nettelbeck (2019) 149–156; Evans (2005) 67.
144 Anonymous Contributor (1846) 108.
145 Henderson (2014) 67–69; Dussart / Lester (2014) 10.
146 Laidlaw (2021) 252.
147 Aborigines Protection Society (1855) 51–55; Nettelbeck (2019) 148–150.

If it is true, as argued by Anna Haebich, that "child removal was an integral part of the Aborigines' experience of colonization", equally integral to this experience was physical and cultural elimination pursued under the banner of protection.[148] By arguing that the reformatory principle intrinsic to the English doctrine of *parens patriae* and providing a legal justification for child removal might be assumed to be part of the legitimation underpinning Aboriginal protection in colonial Australia, this article contributes to the wider investigation of legal transfers in the common law world.

Abbreviations

QLD: Queensland
SA: South Australia
VIC: Victoria
WA: Western Australia

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148 Haebich (2000) 70; Lester (2015).

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Philip Girard

On the Edge of Many Empires: Employers' Liability in Quebec's Industrial Age, 1880–1931*

Work in the pre-industrial era held many dangers, but the industrial revolution brought with it new ways of maiming and killing workers. While some women were injured or killed in factory accidents, it was mostly men, and male breadwinners at that, who were the victims. This situation created two very big problems: a labour relations problem whereby worker-employer relations were embittered by inadequate post-accident economic support from employers, and a social problem of impoverished families who had now lost the support of their breadwinner. In common law countries, for much of the 19th century it was the private law of tort that provided the only legal recourse for injured workers or the families of those killed by industrial accidents. And that law, never very worker-oriented to begin with, was made even less so by the adoption of the fellow servant rule in the Anglosphere, a rule that precluded recovery where the cause of a worker's injury was the negligence of a fellow servant rather than a fault attributable directly to the employer. It was the third of the unholy trinity of anti-worker liability rules in the common law, the other two being voluntary assumption of risk and the rule that any contributory negligence by the worker was a complete bar to recovery. In addition, the courts set a high bar for proving the causal link between an employer's negligence and a worker's injury, one that caused many claims to fail.

Agitation by unions and their allies led to reforms of employers' liability law. The German scheme of 1884 was based on a state-supervised insurance scheme integrated with medical treatment and compensation for illness, which also gave employers a role in accident prevention. Britain and France preferred to reform their private law of liability in more worker-friendly directions while still preserving the role of courts as the ultimate arbiters of liability. The British Employers' Liability Act, 1880 mostly abolished the

* I would like to thank Ariel Montana for excellent research assistance in the preparation of this paper.

fellow servant rule but also limited damages to three years' earnings in the most serious cases, allowed contracting out, and maintained the fault principle.[1] Not until 1897 in Britain and 1898 in France was no-fault liability finally introduced, but there was no requirement for employers to obtain insurance and claims by workers still had to be made through the ordinary courts in France. In Britain contracting out was prohibited in 1897 but workers had the option of using the common law as amended to seek full recovery, or invoking the no-fault option where lesser, statutorily mandated compensation was available. Claims were made before arbitrators who were often County Court judges sitting in this capacity but appeals on points of law could be made to the superior courts. Coverage under the 1897 Act was quite restricted but agricultural workers were added in 1900 and the Workmen's Compensation Act, 1906 made coverage nearly universal. It left the same litigation mechanism intact but mandated costless access to the arbitrators, though workers would have to pay their own lawyers if they chose to be represented.[2]

Canadian common law provinces generally followed the English example. In Ontario, for example, the fellow servant rule was abolished in 1886 and the voluntary assumption of risk doctrine substantially undermined in 1889, with the other common law provinces following in later years. Several provinces (but not Ontario) then followed the British Act of 1897, introducing no-fault liability as an option to recourse at common law. Comparative fault, allowing an apportionment of liability between two or more parties where all were at fault to some degree, would not be introduced until the 1920s, but by that point the private law was irrelevant to employer liability as most provinces had introduced state-run no-fault compensation schemes that abolished private law actions by workers.[3] US state efforts in the field of workers' compensation generally adopted the British statute but began to oblige employers to obtain private insurance starting in 1911.[4] All these reforms, until the introduction of a public scheme in Washington state in

1 43 & 44 Vict., c 42 (UK).

2 The 1897 British law is 60 & 61 Vict., c 37; the 1906 law 6 Edw. VII, c 58. The French law of 1898 with amendments to 1924 is reproduced in Merrill (1925). On the lead-up to the 1897 Act, see Bartrip/Burman (1985).

3 Risk (1983); Phillips/Girard/Brown (2022) 411–420. On the adoption of comparative fault outside Quebec, see Brown (2013).

4 Perlin (1985).

1911 and Ontario's Workmen's Compensation Act of 1914, kept liability for worker accidents within the private law of civil liability, tort in common law and delict in civil law, with its attendant problems of access to justice for those without significant resources to hire lawyers and pay court costs. Ontario's 1914 Act abolished tort claims by injured workers, established a statutory schedule of compensation, and provided that all claims for compensation would be adjudicated by a Workmen's Compensation Board with no appeal to the courts or judicial review. The Board would levy premiums on employers and pay claims out of that fund, supplanting private insurance, though some large employers such as railways and municipal corporations were permitted to self-insure.

All of this is well known. In this paper we explore the less well-known terrain of employers' liability in Quebec during the period in question. The period 1880–1930 is conventionally treated as the first phase of Quebec's industrial revolution, and with good reason. A largely agricultural society at Confederation, Quebec's many natural resources were rapidly exploited on an industrial scale in the following decades.[5] By the early 1900s the Canadian Pacific Railway's Angus Works at Montreal had become the largest railway workshop in the world, with a labour force of between 4,000 and 8,000 workers. The electricity generation works at Shawinigan (1898) were the second largest in the world, after Niagara Falls, attracting a wide variety of industries from aluminum smelting to pulp and paper, chemical, and textile plants. This rapid growth is clearly reflected in industrial accident rates. Reported industrial accidents increased ten-fold in the two decades after 1888, and even then, all agreed such events were seriously underreported.[6] The traditional periodization works well for our topic because 1931 was the year that a workers' compensation scheme modelled on Ontario's was passed. It abolished actions in delict in this area, gave exclusive jurisdiction over workers' compensation to a *Commission des accidents du travail*, and remained essentially unchanged until the 1980s.

5 Whether these resources were the settler population's to exploit without the consent of Indigenous peoples was not a question that troubled the non-Indigenous inhabitants of Quebec (or other provinces) at the time.

6 Statistics derived from Quebec Legislative Assembly Sessional Papers, Inspection of Factories (1889–1894); Sessional Papers, Inspection of Industrial Establishments and Public Buildings (1905–1909).

This 1931 law will be the terminus of this study, which examines the winding road followed from the treatment of employers' liability under the Civil Code of Lower Canada in the later 19th century to the removal of this entire area from the private law in 1931. It proceeds in three parts: the pre-1910 law, dissatisfaction with which led to the creation of the first commission of inquiry into the law, the Globensky Commission, which reported in 1908; the first reform period (1910–1925), from the passage of the Workmen's Compensation Act, 1909 (in force as of 1 January 1910) to the 1925 report of the second major inquiry into the topic, the Roy Commission; and the lead-up to the Workmen's Compensation Act, 1931, 1925–1931. We will examine these developments through the lens of imperial, national (i. e., Anglo-Canadian) and transnational borrowings. As our title indicates, Quebec was on the edge of several empires – British, French, and American – as well as being part of a federal state in which other provinces were innovating in the field of workers' compensation. Increasingly in the 1920s the province also had to take account of the International Labour Organization's (ILO) investigations and reports on employer liability. It will be argued that the general trend over this period was a transcendence of the civil law-common law divide as the problematic consequences of industrialization led to a convergence of policy outcomes across a variety of jurisdictions regardless of which legal "family" they belonged to. By 1931 the role of France as a model for workers' compensation legislation in Quebec had been entirely supplanted in favour of the ILO-approved model adopted by Ontario in 1914.

1. Pre-1910: employers' liability under the Civil Code of Lower Canada

In this period, tensions between common law and civil law approaches to employer liability were prominent. The governing law was contained in Arts. 1053 and 1054 of the *Civil Code of Lower Canada* of 1866.[7] Art. 1053 set out the basic principle of fault-based liability:

7 Lower Canada was the former name of the territory that became the Province of Quebec after Canadian Confederation in 1867. On the origins of the 1866 Code, see Young (1994).

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill.

Employer liability was simply a subset of this general principle. Art: 1054 specified that this liability extended not only to harm caused by one's personal fault but also to "that caused by the fault of persons under [one's] control and by things which [one] has under [one's] care." Among several examples given in the section, one stated that "Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed." These two articles governed liability for injuries from workplace accidents, but if the worker died from these injuries, Art. 1056 came into play. This article, which had no equivalent in the Civil Code of France, was modelled on the 1846 English statute known as Lord Campbell's Act.[8] It gave a right of action to the spouse and ascendant and descendant relations of the deceased to seek compensation for "all damages occasioned by such death," provided they launched their action within a year of the death. Art. 1056 entered the Code somewhat mysteriously in 1866 and gave rise to much interpretive controversy in subsequent decades, especially on the question of whether "all damages" included non-pecuniary harms such as grief at the loss of a loved one (generally recoverable under continental civil law) or were restricted to a calculus of economic loss only (the traditional common law approach).[9]

The Quebec law of employer liability, even though fault-based, was less harsh towards injured workers than the common law, though note that the operative descriptor is "less harsh" rather than "more generous". In the first place, the three major employer defences recognized in common law either did not exist in civil law or were considerably less powerful. The defence of common employment, pursuant to which harms caused by a co-worker did not engage the liability of the employer under the common law, did not exist in Quebec, Art. 1054 expressly stating the contrary. Secondly, contributory negligence on the part of the employee was not the complete defence it was in common law as Quebec law recognized comparative fault. An employee who was determined to be, say, 20% at fault, would still receive

8 9 & 10 Vict., c 93.

9 On this debate, see generally Reiter (2019).

80% of the compensation otherwise payable. Finally, voluntary assumption of risk, though theoretically available, did not loom as large in the civil law jurisprudence as under the common law.[10] Only experienced workers who could fully appreciate the risks inherent in given tasks might find this defence raised successfully against them.[11] This contrasted with the common law, where the courts prior to abolition of the fellow servant rule held that workers accepted the risk that they might be harmed by the negligence of a co-worker.[12]

Furthermore, Quebec judges for the most part took a less stringent approach to questions of fault and causation than did common law judges. They were prepared to recognize a presumption of fault against the employer in certain situations where the cause of an accident was unknown. Thus, where a company had allowed a quantity of dynamite to accumulate close to where workers were active, and an explosion killed one of them, the court allowed recovery even though the cause of the explosion itself could not be determined. The fact of leaving such dangerous material close to workers raised a presumption of fault.[13]

Moreover, after the Quebec Factories Act, 1885 required certain safety measures to be taken in factories, a failure to comply with such measures was considered a fault that could generate civil liability provided causation was established. The long title of the act was An Act to protect the life and health of persons employed in factories. Various sections stated that where the precaution in question was not taken, the factory "shall be deemed to be

10 It should be noted that even though there was a contract of employment between the parties, the authorities were agreed that actions for workplace injuries or death were properly brought in delict, though courts would give effect to exclusion clauses in such contracts in appropriate cases.

11 The differences between civil law and common law on these points are reviewed in Walton (1900). Walton, although English, had been called to the Scottish bar in 1886, lectured in Roman law at the University of Glasgow, and was named dean of law at McGill in 1897, the first full-time professor appointed to the faculty in its fifty-year history. A prolific and perceptive jurist, he wrote widely on Roman law, Scots law, and comparative law, and later authored an introduction to French law in English with his old friend Sir Maurice Amos; see the entry on him by Hanbury/Metcalfe in the *Oxford Dictionary of National Biography* (2004).

12 Kostal (1988), discussing an 1884 Ontario decision where no liability was found following an explosion at a gunpowder factory that left five men dead and one severely disabled.

13 *Asbestos and Asbestic Co v Durand* (1900).

kept unlawfully […] so that the health of any person employed therein is likely to be permanently injured" – arguably deeming the "fault" required by Art. 1053 to exist.[14]

Quebec judges also had to rule on the validity of employer-imposed waiver clauses by which workers gave up their right to sue for injury. They initially allowed these but later changed course and ruled that they did not apply where the employer was guilty of *faute lourde* (gross negligence). Nor were such clauses binding on widows and children where a worker was killed on the job, as they had an independent cause of action under Art. 1056. Finally, there was an emerging current of jurisprudence that used Art. 1054, regarding liability for things under one's care, to effect a shift of the burden of proof from worker to employer where a piece of machinery malfunctioned.[15]

These worker-oriented judicial interpretations in Quebec were often not upheld at the Supreme Court of Canada (SCC), which featured four common law judges and two civil law judges for most of this period.[16] The success rate of workers in reported cases was between 72% and 78% in the Quebec courts, while it dropped to 53% in the SCC.[17] This was largely the result of the latter judges arguing that there should be uniformity of approach on certain legal questions within the British empire, and re-interpreting Quebec law accordingly. The SCC would not accept, for example, that failure to comply with the Quebec *Factories Act* could generate civil

14 SQ 1885, c 32. See *Montreal Rolling Mills v Corcoran* (1896), affirming the judgment of the Quebec Superior Court on this point.

15 *Shawinigan Carbide Co v Doucet* (1909). On earlier Quebec case law adopting this approach, see Howes (1991).

16 A seventh judge (i. e., a fifth common law judge) was added in 1927 in response to claims from western Canada that its growth and development meant that it "deserved" a place on the Court, though the extra position became a "western seat" only by convention, not law. Not until the enlargement of the Court in 1949 to nine judges was a third judge from Quebec added, this time as a matter of law. This restored the common law: civil proportions present at the foundation of the Court in 1875 – two-thirds common law judges, one-third civil law, reflecting the approximate population balance between Quebec and the rest of Canada. In 1949, the population of Quebec constituted 34% of the Canadian population.

17 Lippel (1986) 41. Rates of success for workers in Quebec were also somewhat higher than those reported for Ontario by Risk (1983) 426–436, though appeals to the Ontario Court of Appeal began to be more successful for workers following 1900.

liability.[18] Consistent with its jurisprudence in the common law provinces, the Court held that the Act's provisions were mere "police regulations" not meant to generate a cause of action. It is no wonder that one Quebec advocate lamented in 1905 that the SCC had become "le cauchemar des victimes d'accidents du travail" (a nightmare for victims of workplace accidents).[19]

Quebec judges pushed back, openly lamenting that the SCC's jurisprudence on employer liability "seemed to contradict the ideas that prevail today in all civilized countries." Somewhat surprisingly, the Judicial Committee of the Privy Council (JCPC), not known as a worker-friendly court, also pushed back, applying civil law reasoning to overturn SCC judgments and restore Quebec jury awards in favour of injured workers or families of deceased workers in three important cases prior to 1910.[20]

Perhaps uncomfortable with this squeeze play where they were being criticized from above and below, the SCC eventually articulated the law of employer liability in Quebec in a 1910 case in a way that civilian jurists would likely have approved. It is also a strikingly modern formulation. Duff J observed that

> [b]y the law of the Province of Quebec an employer is bound to take reasonable care that his employees shall not in the prosecution of their duties, by reason of any defect or insufficiency in his plant or appliances, be exposed to any risk of injury which, having regard to the character of the work, is an unnecessary risk; and it is but a corollary to this rule that where the work in which the employee is engaged is of such a character that a reasonably prudent and competent employer would anticipate that, in the prosecution of it his safety may be endangered it is the duty of the employer to take all reasonable measures to protect him from that danger.[21]

Thus, the SCC allowed recovery here where the cause of the accident could not be precisely identified, exactly the situation where they had previously said there would be no liability. Ironically, this case was decided the year

18 Thus, the SCC overturned the Quebec Court of Queen's Bench decision in *Montreal Rolling Mills v Corcoran*.

19 Lamothe (1905) 117.

20 Quotation from Chief Justice Adolphe Routhier speaking for the Court of Revision in *Gauthier v Wertheim* (1905) 283. The JCPC cases were *Robinson v CPR* (1892), *McArthur v Dominion Cartridge Co* (1905), and *Miller v Grand Trunk Railway* (1906). In *Miller* the JCPC stated that the SCC's decision in *Reg v Grenier* (1899), should not be followed because it now contradicted the JCPC's decision in *Miller*.

21 *Montreal Light, Heat and Power Co v Regan* (1908) 589.

before Quebec had adopted its first workers' compensation law, which provided for liability without fault in most industrial settings. The SCC decision just mentioned was based on the prior law and thus became essentially irrelevant after the adoption of the new law.

The reaction of Quebec legal commentators to the state of the law was mixed. They were generally in favour of maintaining fault-based liability, which they saw as embodying an appropriate moral stance and consonant with natural law, but nonetheless admitted the justice of the results reached by the Quebec courts. J. C. Lamothe, a lawyer who strongly advocated for better protection for workers, wrote in 1905 that "through a humane fiction the courts ingeniously manage to find a fault [in the employer], or even to create one where it does not exist, in order to compensate the victims."[22] Walton, for his part, saw in this trend a surreptitious adoption of the French concept of "professional risk" which ordained that when accidents arose, the person profiting from the carrying on of hazardous activities such as manufacturing should bear the risk in preference to the innocent employee.[23] Pierre-Basile Mignault, Quebec's best known doctrinal writer and author of the magisterial nine-volume treatise entitled *Le droit civil canadien*, strongly supported fault-based liability and critiqued judicial analysis that employed the "humane fiction" noted by Lamothe, but even so grudgingly admitted that the results were just.[24] This dissonance between the limits of the existing law and the desire to secure more certain compensation for injured workers created a climate receptive to legal reform.

As to why the Quebec judiciary were relatively more open to worker claims than their common law confrères, one must speculate somewhat and delve into the domain of culture. The Catholic Church was unquestionably the dominant cultural force in Quebec during this period, and its ultramontane bishops sought to bring the faithful ever more securely into Rome's orbit. Catholic thought of the period, while fundamentally conservative, responded to the challenges of the industrial revolution by critiquing both socialism and unbridled capitalism. Thus, the encyclical *Rerum Novarum* issued by Pope Leo XIII in 1891 favoured the creation of trade unions and advocated just wages for workers. Such views were infused with pater-

22 Lamothe (1905) 23.
23 Walton (1910) 21–22.
24 Mignault (ed.) (1901) 372–376.

nalism and hierarchy, but nonetheless provided some counterpoint to Anglo-Protestant and common law ideas of liberal individualism that treated workers as fungible units of production rather than human beings. Moreover, Quebec law, like French law, was receptive to the idea that civil liability could include compensation for emotional harms to injured parties and their families. The admissibility of such claims forced judges to consider the subjectivity of claimants and their loved ones, again emphasizing their humanity rather than their economic value to employers.[25]

2. A first attempt at reform, 1910–1925

Even though the civil law was not as unfavourable to injured workers as the unreformed common law, the usual financial and cultural obstacles of access to court-based justice frustrated redress in many cases. Contemporaries estimated that compensation was obtained by injured workers in no more than 12 to 25% of workplace accidents.[26] The Quebec branch of the Trades and Labor Congress and other worker organizations had been lobbying for years for a better system while employer groups also complained that damages awards were too high and unpredictable. A law was put forward in 1904 and debated in the Legislative Council but withdrawn in the face of employer opposition.[27] A commission was then appointed in 1907 to study the problem, chaired by lawyer and secretary-general of the *Barreau du Québec*, Arthur Globensky, and featuring one representative each from labour and industry. It heard from both employers and worker groups but did not consult widely.[28] Quebec labour was not well organized at this time – only 6% of workers were unionized in Quebec in 1911 – and labour-side briefs were not especially effective or well argued, while those of the well-resourced manufacturers' associations were.[29] The Commission studied mostly British and European legislative solutions as US states had not yet begun legislating in the field though they would do so shortly. The Commission's suggested regime, largely reflected in the law adopted in 1909, drew mostly on the

25 Reiter (2019).
26 Lamothe (1905) 113.
27 Quebec had a bicameral legislature until 1968.
28 On the origins of the 1909 law, see Stritch (2005); Lippel (1986).
29 Stritch (2005) 571.

French law of 1898, in fact copying verbatim some of its substantive provisions. The English laws of 1897 and 1906 played a supplementary role and where these diverged from the French law, the Quebec law tended to adopt the provisions of the law that were less generous to the worker.[30]

Ironically, the second sitting of the Commission, at Montreal on 29 August 1907, occurred on the very day of the worst construction disaster in Quebec history, the collapse of the railway bridge being built across the St. Lawrence River between Lévis and Quebec City. Seventy-five men lost their lives, almost half of them Mohawk steel workers from the Kahnawà:ke reserve near Montreal.[31] Such tragedies provided a similar impetus to reform as the notorious Triangle Shirtwaist Factory fire in Manhattan four years later, in which 146 people, mostly immigrant Italian and Jewish women and girls, died.

The bill that became the Workmen's Compensation Act, 1909 incorporated the main recommendation of the Globensky Commission, which was the adoption of the no-fault principle. It was introduced in the *Assemblée législative* by the Minister of Public Works and Labour, Louis-Alexandre Taschereau, who would go on to serve as premier from 1920 to 1936 and whose government would preside over later, more radical changes to the law of workers' compensation.[32] The passage of the law was not really in doubt

30 Rapport de la Commission d'enquête sur les accidents du travail (1908), known as the Globensky Commission after its chair. Stritch (2005) 568 states that most of the Commission's recommendations were taken from the English law, but this is correct only insofar as some of the French law's provisions were broadly similar to those of the English law. Distinctive provisions of the French law not found in English law, such as the enhancement of compensation in cases of "inexcusable fault" by the employer and the reduction of recovery for wages above a certain amount (both discussed below), were copied in Quebec and are not mentioned by Stritch. Walton (1910) and most other contemporary commentators and judges saw the 1909 Act as based essentially on the French law of 1898. The influence of the French sociologist Frédéric LePlay on both the French and the Quebec law is examined in Prémont (2002).

31 "Grand Désastre National" (30 August 1907). The Mohawk had discovered their aptitude for this kind of work when part of the Kahnawà:ke reserve was expropriated for the base of the new CPR bridge in 1886. The railway trained some of them to do the work, who then trained others, beginning a tradition of high steel work on skyscrapers that continues today. A second attempt to build the Lévis bridge also ended in disaster in 1916, when it collapsed with the loss of eleven lives. See Crabb (2022).

32 No official record of the debates existed at the time, but various newspapers reported them. A non-official reconstruction of these accounts is provided for most but not all

because the Liberals had a comfortable majority, but party discipline was not as rigorous as it later became and it was always possible that some members might dissent. Taschereau was at pains to point out that the proposed reforms were not meant to be a partisan issue, and both his remarks and those of the opposition were relatively measured, focusing on substantive issues rather than trying to score points for their party.

The law's main innovation was to carve out an exception from the general law of civil liability by stating that accidents in the industrial sectors covered by it would render employers liable even without fault. This addressed the criticism that the cause of many accidents could not be determined precisely, leaving the worker without a remedy. Employers were not required to purchase insurance (an amendment to this effect was proposed by the opposition but failed), but the Act might have incentivized them to do so.[33] It might also have attracted more insurance companies to provide coverage now that potential liability was capped by the Act, making it easier to assess risks and calculate premiums. Coverage under the Act was far from universal and aimed principally at workplaces containing dangerous machinery: after a list of industrial enterprises and transportation businesses (including the building of transportation infrastructure), its residual clause included workers in "any industrial enterprise […] in which machinery is used, moved by power other than that of men or of animals," wording taken from the French law of 1898. Employment in agriculture and on sailing ships was specifically excluded, even though both were dangerous occupations, and the general run of white- and pink-collar employment, domestic service, and artisanal work was also excluded.

The quid pro quo for more certain compensation was the provision of something less – markedly less – than full compensation. Those suffering from permanent and total incapacity to work (at any job, not just their former employment) would receive only half their wages in the form of a life pension, while those with partial permanent incapacity (e. g., the loss of a hand or an eye) would receive half the amount by which their earning

sessions after 1907 on the website of the Assemblée nationale du Québec: Débats de l'Assemblée législative (débats reconstitués), https://www.assnat.qc.ca/en/travaux-parlementaires/journaux-debats.html. The version of the 1909 and 1926 debates found there is relied upon here. Until 1968 the *Assemblée nationale* was called the *Assemblée législative*.

33 Insurance companies had to be licensed by the cabinet to offer the benefits mandated by the Act, to ensure that only solvent established companies entered this business.

power was reduced. Temporary incapacity entitled the worker to one-half their wages for the period of incapacity, beginning only on the eighth day after the accident (in France, it was the fifth day). Even these amounts were subject to significant limits. Workers earning more than $1,000 per annum were excluded from the Act entirely and could sue only under the fault-based provisions of the Civil Code. For those earning between $600 and $1,000 per year, only one-quarter of the excess of their wages over $600 would enter the calculation, and only one-half of that, or 12.5%, would thus be added to the basic $300 per year pension. This provision was also taken from the French law, but there no upper limit to claimant's wages was imposed. These caps were the most controversial part of the bill during debate. The opposition wanted them raised or done away with entirely, but Taschereau insisted that industry could not afford any more and would be uncompetitive with that outside Quebec if the law were any more generous. The Liberals were especially concerned to attract American capital to Quebec at this time to help develop its resources and stem the tide of out-migration to the US, and hence reluctant to add what might be seen as undue burdens to industry.[34]

The families of workers who died on the job would receive a lump sum of four times the average yearly wage of the deceased, subject to a floor of $1,000 and a ceiling of $2,000. This was different from France, where the compensation took the form of a life pension for the widow and minor children, if any. During the debate on the bill, Taschereau said the government had adopted the English approach of a lump sum because "Nous n'avons pas ici l'assurance d'État, les pensions aux vieillards, etc." (We don't have state-sponsored insurance here, or old age pensions, etc.). In France, where the welfare state was more advanced, there was a *Caisse nationale des retraites pour la vieillesse*, which provided old age pensions and acted as a guarantor of pensions ordered by the court to families of deceased workers or those suffering permanent incapacity, in case the employer or insurance company did not pay. State-sponsored old age pensions were still two decades away in Canada.

34 Vigod (1986). Taschereau was the son of Jean-Thomas Taschereau, one of the original appointees to the Supreme Court of Canada in 1875, and the father of Robert Taschereau, who would also be named to the Supreme Court of Canada, becoming chief justice 1963–1967.

Another significant difference with the French Act was the failure to compensate for medical expenses except in the case of the worker's death, and even here the amount specified was a flat $25 for both medical and funeral expenses. The French Act, by contrast, made the employer responsible for the medical, pharmaceutical, and (where applicable) funeral expenses of the worker. Only the last were subject to a cap (of 100 francs) though the former were calculated pursuant to a tariff established by local authorities in each region of France.

The statutory compensation remained within the domain of private law and could be obtained only through an action begun in the Superior Court of Quebec (unless, of course, the employer voluntarily paid up). This action had some unusual features, some of which benefitted employers while others benefitted employees. To the satisfaction of employers, juries were excluded and the suits were to be heard in summary fashion.[35] There was some sense in this as the main factual issues that juries would have previously decided – was there fault and if so, what should the compensation be – were now settled by the legislation itself. But s. 27 of the Act required a worker to be authorized by the judge to bring the action "upon petition served upon the employer." The judge "shall grant such petition without the hearing of evidence or the taking of affidavits, but may before granting the same use such means as he may think useful to bring about an understanding between the parties."[36] This provision had proved contentious in the *Assemblée* debates on the bill, with opponents protesting that the judicial authorization merely complicated matters and notice to the employer alone should be sufficient. They failed, however, to have the requirement removed.

It is not clear how the encouragement to mediate these disputes prior to litigation was dealt with in practice, or whether it was taken up at all given that it was left to the discretion of the judge to make the attempt. With the worker's entitlements clearly set out in the Act, one suspects that any pretrial mediation may have involved an employer offering less in return for prompt payment and forgoing the "hassle" of a trial. For even though liability was no-fault, workers were by no means guaranteed success. They were still responsible, according to author Thomas Foran, for introducing evi-

35 The law of New France had not authorized the use of juries, but they had been introduced under the British for both criminal process and civil claims.

36 Workmen's Compensation Act, SQ 1909, c 66.

dence on all the elements of the claim: the contract, the accident, the nature of the work, and the fact that it happened by reason of or in the course of the work.[37] He might have added that the worker also had to prove that their work fell within an employment sector covered by the Act, and the nature and extent of his or her injuries. Aside from this evidentiary burden, s. 6 contained some defences for the employer: no compensation was to be granted if the accident "was brought about intentionally by the person injured," and the court was empowered to "reduce the compensation due to the inexcusable fault of the workman, or increase it if it [was] due to the inexcusable fault of the employer." This provision, which re-introduced a certain element of morality and subjectivity into a law meant to foster predictability, was taken from the French law of 1898 and had no counterpart in Anglo-Canadian law.

The prescription period for the action was short, only one year, but the Act contained other provisions that were more favourable to the worker. The benefits provided by the Act could not be excluded by contracts of employment and the compensation was entirely at the charge of employers. They could not make any deduction from employees' wages therefore, even with their consent, unlike some European systems that were jointly funded by employers and employees. The benefits were inalienable and exempt from seizure, and employees had a privilege (lien) on the property of the employer to secure their payment. In case of employer bankruptcy, however, this privilege might not provide much protection. Requests for augmentation of compensation based on aggravation of a disability could be brought up to four years after the initial judgment, though employers could petition to reduce compensation based on alleged diminution of a disability. The court could also grant a provisional daily allowance to the worker at any stage of the proceedings, including while an appeal was pending.

Interpretation of the 1909 law in many respects followed the pattern of the earlier jurisprudence, with the Quebec courts tending to a more generous interpretation of the Act while the SCC was more stringent. Although the Act did not make any provision for occupational disease, the Quebec courts allowed recovery for hernias suffered at work as "accidents," and in one case allowed recovery on a permanent disability basis for a worker who

37 Foran (1915).

had gone insane after losing his arm in an industrial accident and had to be confined to an asylum.[38] In cases where it was not clear whether the worker had been injured or died from an industrial accident or some other cause, the courts sided with the worker. Some parts of the forestry business, a very dangerous sector that was initially neither expressly included nor excluded by the Act, were included via judicial interpretation. A good example of both these tendencies is *Moore v Storey*, a 1923 decision of the Quebec Court of Appeal.[39] Here a young man in good health was placed by his employer alone on a platform attached to a tree on the bank of a river. He was given an implement with which he was to direct floating logs to prevent a jam. An hour later he was found drowned without anyone having witnessed the event. The court declared he was presumed not to have committed suicide, but rather that he fell accidentally from the float into the water. While on a literal interpretation the floating of logs could be seen as coming within the category of "any transportation business by land or by water" mentioned in the Act, it seems likely that the failure to mention expressly forestry activities in the Act, when it was such an important business in Quebec, reflected a legislative decision not to extend coverage to it. Yet the court awarded death benefits to the man's family, having found that the activity in which he was engaged was covered by the Act.

During this period the Quebec courts looked mostly to French juristic writing to interpret their own law, and this may have influenced their approach. French labour was better organized and more militant than in Quebec, and interpretation of the law in France tended to be more generous to the worker. The Quebec legislator did not, however, follow the French model of including domestic servants and agricultural workers, and their express exclusion prevented the courts from adding them.

With respect to the effect of inexcusable fault on the claim of the worker or liability of the employer, unique to the French law and taken from it, here was a place where the Quebec law was actually more generous than the French. Quebec had not copied the clause in the French law that set a ceiling of 100% of the worker's pre-accident salary on such claims, and Quebec judges tended to interpret the notion of inexcusable fault quite broadly while also making rather generous awards under this section. This was one

38 *Leprohon v Ogilvie Flour Mills* (1919).
39 *Moore v Storey* (1923).

of the ways that the low ceiling of $2,000 on claims could be avoided. In the case cited earlier about the worker who lost an arm and was confined to an asylum, the court found inexcusable fault on the part of the employer and awarded $5,000 to his curator, representing the estimated cost of keeping him in the asylum for the rest of his life.[40]

It was never doubted that the fault required under this "inexcusable fault" provision need not be a personal fault of the employer, who was most often a corporation in any case, but could be a fault of an employee that resulted in the serious injury or death of a co-worker. Whether that fault had to be an intentional act or omission, or could arise merely from gross negligence, was debated, with the Quebec courts coming down on the latter side. In a case where an employee of a railway company was supposed to transmit a message to train A to stop in order to prevent a collision with train B, and negligently failed to transmit the message with consequent loss of life, including employees of the railway, the Quebec courts held that this was an inexcusable fault for which the employer was responsible. They also held that the violation of certain laws by an employer could constitute an inexcusable fault, notably hiring minors under the age permitted by law. Legal authors criticized this approach, preferring to blame the parents who permitted their children to work under such conditions, but the courts maintained their position. With respect to compensation in cases of inexcusable fault of the employer, some courts calculated the amount of recovery as if in an ordinary case of negligence, even though such claims were abolished by the Act. This too was subject to doctrinal criticism.

However, even generous interpretation could not make up for the Act's various flaws. It provided an entitlement to only half the worker's regular salary as compensation for total permanent disability, and then only to a maximum salary of $600 per annum. For workers earning between that sum and $1,000 annual salary, only one-quarter of the wages above $600 were to enter into the calculation. For workers earning over $1,000, the Act did not apply at all and they were left to their recourse under the ordinary law. In cases of permanent partial disability, the award would be reduced in proportion to the percentage of disability found. These sums were to be paid as a pension, or "rent" in the English version of the Act, but another cap inter-

40 Ibid. Chase-Casgrain (1922) reviews the cases to that point on the employer's inexcusable fault, and the examples in the following paragraph come from this source.

vened here. Section 2 stated that "the capital of the rents [...] shall not exceed $2,000" – a provision that gave rise to much debate. The Act did not provide any medical benefits or hospital coverage except in the case of the worker's death, as noted above, and left recovery to the ordinary processes of execution of judgments if the employer did not voluntarily pay up. The risk of employer insolvency thus lay on the injured worker. Perhaps the biggest disadvantage of the 1909 law, however, was simply that it left liability to be determined by the ordinary courts, with the possibility of multiple levels of appeal, the prospect of long timelines to resolution when the need for income was immediate, and the need for legal representation.

3. Mounting dissatisfaction, 1925–1931

After World War I, Quebec labour became better organized and more insistent in its demands for reforms to the Act, and at this point the English-French, common law-civil law dichotomy began to assume rather less importance as events in common law Canada and in the international sphere began to make an impact in Quebec's legal universe. The year 1922 witnessed an important milestone with the establishment of the Roy Commission of inquiry into workers' compensation. The recommendations in its 1925 report, albeit rather weak, helped to put the province on the road to the eventual adoption of the 1931 law that would govern the field for over half a century, but the path between these two bookends was anything but smooth. A first, rather timid, law embodying some of the Roy Commission's recommendations was passed in 1926 but never proclaimed into force.[41] A second attempt was passed and proclaimed in force in 1928, the main innovations of which were to impose compulsory (private) insurance on employers and to create a *Commission des accidents du travail* which would now have exclusive jurisdiction over accident claims. Only three years later, however, after strongly resisting government-sponsored insurance, the Taschereau government gave in. It repealed the 1928 law and substituted a new law directly copying Ontario's that authorized the *Commission* to levy premiums and pay benefits. This brought Quebec in line with the other Canadian provinces and completed the break with the French tradition begun in 1928.

41 Workmen's Compensation Act, SQ 1926, c 32.

The Roy Commission's method of work, its membership, the sources of law it found relevant, and the discourse surrounding it all highlight an important transformation in this area of law, one pointing to the triumph of public law over private law as the administrative state expanded its reach. Its methods featured recognizably modern techniques of social science research, as compared with the modus operandi of the Globensky Commission: 4,900 questionnaires were sent out to union workers, employer groups, and bar, insurance, and medical associations. The response rate was apparently high though not specified in the report and all the responses were analyzed. Public hearings, 21 in all, were held in seven different cities across the province in the spring of 1924, where the Globensky Commission had sat only in Montreal and Quebec City. The Commission's membership comprised the tripartite grouping common in labour matters: two representatives each for business and labour, presided over by an ostensibly neutral chair.[42]

Often a judge was chosen for the role of chair of such commissions, but Ernest Roy was not named to the Superior Court of Quebec until just after he was named chair of the Commission. He offered his resignation as chair but it was not accepted. A lawyer and journalist, he had served two terms as member of the Quebec Legislative Assembly, 1900–1908, then switched to federal politics in 1908. Roy served only one term as a Liberal MP, however, before being defeated in the 1911 election that saw the end of Sir Wilfrid Laurier's long reign. In some respects his neutrality might have been questioned, as he was president of a large company that manufactured cars, munitions, and agricultural implements, and director of an insurance company.[43] It is hard to say whether he favoured one side over the other, however, as the Commission's final report avoided some of the most difficult questions that had to be decided, especially whether a public system of insurance administered by a government agency was desirable.

The labour representatives had been carefully chosen to straddle the confessional, social, and political divides among Quebec's workers. Pierre Beaulé was the president of the newly founded (1921) *Confédération des Travailleurs Catholiques du Canada* (CTCC), an entity representing unions of both skilled

42 Rapport de la Commission d'étude sur la réparation des accidents du travail (1925) (hereafter, Roy Commission Report).

43 Assemblée nationale du Québec (2009), Ernest Roy (1871–1928).

and unskilled workers, mostly in Quebec, that supported the social teachings of the Catholic Church and rejected affiliation with US bodies such as the American Federation of Labor.[44] Gustave Francq was active in the Quebec branch of the Trades and Labor Congress of Canada, which represented skilled workers, was allied with the American Federation of Labor, and in which religion played no role. Both groups, however, in their rejection of socialism and support for a broadly conciliatory approach to relations between labour and capital, were considered "safe" by the Quebec state.[45]

The Commission asked representatives of employer and worker groups to meet on their own outside of the Commission's formal meetings to see if they could agree on the answers to various questions put to them. They could not, except on some fairly minor issues, but this impasse seems to have led the employer and worker representatives on the Commission itself to compose "supplementary reports" that were appended to the Commission's own report. This time the positions taken by these two groups were the inverse of their roles before the Globensky Commission, where the employers had been much better prepared than the employee groups. The two-page employer report contained assertions and conclusions based on little evidence, beginning with the questionable observation that "it is incontrovertible that the great majority of industrial accident cases are resolved to the satisfaction of both parties."[46] The employer representatives could live with some responsibility for medical expenses and were prepared to support compulsory (private) insurance provided that large employers could self-insure, but opposed any increase in the 50% recovery rate, the inclusion of occupational diseases under the Act, and the removal of accident claims from the jurisdiction of the courts.

The 20-page worker report, prepared by Francq, was fulsome, packed with data, and well argued. Francq had also prepared the "comparative law" part of the Commission's report. He went to Europe for personal reasons in the spring of 1924, but the Quebec government paid some of

44 Non-Catholics could join the CTCC but could not vote or hold executive positions. The CTCC was "pan-Canadian" nationalist rather than focused on Quebec nationalism. On the origins and features of the CTCC, see Rouillard (2004) 49–60.

45 On Francq's career, see Leroux (2001). FTQ refers to the *Fédération des Travailleurs et Travailleuses du Québec.*

46 Roy Commission Report (1925) 47 (author's translation).

his travel expenses to enable him to study on site the laws of England, France, Belgium, and Switzerland. His report for the Commission included summaries of their laws, as well as a useful table containing details of the worker's compensation laws across Canada on twenty different variables. It revealed that all Canadian provinces except Prince Edward Island now had workers' compensation boards like the one pioneered in Ontario in 1914. These had adopted a different model from that found in most US states, where reform had obliged employers only to purchase private insurance rather than creating a public agency which replaced private insurance by levying premiums directly on employers and paying out benefits.[47] In the end, however, as Justice Roy decided not to cast a "deciding vote," the Commission's final report outlined the basis of disagreement between the two groups more than providing solutions. On the most controversial questions, it observed only that a system of compulsory insurance (without advocating either a private or public model) "would render great benefits to both employer and worker" and did not clearly recommend that claims be taken from the courts.[48]

Francq's work on another body just after he finished his work with the Commission would also have an impact on the legislation eventually adopted in Quebec. He was the Canadian representative on the Committee on Compensation for Industrial Accidents of the International Labour Organization (ILO), the first affiliated agency of the newly founded League of Nations, and spent the spring of 1925 in Geneva in this capacity. The ILO study of this question, published in 1925, contained recommendations largely in tune with labour's demands in Quebec. These related to subsidizing medical care for injured workers, creating an independent body to administer accident funds, providing coverage for some industrial diseases, and removing the cap on annual income for those covered by the Act.[49] None of these were popular with employers, as the Commission had discovered.

The Roy Commission had left the government a free hand as to what reforms it wished to implement. When the 1926 Act was introduced in the

47 At this point only Washington State had created a public commission (in 1911) with powers similar to Ontario's.

48 Roy Commission Report (1925) 45 (author's translation).

49 International Labour Organization (1925).

Assemblée by the Minister of Public Works and Labour, Antonin Galipeault, he was only too pleased to refer to the ILO's recommendations as he told the house that the ILO itself frequently referred to Quebec's own worker protection legislation in its deliberations. Here he rattled off a long list of statutes passed in Quebec in the previous decade but unabashedly presented these as Liberal achievements, unlike his predecessor who had tried to focus on the substance of the 1909 bill and to lower the partisan temperature. Galipeault's efforts went in the opposite direction, rousing the anger of the opposition who claimed that they had provided the ideas for some of the legislation he was trumpeting as Liberal accomplishments.[50] In fact, Galipeault was misrepresenting the ILO's findings. Far from lauding Quebec as a leader, it found Quebec and Saskatchewan were the only two provinces which did not subsidize medical care for injured workers, have an independent body that administered accident funds, or provide universal coverage of eligible workers, regardless of annual income.[51] The ILO report did not criticize Quebec directly, but allowed readers to come to their own conclusions based on its findings.

Both in the unproclaimed 1926 law and its 1928 successor, no state insurance scheme was provided for. In 1926 Galipeault stated that the proposed reforms looked to the Commission's recommendations, the work of the ILO, and the law of France. The Roy Commission, as we have seen, left the government with a largely free hand, and on the major question of whether compensation claims should be entrusted to a commission, Galipeault stated simply that it preferred the position of the employer, despite the ILO recommending a commission. As for the Ontario commission, Galipeault was of the view that Quebec had little to learn from it. Neither France nor England had such a commission, he observed. Thus, the French model continued to be the touchstone for the government in 1926, with lip service paid to the ILO, while the Ontario / Canadian model was held at arm's length.

In justification of his rejection of the Ontario model, Galipeault maintained that insurance costs in Ontario were 30% higher than in Quebec under private insurance, owing to the high costs of government administration.[52] Charles Smart, the Conservative member for Westmount, asserted

50 Débats de l'Assemblée législative (débats reconstitués) (23 February 1926).

51 International Labour Organization (1925) 6–7.

52 Galipeault reported that in 1923 the Ontario Workmen's Compensation Board had only $4 million to administer but had 75 employees and spent $200,000 on salaries. Even if

the contrary and one would have expected him to know as he was a wealthy industrialist with textile factories in Montreal, Toronto, Winnipeg, and Welland, Ontario. Unlike the employer representatives on the Roy Commission, he supported the creation of a commission and constantly pressed the example of Ontario on the government – to no avail. This is one of the unexplained differences between Ontario and Quebec: why large employers generally supported the creation of a state-run entity in Ontario in 1914 but most of their Quebec counterparts did not until many years later.

The 1926 law did make some improvements, which were retained in subsequent laws even though the 1926 law itself was never proclaimed into force. It got rid of the salary cap on eligibility for compensation while at the same time stating that a worker's salary above $2,000 would not be considered in fixing the amount of the indemnity. Recovery of medical and hospitalization expenses (to a maximum of six months for the latter) would now be allowed. The law also followed French law on a point where the government had declined to do so in 1909: it required pensions, rather than lump sums, to be paid to widows and minor children upon the death of a worker due to a workplace accident. But the limitation of recovery for accidents to only one-half of a worker's salary was kept in place, at a time when it was two-thirds in most Canadian provinces.

Why the 1926 law was not proclaimed is something of a mystery, the only reference to this fact in the debates on the 1928 bill being the observation of the Minister of Labour, M. Galipeault, that it would have led to the ruin of small and medium-sized industries in Quebec.[53] In 1928 two new laws made a marked departure with the past. The Workmen's Compensation Act, 1928 at last made insurance compulsory for employers (in 1926 premier Taschereau had observed during the debates that three-quarters of employers in Quebec had no insurance), but still relied on private insurers to offer coverage.[54] It continued the more generous compensation scheme created in 1926 and removed the salary cap but replaced it with a cap of $10,000 on the total benefits to be paid out in case of permanent total incapacity. Payments to

these figures are correct, administrative costs of 5% do not seem excessive, especially when one considers that private companies build profits into their rates that are unlikely to be less than 5%. Testimony before the Roy Commission was to the effect that administrative costs at the Ontario Board absorbed 4% of premiums levied.

53 Masson (8 March 1928) 3.

54 SQ 1928, c 79.

injured workers as well as families of deceased workers were now to be made in the form of monthly pensions rather than lump sums or the quarterly payment of pensions in those cases where pensions had been permitted. More significantly, the law added the "meat chart" that was being adopted elsewhere in Canada and the US. This was a table that laid out the percentage of wage recovery to be awarded in cases of permanent partial incapacity such as the loss of one eye, one or more fingers, one hand, one leg, etc.

These matters had formerly been left to judicial discretion but now, in a piece of companion legislation, a *Commission des accidents du travail* was to be created. It would have exclusive jurisdiction over claims for compensation, and the adoption of the "meat chart" was meant to allow for ease of administration by this body. The role of the superior courts was finally to be removed, and neither appeals from nor judicial review of decisions of the *Commission* were allowed.[55] In another move away from the French model and towards the North American, the provisions for "inexcusable fault" of either employer or employee were removed, though compensation could still be denied to a worker guilty of "serious and wilful misconduct" which contributed to the accident – a provision contained in the laws of other Canadian provinces. The law creating the *Commission* also gave it extensive powers aimed at improving safety in industrial establishments and providing for the rehabilitation of injured workers. The first chair of the *Commission* would be lawyer Robert Taschereau, nephew of the premier.

Unlike 1925–1926, when employers before the Roy Commission and via members in the *Assemblée* had voiced support for keeping workers' compensation in the courts, such concerns were muted in the debates over the 1928 law. It passed in the *Assemblée* by a majority of 64 to 4, with two opposition members and two government members voting against it.[56] This represented a sea change in employer attitudes, and likely gave the government the confidence to proceed even further a few years later.

After his predecessor had adamantly denied in 1926 and 1928 that Quebec had anything to learn from Ontario, and that there was any place for state-run insurance in Quebec, in 1931 the new Minister of Public Works and Labour, Joseph-Napoléon Francoeur, put before the *Assemblée* a bill institut-

55 SQ 1928, c 80.
56 Montreal Daily Star (8 March 1928).

ing state-run insurance that was a virtual copy of the Ontario Workmen's Compensation Act.[57] The existing *Commission des accidents du travail* was maintained and now given the task of calculating and levying insurance premiums for all employers in Quebec who had more than seven employees (employees in businesses with fewer than seven employees were left to their private law remedies under the Civil Code). The list of businesses subject to the Act was expanded once again, but domestics and agricultural workers remained excluded. The Workmen's Compensation Act, 1931 maintained the changes made by the 1928 Act and extended compensation to those suffering from a limited number of industrial diseases. It also extended the powers granted to the *Commission*, providing it with extensive powers of surveillance over injured workers, the dependents of deceased workers, and employers. The Ontario Act had twelve major divisions, all of which were reproduced in almost identical language in Quebec's 1931 law.[58]

On one issue the Quebec statute went further than Ontario's. One of the major issues raised by the opposition and by labour groups in the debates in both 1928 and 1931 was the tenure of the members of the *Commission* and its ability to appoint its own staff. The 1928 Quebec law had not granted the commissioners tenure during good behaviour and had provided that the cabinet would appoint the staff of the *Commission* and fix their salaries. The Ontario law gave the commissioners tenure during good behaviour and permitted them to hire their own staff and fix their salaries, though these had to be approved by cabinet. The 1931 Quebec law reiterated all these provisions but went on to state that the commissioners could be removed only on a joint address to both houses of the Quebec legislature, the same process contemplated for removal of superior court judges under the British North America Act, 1867.[59]

Why this sudden volte-face on the role of the state in workers' compensation? As noted earlier, employer views were beginning to be more receptive to a state-run model in the later 1920s. Nonetheless, the 1920s saw considerable ideological conflict within Quebec over proposed reforms to workers' compensation. The split was not just between employers and

57 The version in the Revised Statutes of Ontario 1927, c 179, has been used for comparison purposes.

58 SQ 1930–1931, c 100.

59 The Ontario law did not indicate any process for deciding whether a commissioner had transgressed the good behaviour requirement.

employees but also followed other fault-lines in Quebec society. What Quebec scholars call clerico-nationalist opinion, that is, a nationalist viewpoint heavily coloured by a conservative version of Catholicism, was not at all happy with the growth of state power in the field of workers' compensation. Their ideas can be traced most easily in the *Revue du droit*, a periodical founded in 1922 precisely to oppose "liberal" views on law and to advocate for legal interpretation through a clerico-nationalist lens.[60] While sympathetic to the plight of workers, its editors pronounced that fault-based liability was based in natural law and should not be altered by mere human agency (in line with Pope Leo XIII's 1879 encyclical *Aeterni patris*). The initial 1909 reform could be tolerated because it left compensation in the hands of the courts and did not involve the state directly. But abolishing private law claims and giving exclusive adjudicatory authority to a government agency was tantamount to socialism and had to be resisted at all costs.[61] Consistent with these views, the editorial board of the *Revue* also opposed changes to the law in France that expanded accident insurance coverage to domestics and agricultural workers, measures which contributors to the *Revue* found totally beyond the pale (though without stating why). While the new Quebec law did continue to exclude domestics and agricultural workers (as did other provinces), in most other respects the government ignored the critiques voiced by the segment of Quebec opinion represented by the *Revue du droit*.

Louis-Alexandre Taschereau had introduced the first workers' compensation law in 1909, become premier in 1920, won two elections with a strong majority after that, and would win a third majority a few months after the passage of the 1931 law. His government had a clear mandate to carry out whatever legislative programme it wished. It is a measure of its caution and its commitment to keeping the province's capitalists onside that even with this amount of support it still moved haltingly to reform the law of workers' compensation, moving through three stages in 1926, 1928, and 1931. The rise of working-class militancy in the 1920s generated some pressure for reform but divisions in Quebec labour between Catholic unions and the secular international (i.e., American) unions blunted its effectiveness on

60 Belley (1993)

61 Lemieux (1924) and Ogden (1932). The main demand of these authors was not to abolish the commission but to permit workers to retain the option of suing in the ordinary courts.

some issues.[62] On workers' compensation, however, Quebec labour was relatively united, and they wanted the Ontario law implemented. The workers' column in Quebec City's *Le Soleil* opined that this was probably the first time an Ontario law had been so faithfully copied in Quebec. The author then pithily summarized the campaign: "the workers wanted it, the government promised it, and now we have it."[63]

Pressure from workers had been constant in the 1920s, but what changed by 1931 seems to have been the position of employers, whose voices were noticeably silent during the passage of the Act. The insurance industry remained vocally opposed, but the employer concerns that had been voiced to oppose or blunt change in previous debates were absent in 1931. It can be inferred that Quebec employers had finally come round to the view that adopting a commission similar to Ontario's would not be the end of the world, and might indeed be more advantageous to them than continued dependence on private insurance. Here, the outside scrutiny of the ILO and the cross-Canada move to state-run compensation boards in the 1920s was critical. As Pierre Beaulé said after the passage of the bill in 1931, workers had stuck with the model advanced by the ILO in the early 1920s and had finally seen it enacted.[64] The Roy Commission's report drew these models to public attention and – in Francq's supplementary report if not in the Commission's own report – provided a rationale for Quebec to adopt them. In doing so the 1931 law represented the province's first significant entry into the new world of the administrative state. It also signified buy-in to a distinctive Canadian model of workers' compensation for industrial accidents, one that essentially excluded private insurance in a manner similar to that chosen for the Canadian health care system decades later.

4. Conclusion

The Quebec Liberals had claimed for decades that the amelioration of the lives of the working population was a priority for them. They had passed a number of worker-friendly laws, although many of these were symbolic and those that did create new rights were often weakly enforced.[65] The 1931 Act

62 For an exploration of this conflict, see Ewen (1998).
63 "L'ouvrier satisfait de la loi" (18 March 1931) (author's translation).
64 Ibid.
65 Vigod (1986) 134–135.

was different: it represented a significant step forward in the evolution of the Quebec state's administrative capacity and of the welfare state, creating a powerful arm's-length body that would take over a traditionally judicial role and exercise regulatory authority over workplace safety. This is not to say the Act represented an unalloyed benefit for workers. The *Commission des accidents du travail* would in due course give rise to new problems. The results of its opaque decision-making process could not be challenged in court and were therefore much less amenable to public scrutiny. The relatively low benefits provided suggested that workers were unworthy of the full compensation that was the basis of the private law of liability for personal injury. And the *Commission* was empowered to exercise a type of ongoing surveillance and interference in workers' lives that had not existed under the private law. But for many claimants it did provide a modicum of security that was an improvement over the uncertainty of private law recourses.

World War I destroyed the German, Austro-Hungarian, and Ottoman empires, fundamentally transformed the Russian Empire, and left those empires remaining, primarily the British and French, in an enfeebled state. As they declined, other sources of inspiration had to be found. Quebec had long featured a sort of legal Venn diagram, with overlapping influences from Britain and France. The example of workers' compensation shows how this diagram was transformed in the 1920s, with the British and French portions receding, and that occupied by other Canadian provinces and international bodies increasing. It thus represented the dawn of an era in which comparative public policy could prevail over comparative law. The world of comparative public policy was a multi-polar one, in which loyalty to the solutions suggested by one's legal metropole could be trumped by those of a rival tradition. This new world also saw the emergence of new players at both the sub-national and transnational level. Within Canada, Quebec's borrowing from Ontario was only one example of inter-provincial borrowings both among the common law provinces and across the common law-civil law divide, a process that tended to elevate the province of Ontario into a new legal metropole. Meanwhile, the ILO was an early example of a supra-national body that floated above national legal traditions, comparing and contrasting them and presenting what were packaged as "best practices" that did not necessarily align with any one legal tradition. In this new multi-polar environment, no legal tradition had a monopoly on efficient, effective, and legitimate solutions to the myriad problems thrown up by industrial society.

Abbreviations

AC	Appeal Cases (Reports of the Judicial Committee of the Privy Council)
CS	Cour supérieure (Reports of the Quebec Superior Court)
KB/QB	King's Bench / Queen's Bench (Reports of Quebec's appellate court)
SCR	Supreme Court Reports (Reports of the Supreme Court of Canada)
SQ	Statutes of Quebec

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Christopher M. Roberts and Hazel W. H. Leung

The Legacies of Vagrancy Law and the Reconstruction of the Criminal in Hong Kong, 1945–2022*

1. Introduction

This article explores certain aspects of the manner in which the problem of the "vagrant" was addressed in Hong Kong following the Second World War. The Anglo vagrancy law tradition is often traced to certain legal measures implemented in the mid-14th century in the wake of the Black Death.[1] Those measures were reiterated and developed time and time again over the following centuries.[2] *Inter alia*, those vagrancy laws were used to penalise idleness, driving individuals to work while reducing the terms on which they might bargain for wages and better work conditions; to penalise various forms of activity that were deemed immoral; to stigmatise a loosely defined form of criminality, justifying the adoption of a variety of anti-crime measures; to control urban boundaries, including by authorizing deportations; and to enhance the discretionary authority of the police and magistracy over the poorer members of the population generally. Substantively and procedurally, vagrancy laws accomplished these diverse ends through inclusion of four component parts: anti-poor measures; anti-immorality measures; anti-criminal measures, which often targeted the figure of the "vagabond" in particular; and anti-migrant measures. While vagrancy laws had a long history prior to the 19th century, they took on their most enduring form via the 1824 Vagrancy Act, passed in the wake of a period of extensive social unrest. In addition to being extensively enforced in England and Wales, the law set a

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1 For more, see Poos (1983).

2 For more, see Beier (1985); Rogers (1994); Beier (2008); Hitchcock (2018).

model that was exported around the empire.[3] As Lowe observes, "vagrancy became a criminalized category across the globe in the 19th century," allowing for "the surveillance of a wide variety of practices such as trespassing, loitering, migration, prostitution, begging, or dissent."[4] While there were small regional and national variations – including for instance the penalization of "obeah" in the Caribbean and West Africa, the penalization of sharing the company of members of the indigenous population in Australia, and the penalization of "catemites" in Sudan and Northern Nigeria – the general template was remarkably similar everywhere.[5] Vagrancy law was not only a functional legal order, moreover. Rather, it can be seen as having provided an important genesis point for several of the better known hierarchical, discriminatory, racist ideologies, such as eugenics, that developed as the 19th century progressed.[6]

All of the above sorts of aims and measures were pursued and utilised in Hong Kong over the course of the first century in which the British ruled the city.[7] Various legal powers under which poorer members of the Chinese population might be detained or removed from the colony were among the first measures taken in Hong Kong, and remained a major subject of official concern throughout the 19th and early 20th centuries. Relevant measures included Ordinance 11 of 1845, Ordinance 7 of 1846, Ordinance 6 of 1847, Ordinance 1 of 1849, Ordinance 8 of 1858, Ordinance 7 of 1859, Ordinance 12 of 1888, Ordinance 25 of 1897, Ordinance 9 of 1912, Ordinance 25 of 1917 and Ordinance 39 of 1935, among others. The tendency to see Triads as a form of vagrant or vagabond began in this period as well. Controlling the colony's poorer Chinese population, including through broad power of deportation in particular, was, in short, a key governance mechanism of 19th and early 20th century Hong Kong, relied on by the authorities on an everyday basis, as well as in the context of political tension.[8]

3 For more, see Roberts (2023).
4 Lowe (2015) 122.
5 See Human Rights Watch [Alok Gupta] (2008); Kimber (2013); Paton (2015); Boaz (2018).
6 For more, see Roberts (2024).
7 See Munn (2001); Lowe (2015) 121–127.
8 For more, see Roberts / Leung (2023).

While they did not cease to be used immediately, vagrancy laws were far less relied upon in post-World War II Hong Kong – a particular puzzle given how essential they were to governance in the colony in the 19th century. Broadly speaking, this article will argue, reduced reliance on vagrancy laws was not indicative on an abandonment of the purposes those laws had served. Rather, vagrancy laws gradually became surplus to requirements, as several more specific, targeted laws, policies and techniques developed the authorities' legal tools for addressing situations that were previously dealt with through vagrancy law. This article explores post-war developments in two of the functional areas previously addressed through vagrancy law – migration control and "criminal" control – leaving vagrancy law's anti-poor and anti-immorality functions to be explored on another occasion.

The first turn away from vagrancy law came in the immediate wake of the war. One of the key functions played by vagrancy laws in 19th century Hong Kong was providing authorization for the removal of populations deemed threatening, undesirable or surplus. Large "refugee" populations entered Hong Kong in the mid to late 1940s.[9] Dealing with the new refugee populations was complicated, however, not least due to the colony's sensitive and rapidly shifting political relations with mainland authorities in the period. The response the authorities adopted was multifaceted and heavily internally debated. While vagrancy law as a means of authorizing deportation remained part of the picture, vagrancy laws played only a minor part in the overall policy, unable as they were to deal with either the scale or political complexity of the challenges posed. These developments are explored in the following section.

The next turn away from vagrancy law evolved more gradually. Another key function of vagrancy laws in the 19th century was to legitimize public power and discretionary police authority, by suggesting the existence of unruly, threatening, occasionally political and always dangerous criminal elements within the population. In the 19th century, a primary figure of concern in this regard was the "vagabond," one category of offender penalized by the 1824 Vagrancy Act. References to both "vagrants" and "vagabonds" diminished in the post-Second World War period. At the same time, new figures of the "criminal other" quickly rose to attention. In the late

9 On the complexities in terms of the use of that label at the time, see Madokoro (2015).

1940s and 1950s, the communist agitator was repeatedly invoked. As the 1950s gave way to the 1960s, the communist agitator was gradually replaced in public imagination by the figure of the "Triad member," matching a growing concern with "gang" activity elsewhere around the world in the period. In both cases, reference to these threatening criminal others was closely linked to public support for the adoption of various forms of policing and public order control. These developments are explored in the third section.

In short, vagrancy law gradually came to be less relied upon in Hong Kong in the decades following the Second World War. The functions vagrancy law had served did not go unfulfilled, however. Rather, vagrancy law gave way to various new, more targeted law and policy regimes, of which the new immigration and "anti-Triad" criminal law regimes constituted two key components. The penalization of vagrancy as such in Hong Kong was brought to a final conclusion in 1977, during a period in which vagrancy laws were under challenge across the British settler colonial world. Once again, however, this annulment of vagrancy law as such did not represent an annulment of its purposes, as a new, stricter penalization of loitering, which ensuring the ongoing ability of the police to detain on the basis of suspicion or animus alone, was brought into effect a few years thereafter. The supplantation of the penalization of vagrancy by the penalization of loitering is explored in the fourth section below.

In sum, in Hong Kong as elsewhere around the British Empire and the British colonial world, the 19th and early 20th centuries were marked by the extensive dissemination, heavy enforcement and extensive ideological impact of vagrancy law measures.[10] Following the Second World War, however, these regimes were gradually replaced, as the various sub-component features of vagrancy law were disaggregated and replaced by more functionally specific and targeted law and policy regimes. While individuals in Hong Kong may no longer face punishment on charges of "vagrancy" or "vagabondage" specifically, therefore, the vagrancy law legacy remains alive and well.

10 See Roberts (2023); Roberts (2024).

2. The Post-War refugee problem

During the Second World War, prior to the Japanese occupation, Hong Kong's government established some social services aimed at addressing the needs of refugees. While they recognised the need to take some palliative steps, the authorities were in at least equal measure antagonistic to Hong Kong's wartime refugee population. In 1940, Henry Butters, the Financial Secretary in Hong Kong, wrote to the Colonial Secretary to indicate, relative to services being provided to refugees, that while he was "entirely in favour of social services for the working classes," he "dread[ed] the consequences of swelling the population by a parasite class which lowers the standard of living of the workers and prevents genuine social amelioration."[11]

Concern with the presence of a large refugee population was renewed after the war: while Hong Kong had depopulated to 600,000 during the war, by the end of 1946 the population was up to 1,600,000, approximately the same as the population prior to Japanese occupation.[12] In 1946 the Chairman of the Urban Council wrote to the Colonial Secretary to indicate that, in his view,

> [t]he existence of large numbers of unemployed – and probably unemployable – or partly employed persons, who occupy ruined buildings in the Colony, constitutes an increasingly serious menace to public health and the maintenance of peace and good order in the Colony. It is difficult to get owners to repair their premises sufficiently to keep these people out and the sanitary condition inside soon becomes positively dangerous […].[13]

An appropriate policy response, the Chairman felt, was apparent:

> The situation […] is different now from that of the period immediately preceding the Pacific War, when the Japanese were oppressing South China, and we could not send refugees back to their native country, but had to afford them succour here to some extent. Now it would seem that a pauper should seek relief in his own parish.
>
> The suggestion accordingly is that the Chinese Government and international relief authorities should be approached with a view to the establishment of a dispersal relief on the Chinese side of the New Territories frontier some miles inside China, to which destitute or semi destitute natives of China who have drifted into the urban districts here might be consigned and ultimately sent back to their native villages.

11 R. Butters (F.S.) to Hon. C.S. (Apr. 4, 1940), Hong Kong Record Series (hereinafter HKRS) 51-1-188.

12 See Mark (2007) 1146.

13 CUC to Hon. C.S. (May 7, 1946), HKRS-41-1-1725.

This suggestion was supported by the Secretary of Relief, who suggested that the proposed camp on the Chinese side of the New Territories border should be "strongly barbed," to prevent those detained from returning to Hong Kong.[14] However, due to the sense it would be difficult to persuade the Chinese authorities to agree to such a proposal – as well as the fear that the process of deportation involved would open British officials to criticism, and that a camp across the border would likely be loosely run, allowing those detained therein to return in short order[15] – other officials suggested the construction of a camp in the New Territories, with the condition that the camp be "situated in a remote place and run on austere […] lines," in order to ensure that no further influx be incentivised.[16] A "progressive repatriation" programme was also proposed, modelled on initiatives that had been undertaken prior to 1941. In order to prevent refugees settling in existing buildings in Hong Kong, the Chairman of the Urban Council also urged the use of emergency powers to force property owners to make their properties "squatter proof."[17]

Hong Kong's Colonial Secretary reluctantly supported the proposals, suggesting that the existing refugee camp at Aberdeen be used in the meantime, since a new camp in the New Territories would take some time to build.[18] However, Governor Mark Young expressed some hesitation as to the wisdom of the proposed approach. In October he wrote to the Colonial Secretary to express his concerns as to the adoption of such a policy. In particular, Young was concerned with the bad optics surrounding the invocation of the Emergency Regulations.[19] The Hong Kong Social Welfare Council opposed the use of camps as well, observing that

> [l]ife in camps is demoralizing. It reduce[s] the readiness of the people who are put into them to work for themselves, and it engenders a pauper mentality. It is therefore very difficult to get people out of camps when once they have been placed in them. The deterioration in this respect of inmates of camps before the war was one of the most regrettable features of them.[20]

14 S. of Relief (May 14, 1946), HKRS-41-1-1725.
15 See ACS to PACS (June 5, 1946), HKRS-41-1-1725.
16 ACS to PACS (May 21, 1946), HKRS-41-1-1725.
17 CUC to Hon. C. S. (May 28, 1946), HKRS-41-1-1725.
18 See Hon. C. S. to Governor, HKRS-41-1-1725.
19 See Governor Mark Young to Hon. C. S. (Oct. 3, 1946), HKRS-41-1-1725.
20 See Letter from Chairman of Hong Kong Social Welfare Council to Hon. C. S. (Oct. 25, 1946), HKRS-41-1-1725.

At the same time, the Governor requested that the Attorney General look into the law then in force in order to determine whether or not amendments would be required to deal with the "refugee problem." In response, the Attorney General observed that while "under the Emergency Regulations the Police could arrange the compulsory removal from the Colony of unemployed destitutes […] such persons would commit no offence if they returned".[21] The Attorney General therefore suggested that expulsion might best be pursued under the "Vagrancy Ordinance, on breach of which a returning destitute would have committed an offence and [would] be liable to further legal sanctions." The Executive Council meanwhile recommended that "an attempt […] be made through the guilds, Chambers of Commerce and other local Chinese organisations to persuade as many as possible of these destitutes to return to their villages voluntarily."[22]

A proposed scheme of voluntary repatriations began in early 1947. Only 4,000 individuals had been repatriated by March, several of whom made their way back to Hong Kong, leading the government to determine the scheme a failure.[23] While the Solicitor General had prepared a new draft amendment to the Vagrancy Ordinance, section 24A, to facilitate large-scale deportation,[24] the Executive Council advised against adoption of that amendment, concerned with the criticism it would likely generate.[25]

Meanwhile, a subcommittee of the Social Welfare Council came to adopt a more favourable position relative to the establishment of a refugee camp, should it be appropriately established, including through the deployment of an "honest, intelligent, and humane" procedure of rounding up destitutes and the appointment of "camp staff of good education, integrity and judgment."[26] The Sub-Committee justified this policy on the grounds that "destitution is but the culmination or the logical consequence of the 'five giant evils' of Want, Ignorance, Disease, Squalor and Idleness." Among other things, the subcommittee recommended that those within the camp might

21 Executive Council Meeting Minutes (Oct. 30, 1946), HKRS-41-1-1725.
22 Ibid.
23 See Memo from Executive Council Meeting (Mar. 19, 1947), HKRS-163-1-1249.
24 See Memo from Solicitor General to Attorney General (Jan. 8, 1947), HKRS-163-1-1249.
25 See Memo from Executive Council Meeting (Mar. 19, 1947), HKRS-163-1-1249.
26 Hong Kong Social Welfare Council – Destitutes Sub-Committee (May 1947), HKRS-41-1-3230.

be used as a labour pool, that might subcontract out for government or private projects requiring unskilled labour when needed. They warned however both that "while conditions in this camp should be as to represent an obvious improvement in the immediate material circumstances of the destitutes admitted thereto, the main purpose of the camp should be to induce the destitute to find employment or apply for repatriation but not to encourage him to settle down in the camp or to seek re-admission," and that care should be taken with the relevant terminologies, in particular by avoiding referring to the camp as a "detention camp" and by ensuring "that the camp […] not have the appearance of a 'concentration camp'."[27] The subcommittee suggested that a different approach should be employed relative to British subjects, meaning those born in Hong Kong, whom they suggested the government should move to separate rehabilitation camps – though the subcommittee also suggested the onus of proof should be on the destitute in regards to demonstrating that they were a British subject, rendering it challenging to successfully claim such a status.

Once the subcommittee had become open to the idea of camps, however, its vision of the nature and purpose of those camps rapidly grew harsher. By June 1947, the subcommittee was suggesting that the aim of the camps "should be to induce the destitute alien to leave the Colony," including by giving them no work other than the minimum necessary in their circumstances; by forbidding "smoking, gambling, etc.;" and by segregating men, women and young persons.[28] The subcommittee suggested new legislation, enhancing the ability of police and health authorities to remove individuals to the camps directly, without the need for magisterial involvement. The subcommittee also recommended the appointment of eight justices of the peace, who could interview destitutes newly arrived in the camps, and either order their detention, accompanied by fingerprinting and photographing, or release. While the subcommittee's underlying recommendations had grown much more draconian, they remained alert to public perceptions by recommending that legislation drafted to address such issues "be framed in such a manner that it cannot be justifiably attacked, in order to minimise the danger of political repercussions," specifically by being framed "as catering

27 Report of the Sub-Committee on Destitutes (June 23, 1947), HKRS-41-1-3230.
28 Ibid.

for the welfare of the destitute." The subcommittee also indicated that "[c]are should be taken in the method of collecting destitutes from the streets and publicity of the scheme should be avoided as much as possible." When the matter came before the Executive Council it was sharply divided, however, with a majority of one suggesting further reflection before any new measure be taken.[29]

In October 1948, the Hong Kong government amended the Deportation of Aliens Ordinance in several manners designed to procedurally facilitate deportation.[30] Shortly thereafter, five prominent communists were expelled, on the grounds that they had "abus[ed] the asylum of [Hong Kong] by activities directed against the established Government of China."[31] In early 1949, the Hong Kong government began introducing various measures designed to more tightly control border crossings. These included the Immigrants Control Ordinance,[32] which required entry permits for all Chinese immigrants, except for those from Guangdong; instituting a curfew and registration system for villages close to the border; and the Registration of Persons Ordinance,[33] which made identification cards, including photographs and thumbprints, mandatory for adults, and expanded police powers of search.[34] Barbed wire was put up along portions of the border in the period as well.

29 See Executive Council Meeting (July 2, 1947), HKRS-41-1-3230. The Social Welfare Officer continued to support the creation of camps for juveniles at the very least, however, which he suggested "could absorb certain petty delinquents who would benefit considerably from the training and would offer no danger of 'contamination' to the trainees," and could serve the "constructive" function of helping to "creat[e] a useful body of citizens out of parasitical swarms" (HKRS-156-1-1112, Social Welfare Officer to Hon. C. S., September 20, 1947). The Secretary for Chinese Affairs urged similarly, suggesting that the establishment of "a rehabilitation camp for destitute orphan juveniles" might help the government "gain some experience" with camp management (HKRS-156-1-1112, Secretary for Chinese Affairs to Colonial Secretary, September 22, 1947).

30 See Sutton (2017) 88.

31 Ibid. at 89, citing Grantham to Creech Jones (Dec. 21, 1948), Colonial Office 129/617/5 (hereinafter CO).

32 Ordinance No. 4 of 1949.

33 Ordinance No. 37 of 1949.

34 See Mark (2007) 1147; Sutton (2017) 160. See also Ku (2004); Kam-yee / Kim-ming (2006).

Discussions in the spring and summer[35] also led to the introduction of the evocatively named Expulsion of Undesirables Ordinance, which was approved by the Legislative Council in September.[36] The Ordinance provided for the expulsion, by summary procedure, of non-British "undesirables." According to the law, undesirables included persons "[without] the means of subsistence and […] diseased, maimed, blind, idiot, lunatic or decrepit"; those unable to show they could support themselves and/or their dependents; those likely to become vagrants, beggars, or otherwise "a charge upon any public or private charitable institution;" those "suffering from a contagious disease which is loathsome or dangerous;" those who had "been removed from any country or state by the government authorities of any such country or state for any reason whatever;" someone "suspected of being likely to promote sedition or to cause a disturbance of the public tranquillity *[sic]*;" someone "convicted by a competent authority outside the Colony of" a number of offences stipulated in an attached annex; "prostitute[s], person[s] living on the earnings of prostitution or person[s] of known immoral character;" persons lacking the required quarantine certificates; persons "found squatting or dwelling in any unlawful structure or in any tunnel or cavity or in any place which has been declared by a health inspector to be or to be likely to become dangerous to health;" individuals required to register under the Registration of Persons Ordinance who had, without reasonable explanation, failed to do so; dependents of those deemed "undesirable[s];" and anyone else the authorities should decide to so designate. Those targeted under the Ordinance could only avoid deportation if they could convince the authorities that they were not an "undesirable," that they were a British subject or that they had been "ordinarily resident in the Colony for ten years or more."[37]

35 See Hon. C. S. to Attorney General (Mar. 11, 1949), HKRS-163-1-1249; Solicitor General to Hon. C. S. (June 24, 1949), HKRS-163-1-1249; Attorney General to Hon. C. S. (July 7, 1949).

36 Expulsion of Undesirables Ordinance, Act 29 of 1949 (Sept. 2, 1949), available at: https://oelawhk.lib.hku.hk/items/show/2091. This was not the first "Expulsion of Undesirables Ordinance" passed in the British Empire: similar measures were passed in Trinidad and Tobago in 1922, and in British Guiana and Tanzania in 1930, and in the Territory of New Guinea in 1935.

37 Supplement No. 3, J B Griffin, Objects and Reasons [Expulsion of Undesirables Ordinance 1949] (Aug. 1949), CO 129/604/7.

The provisions in Hong Kong's Expulsion of Undesirables Ordinance were unique, in the context of similarly titled laws, in providing detailed content to the category of undesirability. Trinidad and Tobago's 1922 Ordinance did not specify any particular category of persons as being "undesirable," rather granting "the Governor in Executive Council" the power, if he deemed it "expedient for the preservation of the peace and good order of the Colony," to "make an order […] requiring [any person] to leave the Colony."[38] British Guiana and Tanzania's 1930 Ordinances left undesirability similarly unspecified.[39] While it has not been possible to locate a copy of New Guinea's 1935 Ordinance, it seems likely it was similar. The 1950 Ordinance that repealed and relaced New Guinea's 1935 Ordinance certainly opted for a broader approach, allowing for the deportation as undesirables of anyone "not born in the Territory" who had "at any time been convicted under any law […] of a criminal offence punishable by imprisonment for one year or longer" or "whose presence in the Territory is prejudicial or likely to be prejudicial to the peace, order, or good government of the Territory or to the well-being of the natives of the Territory."[40]

The Expulsion of Undesirables Ordinance was a remarkable sort of measure, including due to the extensiveness of the categories of person it delimited, as well as due to the broad, vague, and demonstrably prejudicial label of "undesirable" through which it classified such persons. While utilizing a new form of labelling, however, the measure fit squarely into the vagrancy law legacy, not only due to the fact that vagrants were among those covered, but also insofar as many of the other categories of "undesirability" – including being without means of subsistence, a beggar, a "prostitute," or simply generally suspicious – had all also been traditionally covered by vagrancy laws. In granting wide power of deportation over such categories of individual, the measure also recalled a wave of eugenically-framed migration laws passed in the United States both prior to and following the First World War.[41]

38 Ordinance No. 24 of 1922 (Trinidad and Tobago), section 2.

39 Ordinance No. 30 of 1930 (British Guiana); Ordinance No. 15 of 1930 (Tanzania).

40 Ordinance No. 9 of 1950 (Papua New Guinea), section 4(1).

41 Examples include 1903 "Anarchist Exclusion Act" (Pub. L. No. 57-162, 32 Stat. 1213 [Mar. 3, 1903]) and the 1924 Immigration Act (Pub. L. No. 68-139, 43 Stat. 153 [May 26, 1924]) in the United States. For discussion of some of these laws, see Roberts (2022).

For its part, the Colonial Office indicated in internal correspondence that there was a "need for some simple and therefore inevitably somewhat summary procedure for relieving the pressure of population in the Colony," in order to address the presence of a "large number of Chinese who have entered the Colony since the war [and who] present urgent and serious problems in the maintenance of public order and health."[42] At the same time, it urged the authorities to only use the procedure [the Expulsion of Undesirables Ordinance] in question in cases of "emergency," and to suspend its usage when "the conditions of over-population cease." In response to such criticisms, the Attorney General of Hong Kong admitted that the Ordinance did indeed authorise an "arbitrary" power, but promised it would only be used "in circumstances of real need."[43] However, the Colonial Office did not find this position particularly convincing and weighed in again later in the year to note that if in fact such measures were intended only for emergencies, it would have been more appropriate to rely on an emergency regulation.[44] In addition, the Colonial Office expressed concern that "[t]here has recently been some publicity about 'Human Rights'," in which context it was felt "the existence of the Ordinance would be a good weapon for anti-colonial propaganda."

In March 1950, Secretary of State for the Colonies James Griffiths indicated that the Expulsion of Undesirables Ordinance would not be disallowed, given the "public order, health, and essential supplies" issues in Hong Kong. However, Griffiths also expressed concern that the government, having adopted the powers in question through a permanent law, rather than as an emergency measure, might afford "hostile propagandists the opportunity of criticizing the Hong Kong Government by talk of arbitrary arrests, concentration camps, etc."[45] Griffiths observed approvingly that section 14 of the Ordinance specifically envisioned the Ordinance's potential suspension and noted that he "should not wish the Ordinance to be used merely as a convenient method for effecting deportation […] or to be kept in force

42 Draft Despatch from the Colonial Office for Foreign Office Consideration, addressed to the Governor of Hong Kong, CO 129/604/7.

43 Hong Kong Legislative Council Minutes (Aug. 31, 1949), CO 129/604/7.

44 Notes from HP Hall (Colonial Office) (Dec. 14, 1949), CO 129/604/7.

45 Dispatch from Colonial Office in London (James Griffiths, Secretary of State for the Colonies) (Mar. 15, 1950), HKRS-163-1-1249.

when there is no longer any likelihood that its provisions will be needed." While some in the Colonial Office supported this position, observing that the Ordinance "would not merely improve morale in Hong Kong, but would also strengthen the Governor's hand by enabling him to reduce the 'undesirable' population among which the Communists are bound to foment trouble," others were more cautious, arguing that its potential over-utilization might have "serious" consequences "both for the Colony [and] for our general relations with China."[46] Although Governor Grantham continued to support the Ordinance, arguing that the "continued alarming increase in population" made it an "essential corollary to the new immigration control measures," the Foreign Office pushed back, suggesting they were "not convinced that the situation is such as to warrant large scale expulsion."[47]

Debates over the Ordinance were eclipsed by the outbreak of the Korean War in mid-1950, following which the Colonial Office decided to give local authorities a freer hand. In particular, the Colonial Office argued that "the Korean developments, and [...] the constant pressure that is being put on the Officer Administering the Government to subordinate the interests of Hong Kong to American requirements in waging the Korean war" were serious enough to allow the Hong Kong government to implement the Ordinance without prior consultation with officials in London.[48] At the end of July 1950, Griffiths wrote to Grantham that "[you may] implement the Ordinance at your discretion without further reference to me."[49] Contemplating the subject in December 1950, the Executive Council determined that the "[g]overnment should adopt a firm policy of inducing the maximum possi-

46 Memo from N C C Trench (Foreign Office) to Hall (Colonial Office) (June 17, 1950), CO 129/624/8. Colonial Office officials had also earlier warned that the "existence of th[e] Ordinance would be a good weapon for anti-colonial propaganda," while those in the Foreign Office noted "it would certainly [make it] easy enough to talk of arbitrary arrest, concentration camps etc". Memo from HP Hall (Dec. 14, 1949), CO 128/604/7; Memo from Coates to HPH Hall (Jan. 25, 1950), CO 127/624/8.

47 Savingram No. 507, Governor of Hong Kong to Secretary of State for the Colonies (May 8, 1950), CO 129/624/8; Memo from NCC Trench (Foreign Office) to Hall (Colonial Office) (June 17, 1950), CO 129/624/8.

48 FC 10112/50, Memo from HP Hall (Colonial Office) to NCC Trench (Foreign Office) (July 21, 1950), CO 129/624/8.

49 Telegram 1182, Secretary of the State for the Colonies to the Governor of Hong Kong (July 27, 1950), CO 129/624/8.

ble proportion of Hong Kong's present population to return to China by forcible eviction of undesirables coupled with a consistent and wholehearted policy of discrimination by all Departments in favour of Hong Kong residents and against newcomers."[50] Hong Kong residents were understood as those "who had resided in the Colony for about 10 years and who w[ere] performing a useful function."[51] Meanwhile, "the forcible eviction of undesirables" was to "be accomplished by increased deportations (including expulsion as at present ordered by the Magistrates) and by use of the Expulsion of Undesirables Ordinance, 1950." In 1951, the Vagrancy (Amendment) Ordinance[52] and the Deportation of Aliens (Amendment) Ordinance[53] expanded the instances in which individuals could be deported without the need for a hearing before a magistrate.[54]

In sum, while Hong Kong's governing authorities initially equivocated between more humane and more securitized approaches to the city's new migrant population, harsher approaches soon won out.[55] While vagrancy law continued to constitute one part of the legal architecture relied upon for deportations in the post-war period, the massive influxes of population that followed the war, together with the new security situation, led to a more expansive and more targeted regime of population and border control, within which vagrancy law had a greatly diminished role.[56] While vagrancy law was much less explicitly relied upon, however, the ideological and rhetorical

50 Executive Council Meeting (Dec. 6, 1950), HKRS-163-1-1249.

51 Ibid. What exactly constituted a "useful function" was left unspecified.

52 Ordinance No. 28 of 1951.

53 Ordinance No. 29 of 1951.

54 Deportation policy remained subject to debate within the government in subsequent years, however, including due to the observation by several government officials that those expelled often seemed to return. See, e. g., Commissioner of Prisons to Hon. C. S. (Dec. 31, 1951), HKRS-125-3-367; Social Welfare Officer to Hon. C. S. (Mar. 7, 1952), HKRS-163-1-1518. Moreover, while several thousand persons were deported in 1950 and 1951, China and Taiwan both stopped accepting deportees in 1952, rendering the other measures adopted more significant. See Sutton (2017) 163.

55 As Goodstadt (2004) had observed, while the British Colonial Office began to support more progressive policies in the 1930s, pressure in this direction dramatically weakened, at least in Hong Kong, in the post-war decade.

56 In some cases, the developments here – such as increased use of concentration camps and barbed wire – fell along the lines of repressive developments in the colonial context generally, augmented by the wartime experience. On the history of concentration camps, see Pitzer (2018). On the history of barbed wire, see Forth (2017).

impacts of vagrancy law could still be strongly felt, with the same descriptions that were so often applied to "vagrants" in the 19th century now applied to "refugees," "undesirables" or the like – in short, that they were lazy and reluctant to work, "parasitic," and potentially both criminally and politically dangerous.

3. New criminal others

As explored above, the Hong Kong government implemented a range of new legal measures aimed at better controlling the border and facilitating deportations in the postwar years, supplanting vagrancy law's traditional role in that area to a significant extent. As noted in the introduction, while vagrancy law played a role in migration control, especially in a city like Hong Kong, that was never its sole function. Another important function of vagrancy law was to provide ideological support to the adoption of strong public order measures, which it was argued were necessary in order to confront the challenges posed by threatening figures such as that of the vagabond. By the post-Second World War period the "vagabond" was no longer frequently referenced as a source of public danger, however. Rather, in Hong Kong the post-war decades saw the rise to prominence of new figures of criminal concern, including prominently the communist agitator and the Triad member.

In order to understand the legal context in the immediate post-war period it is necessary to go back first briefly to 1911, when the Societies Ordinance was passed.[57] Aimed at "provid[ing] for more effectual control over Societies and Clubs," the Ordinance granted the authorities extensive discretionary authority to register associations, declared unregistered associations unlawful, and imposed a range of penalties on those associated with such "unlawful" associations. Sections 4 and 16 of the Ordinance gave the Governor-in-Council the power to exempt societies from registration, as well as the power to order a society's dissolution where it was suspected of "being used for unlawful purposes, or for purposes incompatible with the peace or good order of the Colony." In its commentary on the Ordinance the South China Morning Post ("SCMP") noted that passage of the Ordinance was "brought

57 Ordinance No. 47 of 1911.

about, or hastened to completion by the recent trouble among the boat-builders of the Colony."[58] In passing the Ordinance, the Legislative Council made clear a central aim was indeed to control labour and limit political organizing, stating:

> The objects and reasons mention working men's clubs as one of the classes of society we wish to control. It is these clubs which organise faction fights and lend out fighting men in cases where the Trades [sic] Unions wish to exercise coercion or intimidation […]. Then there is a third class of club, which is dangerous to peace and good order. Sometimes it is frequented by young men having revolutionary tendencies, or closely connected with the revolutionaries. It is necessary for us to keep a close eye on these clubs, and if necessary to suppress them.[59]

Following in the footsteps of the 1887 Triad and Unlawful Societies Ordinance, the Societies Ordinance also specifically penalised Triad membership. In drawing such a connection, the Societies Ordinance implicitly connected labour organizing to criminality in the form of Triad activity and membership. The Ordinance was heavily supported in the English-language press: the SCMP, for instance, suggested that the bill was "urgently required," argued that the new measures would ensure that societies' "power for causing excitement and causing annoyance will […] be considerably curtailed," and "commended" the government "on the steps they are taking to cope with what has become a perpetual menace to employers and to loyal employees alike."[60]

However, the effects of the new measure were disappointing in practice. As it was put in the Legislative Council, the law "failed to give the increased control expected," "probably dr[ove] several undesirable societies underground," "in some cases g[ave] a fictitious responsibility to doubtful societies on the border line," and overall "cast the net too widely," requiring the registration of "a great many societies that require no governmental regulation whatsoever."[61] The Ordinance was amended in 1920.[62] The 1920 framework was relatively progressive, removing the previously existing requirement that all societies exist under the framework of the law. At the same time, the authorities maintained and deployed discretionary power to

58 "In Leash," South China Morning Post (hereinafter SCMP) (Oct. 10, 1911).
59 Legislative Council Proceedings (Oct. 19, 1911).
60 "In Leash," SCMP (Oct. 10, 1911).
61 "Legislative Council," SCMP (June 18, 1920).
62 Ordinance No. 8 of 1920.

declare societies illegal. This power was put into use in response to the major seamen's strike in February 1922, with the government declaring the Chinese Seamen's Union an illegal society on the grounds that it was "being used and is likely to be used for purposes incompatible with the peace and good order of the Colony."[63]

The framework put in place in the 1920s remained in force in the 1940s. In 1948, however, following both Young's replacement by Grantham as Governor in 1947 and the ascendency of the Chinese Communist Party ("CCP") in China's civil war, Hong Kong's government – which, under Grantham, allied itself much more closely with the Kuomintang on security matters than it ever had done before[64] – adopted a more repressive approach to labour governance, and the governance of purportedly hostile "societies" in general. A key step in the direction of a harsher approach to governance came with the adoption of the Trade Unions and Trade Disputes Ordinance on April 1, 1948.[65] The Ordinance required trade unions to register or face dissolution, indicated that only registered unions would enjoy related labour rights, and gave the government extensive discretionary authority over whether to accept registration or not. Just over a year or so later, and less than a week after the CCP captured Nanjing, the Trade Unions and Trade Disputes Ordinance was complemented by the Illegal Strikes and Lockouts Ordinance.[66] That ordinance banned unions from having foreign affiliations, public sector worker industrial action and strikes with political objectives, which caused social hardship or which sought to "coerce" the government.

Shortly thereafter amendments were made to Hong Kong's Societies Ordinance.[67] In support of the new measure, the Attorney-General argued that

> [a]t this time when the state of the world is gravely unsettled and the maintenance of law and order in the Colony is likely to be endangered by outside influences, it is considered necessary that there should be in existence a record of all societies in the

63 "Strike Situation: An Electric Day – Suppression of Intimidators, Government Adopts Drastic Measures, Sign of a Split in the Strike Camp," SCMP (Feb. 3, 1922).

64 See Louis (1997) 1070–1071.

65 Ordinance No. 8 of 1948.

66 Ordinance No. 10 of 1949. The 1948 Trade Unions and Trade Disputes Ordinance had in fact repealed a similar measure that had been instituted in 1927. See Levin/Chiu (1998).

67 Ordinance No. 28 of 1949.

> Colony and a knowledge of their objects combined with enhanced powers to control societies.[68]

Making fairly apparent the amendment's anti-CCP intent, the Attorney-General observed that a key function of the new measure would be to ensure that "local societies now in the Colony which are affiliated or connected with any political organisation or group outside the Colony shall be refused registration and thus become unlawful with the consequence that management or membership of any such society will constitute offences punishable under the law." The new measure restored the requirement of compulsory registration of associations. The Special Branch – a subdivision of the police created in late 19th-century Britain to tackle political crimes – was given authority to oversee registrations.[69] As Sutton puts it, "[c]ombined with the Trade Unions and Trade Disputes Ordinance, the Societies Ordinance effectively outlawed all foreign politics and gave the governor sole discretion without an appeals process to determine if a society should be prohibited."[70] While acknowledging the measure's restrictive nature, Grantham defended it on the grounds that "there is no discrimination, [as] foreign political parties of all views are equally prohibited."[71] For its part, the CCP observed that "[t]he Societies Ordinance is of an anti-Communist, anti-people, anti-democracy and anti-freedom nature. It persecutes the people of Hong Kong and turns Hong Kong into a 'police state.'"[72]

68 "Control of Societies: Registration To Be Refused To Those With Political Affiliations, Legislation Introduced," SCMP (May 19, 1949).

69 "Police Special Branch: Additional Tasks During Past Year," SCMP (Nov. 30, 1950).

70 Sutton (2017) 96.

71 Grantham to Creech Jones (Apr. 8, 1949), CO 537/4835, cited in ibid.

72 CCP Report, "An understanding of the nature of the Society Ordinance" (June 24, 1949), CO 537/4815, cited in ibid. at 97. Similar developments continued in subsequent years. In 1952, further amendments to the Societies Ordinance ensured that even small associations were covered, and extended the authorities' ability to penalise those "incit[ing], induc[ing] or invit[ing]" others to join or support, or who otherwise secured financial support for, unlawful associations. See Ordinance 3, 1952; "Societies Ordinance: Amendments Proposed in New Bill," SCMP (Jan. 9, 1952). The same year, the authorities commenced "clandestine deportations by junk" of suspected Triad members as well as other "alien Chinese," in order to attempt to avoid the challenges posed in the context of attempted deportations across the land border – highlighting from another angle the Triad-vagrant connection. This policy only ran for a few years, however, being determined "no longer feasible" by 1954. See Report on Triad Societies in Hong Kong, Triad Society Bureau – Hong Kong Police (Aug. 1964) (hereinafter Triad Societies Report). In 1955, Hong Kong's

From the moment the CCP gained the ascendency in the Chinese civil war, in short, the threat of communists came to play a major role in shaping policy in Hong Kong, including by justifying the imposition of sharply repressive labour laws and a draconian approach to freedom of association, despite a Labour government being in power in Britain. Ability to forcefully and publicly rely on the figure of the communist agitator as the grounds to justify harsh public order measures quickly declined, however, not least due to need to establish at least non-overtly hostile diplomatic relations with China's new authorities. As such a gradual transition began to occur, in which the figure of the "Triad" took over as the principal image of the threatening criminal other. At times, the Triads were Kuomintang linked,[73] at times communist linked; before long, however, the idea of the Triad as a public order threat had enough legs to stand on its own.

Key in this transition were 1956 protests and clashes between pro-Kuomintang and pro-CCP members of Hong Kong's population. In its internal documents as well as its subsequent press on the issue, the government suggested the clashes had at the very least been sharply exacerbated by Triad gangs.[74] In an address to the Legislative Council in early 1957, Governor Grantham emphasised that it was "crucial to 'turn potential little hooligans into responsible citizens,'" or in other words to prevent them "from becoming 'rioters or members of a Triad society,'" and suggested that boys' and girls' clubs could help in this aim.[75] The government also commenced a campaign against those it saw as Triad members, deporting many. These deportations were apparently ineffective, however, with "the majority [being] sent back to Hong Kong within hours of crossing the border." In response, the government issued new Emergency (Detention Order) regulations, allowing for the emergency detention of those whose "deportation proved impracticable or who unlawfully returned to the Colony following

Attorney General, Arthur Ridehalgh, sent a memo to the Colonial Secretary proposing emulation of a provision of Nigeria's Criminal Code which allowed the Governor-in-Council to declare a society unlawful where he deemed it "dangerous to the good government of Nigeria." Memo from Arthur Ridehalgh (Attorney General) to Colonial Secretary (Feb. 10, 1955), HKRS-920-1-2.

73 See Louis (1997) 1069.

74 See Triad Societies Report; Jones/Vagg (2007) 299–305.

75 Mark (2007) at 1164–1165, citing Hong Kong Hansard, Session 1957, Meeting of February 27, 1957.

their deportation."[76] By the end of 1957, the authorities in China "had completely clamped down of the entry of criminal deportees," however, forcing the authorities to further develop domestic measures.

The government complemented these measures with amendments expanding the Registrar's ability to rescind registration.[77] These amendments too were justified on the basis that they were a necessary response to "[t]he grave and costly riots which [had] burst upon Kowloon," which, in the eyes of the SCMP, had "revealed the alarming extent to which secret and other unlawful societies had insinuated themselves into the Colony."[78] As the SCMP continued,

> [i]t has long been recognised that in a Chinese population such as ours secret societies have more opportunity than usual to flourish, though few imagined last year that they had become so firmly implanted in the Colony. Awakening to the realities was rude and distressing. It also left Government with no alternative but to take whatever legislative steps it deemed essential to bring about the eradication of these bodies, so capable of inciting disorder.

In justifying the new measure, the Attorney General "commented that two things are accepted by reasonable opinion in Hong Kong as axiomatic – the need for maintaining control over societies, thereby combatting subversive or criminal activities, and the vulnerability of the Colony to undesirable organisations, capable and ready to engage in lawlessness such as the riots of last October." The SCMP supported that position, observing:

> The community generally […] believes that Government must adopt all reasonable measures to prevent the continued existence of these unlawful elements […] In the ordinary course of events, this latest legislation would be subject to the criticism that it is too sweeping in the powers it invests in the authorities – executive and judicial. But as the Attorney General argues, proof of the existence of unlawful societies has been one of the big difficulties in the way of prosecuting, and it is essential those difficulties, if not entirely removed, be at least reduced.[79]

76 While these measures were challenged – on the basis that they in effect represented a form of quasi-criminal punishment in regards to which no representation needed to be provided, no formal charges needed to be made, and under which detention could be broadly authorized – the authorities insisted on maintaining them, citing the ongoing danger posed by Triads in particular. See Jones/Vagg (2007) 318.

77 Ordinance No. 31 of 1957.

78 "The New Societies Ordinance," SCMP (July 6, 1957).

79 The SCMP also observed that "victimi[zation of] the innocent," due to "[e]xcessive zeal and arbitrary action," should be "avoided at all costs," however.

In subsequent comments, Arthur Ridehalgh, Hong Kong's Attorney General between 1952 and 1961, argued the amendments had been important in "giv[ing] the Commissioner of Police a measure of help in curbing the activities of Triad and other unlawful societies" by providing "added weapons against these evil associations."[80]

The authorities put their new powers into operation on several occasions in subsequent years. In 1959, for example, the Society of Plantations, a farmers' collective in the New Territories, was dissolved on the grounds that it was a communist front organization, and three of its senior members were deported across the border.[81] In addition, a supportive law, the Companies (Prevention of Evasion of the Societies Ordinance) Ordinance,[82] was passed to "close a loophole" that allowed people to "carry on 'nefarious activities'" by registering under the Companies Ordinance."[83] In 1960, the penalties imposable under Hong Kong's vagrancy law were increased (Ordinance 3, 1960). In 1961, further significant amendments to the Societies Ordinance were made, tightening the rules, extending the Registrar's discretionary powers, and enhancing the penalties applicable relative to "Triad societies" in particular.[84]

1958 and 1959 also saw the formation of a new Triad Societies Bureau within the police. In August 1964, the Bureau released a report on Triad activity and anti-Triad efforts to date. The report observed that more than 10,000 "Triad members" had been convicted between 1956 and 1960 (with the majority bound over for good behavior), and that 600 officers had been brought before the courts, of whom 400 or so were deported under the Deportation of Aliens Ordinance.[85] The gradual transformation in the manner in which the Triad threat was presented could be seen in the bifurcated definition of the Triad contained in the report. On the one hand, the report observed that "[t]he orthodox Triad Society may be defined as a disciplined

80 Societies Ordinance: Resolution for year's extension adopted by Legislative Council Curbing Triad Activities (Dec. 19, 1957), HKRS-163-1-937.

81 See "Around Hong Kong," SCMP (May 31, 1959).

82 Ordinance No. 23 of 1959.

83 "Societies Ordinance: First reading of bill designed to close a loophole, menace of unlawful groups," SCMP (June 25, 1959).

84 See Ordinance No. 28 of 1961.

85 See Triad Societies Report. The Deportation of Aliens Ordinance was Ordinance No. 39 of 1935.

blood brotherhood dedicated to a political cause, members of which are bound by ritual and sacred oath not to betray or offend one another and are engaged in collecting funds for a common purpose." On the other hand, the report observed that

> [t]he Triad Society as it exists in Hong Kong today may be defined as a large number of independant *[sic]* street gangs totally lacking in central control, each one a loose aggregation of a dozen or so criminals who are engaged in the Triad practices of extortion and the organisation and protection of vice in all its forms, but nevertheless able, under the menace of the still awe-inspiring name of Triad, to terrorise the majority of the Chinese population.

In short, in other words, "Triad" at the time was a term with dual meaning – referring both to a well-defined, overtly threatening, tightly-bound, and politically oriented "blood brotherhood," as well as, much more loosely, to any low-level association of individuals engaged in criminal activities. Whatever the empirical reality of this observation, what is clear is that this expansive, dualistic definition of "Triads" was of utility to the authorities, providing two different angles from which the maintenance of a strong police force, backed by forceful criminal laws, could be justified.

The equation of "Triads" with both political unrest and crime broadly continued as the 1960s went on, before gathering further steam following the 1967 "riots." A report on "Triads" issued in 1969 observed an apparent rise in assaults and robbery in the period, carried out by "gangs of young people" "on the fringe of the Triad movement."[86] Among other things, the police blamed the rise in crime on "[t]he decline of parental authority, the acceptance of a more 'permissive society', the continued portrayal of teenage violence in the cinema, on television and other mass communication media coupled with the natural frustration of youth brought about by their social environment."[87] In conclusion, the police observed "whilst the resurgence of a pure form of the triad cult is not seen as likely, a lack of vigilance by the police and other authorities could provide the climate in which quasi-triad activities could give way to a more pure form reminiscent of the situation pre-1956 before the Triad Society Bureau was formed." At a government meeting held shortly after completion of the report, the authorities agreed to "broaden the basis of the […] Triad and Society Bureau and Juvenile

86 Triads, Police Headquarters (June 6, 1969), HKRS-874-7-1, para. 26.
87 Ibid., para. 43.

Liaison Office to deal with all gang and quasi-triad activities."[88] The possibility of utilizing the Emergency (Deportation and Detention) Regulations, understood as likely to constitute a more severe deterrent, was also considered. That possibility was floated again by the Chief of Police in 1970.[89] Meanwhile, "widespread stop and search operations at night" commenced in "areas frequented by youths," a step that, according to official reports at least, "certainly had some effect," though "the Commissioner [was] not confident that it w[ould] be more than temporary."[90]

Alongside these steps, the government decided to devote further resources to the police.[91] In addition, the provision requiring annual renewal was stripped from the Societies Ordinance in 1970, rendering the measure permanent.[92] In 1971 the Legislative Council debated measures that might be taken to further strengthen the fight against crime, in response to a reported rise in crime.[93] In 1972, the Attorney General indicated that the government had determined to reverse the "increasingly liberal and humane attitude" that had, apparently, been adopted in recent years, and to replace it with "a harsher view."[94] The tougher measures the government was taking and proposing were not universally supported. A Special Committee of Hong Kong's Bar Association, for instance, expressed their concern with the new District Court, Magistrates, Criminal Procedure and Public Order Amendment bills, and the enhanced sanctions regime included therein, in particular.[95] Justice, the British section of the International Commission of Jurists,

88 Extract from Notes of Government House Meeting (June 13, 1969), HKRS-874-7-1.

89 See Extract from Minutes of a meeting held at Government House (July 10, 1970), HKRS-874-7-1.

90 See Colonial Secretary to Leslie Monson, Foreign and Commonwealth Office (Aug. 6, 1970), HKRS-874-7-1. The policies also apparently led to "criticism […] by academically-minded expatriate lawyers," which the Colonial Secretary worried could "promote unwelcome interest among people outside Hong Kong who lack the benefit of accurate and up-to-date information on the situation."

91 See Governor's Address to Legislative Council (Oct. 1, 1970).

92 See Attorney General to Legislative Council (Oct. 7, 1970).

93 See Crime Statistics, Legislative Council (Jan. 6, 1971); Legislative Council (Feb. 24, 1971).

94 Speech by Attorney General in Debate of the Governor's Address in Legislative Council (Nov. 15, 1972), HKRS-2144-1-4.

95 See Fighting Crime – Comments on the Fight Violent Crime (hereinafter FVC) Campaign, Compiled by the Special Committee on Crime and Punishment of the Hong Kong Bar Association (May 1973).

also criticised the proposed bills.[96] Other anti-crime community groups supported the measures, however.[97] Police presence on the streets was increased, including through the recruitment of additional police auxiliaries, and more raids and stop and search actions were conducted.[98] On June 21, the District Court, Criminal Procedure and Public Order Amendment Ordinances were passed. The Criminal Procedure (Amendment) Ordinance introduced a system of preventive detention for individuals with four convictions or more, with sentences ranging from five to fourteen years.[99] The Public Order (Amendment) Bill allowed corporal punishment to be used. In addition, the new measures extended the maximum sentence district court judges could hand out from five to seven years. These measures were supported by numerous editorials in the Chinese language press.[100]

The "Fight Violent Crime" campaign continued in 1974. Raids, sweeps and stop and search operations, targeted at "areas […] known to be frequented by triad and gang elements", as well as at "[p]remises such as billiards salons, massage parlours, illegal gambling houses and brothels known to be managed, staffed or frequented by triad and gang elements," remained a centrepiece of the programme.[101] In addition, the programme targeted "known leaders of triad and gang elements," who were to "be picked up and interrogated on a regular basis and, should evidence so warrant, prosecuted." In 1976, the policing of the New Territories was stepped up.[102] Some police authorities remained unhappy with their powers under the law as of late 1976, leading to proposals, *inter alia*, to introduce penal sanctions under which convicted Triad members might be penalised for consorting with other Triad members.[103] The Attorney General expressed some reservations

96 See UK Bid to stop anti-crime laws (June 15, 1973), HKRS-2144-1-4.
97 See, e.g., "Tougher laws give new teeth to new crime drive," SCMP (May 12, 1973); "Measures to beat crime supported--a step in the right direction," Hong Kong Standard (May 14, 1973).
98 See Legislative Council (June 20, 1973); Legislative Council (Aug. 1, 1973).
99 See, e.g., "Bill to increase sentencing power of magistrates," SCMP (May 24, 1973).
100 See Chinese Press Editorial Translations, Public Relations Division (June 20, 1973), HKRS-2144-1-4.
101 Paper for the Governor's Committee-FVC Programme (1974), HKRS-163-8-9.
102 See Notes of the New Territories Administration, Heung Yee Kuk and Royal Hong Kong Police Meeting in Connection with the FVC Committee (Jan. 6, 1976), HKRS-934-1-4.
103 See Review of the Triad Problem, Triad Society Bureau, Royal Hong Kong Police Force (Dec. 15, 1976), HKRS-934-12-54.

around such proposals, however, including due to the fact that they might "victimi[ze] innocent groups."[104] Police actions were complemented by the efforts of the "District Fight Violent Crime Committees," which were deemed by a government report to have been "generally effective in bringing about a greater public awareness of the need to report crime and to become more sensitive towards security matters," including by

> a) promoting public wariness by publicizing campaigns at district level […];
> b) promoting better understanding and free and informal discussions between representatives of local communities and Government departments on matters affecting security and kindred matters […]; [and] c) providing regular opportunities to gauge local public opinion on crime and reaction to police anti-crime efforts.[105]

In sum, by the latter part of the 20th century references to vagrants and vagabonds had largely disappeared from public discourse. At the same time, however, the role played by the figure of the vagabond in terms of justifying strong law enforcement powers in the hands of the state did not go unfilled; rather, the archival materials surveyed above suggest, the figure of the vagabond was gradually replaced – first, more tentatively and with more reservations (in the period) by that of the communist agitator, and later, with greater confidence, by that of the "Triad member". In many ways, moreover, the Triad member, Hong Kong's equivalent of the gang member, was an even more ideally-suited candidate for the role in question, as a mysterious, malleable figure that invoked vague sentiments of political threat, while in practice also constituting a label that could be pinned on forms of activity otherwise best characterized as petty youth street crime.

4. From vagrancy to loitering

Hong Kong's vagrancy law was repealed in 1977 by the Law Revision (Miscellaneous Amendments) Ordinance.[106] The repeal of Hong Kong's vagrancy law occurred in the context of unprecedented contestation of vagrancy laws around the British colonial and settler colonial worlds. Central here were several decades of dedicated challenge to vagrancy laws by civil rights lawyers

104 FVC Sub-Committee – Review of the Triad Problem (Mar. 8, 1977), HKRS-934-12-54.
105 FVC Committee Paper No. 5 – Review of District FVC Committee (Jan. 5, 1978), HKRS-934-1-4.
106 Law Revision (Miscellaneous Amendments), Ordinance No. 70 of 1977.

and legal academics in the United States, which culminated in the 1972 Supreme Court decision in *Papachristou v. City of Jacksonville*, which found that the criminalization of vagrancy was unconstitutional on the grounds of vagueness.[107] This wave of challenges was followed and accompanied by challenges elsewhere as well. In Canada, wandering without apparent means of support, begging and being a "common prostitute" were all decriminalized in 1972.[108] In the United Kingdom, section 4 of the 1824 Vagrancy Act, known as the "sus" provision due to the fact that it authorized detention on the basis of suspicion alone, came under challenge from the 1970s on (though it was only repealed after Hong Kong's vagrancy law, in 1981).[109] In New Zealand the explicit penalization of vagrancy was repealed in 1981.[110]

No sooner had Hong Kong's vagrancy law been repealed than the authorities began considering means through which to fill the lacuna, however. In 1978, the Fight Crime Committees considered the potential addition of a loitering offence to Hong Kong's penal code. The government supported the adoption of such a new provision, arguing that it should be "widely drawn" in order to "counte[r] the activities of gangs who lurk, for example, in the public areas of housing estates and obstruct or frighten residents."[111] In 1979, the penalization of loitering was put forward in the Legislative Council. The proposed amendment criminalised "loiter[ing] in a public place or the common parts of any building" without excuse, or in such a way as to lead to obstruction, or in such a way as to lead another to be "reasonably […] concerned for his safety or well-being."[112] Those convicted of loitering could be sentenced to two years' imprisonment. The new measure was to replace the penalization contained in section 26 of the Summary Offences Ordinance, which, notably, was more limited, targeting specifically overnight loitering. Overall, the bill was framed as a way to combat "gangs, commonly

107 See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); Goluboff (2016).
108 See Ranasinhe (2010).
109 The measure that repealed the "sus" component of vagrancy law in England was the Criminal Attempts Act, 1981 c. 47 (Aug. 27, 1981). That act followed extensive criticism; see Hall et al. (1978).
110 See New Zealand Summary Offences Act 1981, Public Act No. 113 of 1981 (Oct. 23, 1981).
111 Minutes of 68th Meeting of Fight Crime Committees (Oct. 26, 1978), HKRS-934-12-44.
112 Proposed First Draft (Apr. 19, 1979), HKRS-618-1-231.

associated with Triad societies, which come together in public places and the common parts of housing estates and other buildings."

The proposed loitering offence was criticised by the Hong Kong branch of Justice (the British section of the International Commission of Jurists), who noted that their objections were similar to their objections to the "crime of public assembly," in particular in that "[i]n both cases, perfectly innocent conduct can, under the wording of the legislation, be an offence."[113] Henry Litton, of the Hong Kong Bar Association, also criticised the law. Litton's critique was detailed: he noted that the law was broader and "more obscure" than the provisions it was aimed at replacing; that the penalty had been "drastically increase[d];" that no effort had been made to provide clarity as to whether some mens rea had to be proved relative to loitering; that there was a particular problem in terms of the Chinese translation of the phrase "loitering," which "barely adumbrate[d] some recognizable social misbehavior;" and that while the explanatory memorandum had referred to the "menacing behaviour of gangs congregating in public places," this hadn't been reflected in the elements of the crime in question.[114] In a meeting with the legislative scrutiny group shortly thereafter, the Attorney General, John William Dixon Hobley, argued that the bill was necessary in order to "assist the police to maintain law and order by strengthening their preventive powers."[115] The bill was thereafter amended to reduce the penalty applied to six months' imprisonment.[116] However, the bill continued to be criticised by members of the Legislative Council. Wong Lam argued that despite amendments, the revised proposal continued to allow for "unjustifiable interference with personal freedom," and suggested that additional safeguards be added.[117] T. S. Lo took the occasion to criticise the lengthy remand detention in which those

113 British Section of the International Commission of Jurists, Hong Kong Branch–Committee of Justice, Ian Robert Anderson MacCallum to Attorney General (Apr. 30, 1979), HKRS-618-1-231. The Hong Kong branch of Justice noted they would not have a problem with the penalization of loitering if it were limited to cases involving reasonable concern for safety or well-being, however.

114 Hong Kong Bar Association (Henry Litton QC) to Attorney General (May 4, 1979), HKRS-618-1-231.2

115 Notes from Meeting Held by Legislation Scrutiny Group with the Attorney General (May 7, 1979), HKRS-618-1-231.

116 See Amendments to be moved by the Attorney General (May 14, 1979), HKRS-618-1-231.

117 See Draft Speech by Wong Lam JP Legislative Council (May 23, 1979), HKRS-618-1-231.

charged but not yet convicted of loitering or the like might be held.[118] Despite ongoing concerns, the Crimes Amendment No. 2 Ordinance passed on May 23, 1979.[119]

The new penalization of loitering was heavily relied upon: as of 1984, 3,000 or so loitering cases were being brought per year.[120] In 1985, the law was challenged by Judge Penlington's decision in *The Queen v Ma Kui*,[121] a decision influenced by the recent rejection of the "sus" laws in England.[122] In his decision, Penlington attempted to force the loitering law into compliance with some basic notions of due process by requiring "a strict interpretation," and suggested that "the defendant [was] entitled to an acquittal if the magistrate [was] not satisfied" that the explanation offered by the accused as to their presence in a certain place was untrue, with satisfaction in such cases meaning being "satisfied beyond reasonable doubt." Penlington's decision was, unsurprisingly, criticised by the Fight Crime Committee Secretariat, which observed "[s]ome recent interpretations of portions of the Societies Ordinance by the High Court may make it virtually impossible to obtain a conviction for the offence of being a member of a triad society."[123]

Shortly thereafter, loitering charges against Sham Chuen resulted in an appeal to the Privy Council. In *Attorney General v Sham Chuen*, the Privy Council took a far less progressive tack.[124] The magistrate and Court of Appeal below had found the loitering law problematic, due to the fact individuals might be convicted where they were unable to provide a satisfactory explanation of their presence in a place, a requirement that prima facie appeared to violate their right to remain silent. The Judicial Committee of the Privy Council deemed this not to pose a problem, however, albeit through a rather tortured and tenuous form of reasoning.

Unease with the open questions posed by the penalization of loitering lingered, however, leading the Chief Justice and the Attorney General to

118 See Speech Re Crimes Amendment No. 2 Bill T. S. Lo (May 23, 1979), HKRS-618-1-231.
119 Ordinance No. 37 of 1979.
120 See "Judge's decision puts law on loitering in spotlight," SCMP (Oct. 1, 1985).
121 *The Queen v Ma Kui* [1985] HKCU 35.
122 See ibid., para. 9.
123 "A Discussion Document on options for changes in the law and in the administration of the law to counter the triad problem," Fight Crime Committee Secretariat, Security Branch (Apr. 1986).
124 *Attorney General v Sham Chuen* [1986] UKPC 32 (17 June 1986).

refer the question of "[w]hether the law relating to the offences of loitering […] should be amended and, if so, what changes should be made" to the Law Reform Commission in 1987. In its 1990 report, the Commission urged the repeal of the loitering law.[125] Despite the Law Reform Commission's recommendation the authorities decided not to abolish the penalization of loitering, however, and it has remained on the books since. While "vagrancy" law has formally been repealed in Hong Kong, therefore, the broad discretionary power vagrancy laws once granted the police to detain the poor and control public spaces lives on in the form of loitering laws, which have been maintained despite several well-reasoned challenges.

5. Conclusion

Vagrancy law was omnipresent in 19th and early 20th century Britain, the British Empire and the British settler colonial world.[126] In addition to providing the authorities with an enormously flexible tool – and hence constituting a primary source for the expansion of executive and law enforcement authority as such – vagrancy law played a powerful ideological role, helping to cement in official and public imagination connections between poverty, immorality, criminality and migration – the four areas over which vagrancy law exercised its power.[127]

Following the Second World War, however, as this article has explored, vagrancy laws gradually became less relied upon. This reduction in reliance was not indicative of the end of the vagrancy law tradition, however, but rather of the transition of the various functions vagrancy laws once played into new, more targeted legal regimes. This article explored two of those transitions. First, it considered the manner in which confrontation by a large "refugee" population, and a changing security situation, led Hong Kong authorities to develop a stricter border control regime in the years immediately following the Second World War. While vagrancy laws came to be less

125 See Law Reform Commission of Hong Kong, Report: Loitering (June 1990), para. 8.7. The Commission justified its recommendation in significant part on the basis that the police would retain the power to question and detain on the basis of suspicion under section 54 of the Police Force Ordinance, posing the question of why that power should not also be deemed to enable the arbitrary and discretionary deprivation of liberty.

126 See Roberts (2023).

127 See Roberts (2024).

explicitly relied upon in this context, their ideological influence could clearly be seen to persist, as the various negative characterizations those laws had suggested were appropriate in the context of vagrants were transferred to the city's new impoverished migrant population.

Second, the article considered the manner in which, while references to the "vagrant" declined in Hong Kong following the Second World War, new categories of the "criminal other," including both the communist agitator and, later and with enduring appeal, the "Triad" member, became increasing subjects of public attention, justifying the development of a range of new repressive measures. These evolutions can be understood along similar lines to the manner in which the criminal was "reconstructed" in 19th century England.[128] Whatever the truth of the threat (to safety or "law and order") posed by Triads – a subject this article has not explored – the idea of the Triad was clearly useful, in terms of justifying the creation of a stronger police force and the adoption of harsher criminal measures. Third and finally, and in close connection, the article observed that while the penalization of vagrancy was repealed in Hong Kong in 1977, the penalization of loitering was shortly thereafter dramatically increased, ensuring that the space opened up by the removal of vagrancy law as a means under which discretionary detention of the poor might take place was quickly filled.

As in the context of its anti-migrant functions, therefore, while vagrancy law's explicit role in helping extend the power of law enforcement authorities, and in shaping public perceptions of criminal danger, was brought to a close in the latter portion of the 20th century, its legacy lived on, in alternative images of the criminal other and in alternative legal mechanisms that could be put to highly similar use. While this article has not explored the legacies of vagrancy law's other two functions – penalizing the poor and the "immoral" – the legacies in both of those areas are almost certainly similar. Whether the disaggregation and functional specialization of the various subcomponent areas of vagrancy law will serve to strengthen the legitimacy of each, protecting them from the rule of law and human rights-based challenges vagrancy laws have been subjected to – or whether, on the other hand, disaggregation of the regimes may open up increased space for challenge, at least in some areas – remains to be seen.

128 See Weiner (1990).

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Part II

Landscape, Law, and Spatial Justice in the former British Empire

Amy Strecker and Amanda Byer

Introduction:

Landscape, Law, and Spatial Justice in the former British Empire

1. Background to the section

The chapters in this section of the volume were written in the context of an ongoing ERC funded research project entitled PROPERTY [IN]JUSTICE,[1] which investigates the role of international law in facilitating spatial justice and *in*justice through its conceptualisation of property rights in land. International law plays an increasing role in land use decision-making (through international norms on trade and investment, energy, environment, human rights, and cultural heritage), and that role can exacerbate inequalities and geographic disparities, but can at times also act as a tool for improved spatial justice. The project is focusing on Ireland, the Caribbean, Kenya, and Southern Africa,[2] regions (and countries) that not only reflect the experience and heritage of the project team, but which also share an important historical dimension, since land law in these jurisdictions was heavily influenced by (British) colonial law. Although the research is concerned primarily with ongoing issues of spatial injustice, the legal history of empire necessarily underpins any study of the contemporary context, and the interaction and reception of international law cannot be analysed in a historical vacuum. In addition, the common law idea of property influenced and continues to influence various strands of international law affecting land governance. The chapters in this section therefore deal with the historical context of land governance in Ireland, the Caribbean, Kenya and Southern Africa, as well as

1 Funded by the European Research Council (ERC), under the EU's Horizon2020 research and innovation programme, grant agreement no. 853514, Sutherland School of Law, University College Dublin.

2 For more information see https://www.landlawandjustice.eu/.

the legacies of that context today – especially in terms of how law, via the deployment of colonial conceptions of property, environment, and community, erased spatial and cultural diversity in land use, with implications for the subsequent legal protection of land, people-place relations, and the ability of communities to relate to land. As the following chapters illustrate, the idea of property narrowly conceived engenders spatial injustice and reduces the importance of land to vacuous space, to be utilised and developed without adequate consideration of the social, environmental, and cultural consequences.

The focus on spatial justice reflects the project's legal geographical approach. Legal geography calls attention to law's "spatial blindness"[3] and the need for local conditions to be infused in the law to reconcile ostensibly impartial legal concepts such as property with their geographic reality or landscape. This often requires recognition of the unique interactions between local communities, land and law, to make law effective. To do so is necessarily decolonial in the Common Law world, as the legal system was imposed during the creation of the British Empire. Landscape as a legal concept in fact predates property.[4] The work of Kenneth Olwig in particular has shown how the elements of community justice, body politic and custom were inherently embedded in early notions of landscape.[5] In "Recovering the Substantive Nature of Landscape", Olwig advocates recovering the "substantive" understanding of landscape, one that is "more concerned with social law and justice than with natural law or aesthetics."[6] Similarly, in the early etymology of property, Nicole Graham has shown how land had significance greater than the sum of its economic production value and was also an important component of identity.[7] The etymology of property and landscape betray these early meanings that were more substantive in character, tied to identity and particular places, before being subverted in favour of more abstract concepts of exclusive ownership and scenery.[8] The substantive nature of landscape has been partially recovered in international law

3 Bennett/Layard (2015) 406.
4 Jones (2005); Olwig (1996, 2002).
5 Olwig (1996).
6 Olwig (1996).
7 Graham (2011).
8 Byer (2023).

norms,[9] but property law remains largely placeless.[10] Indeed, Nicole Graham and Amanda Byer have demonstrated how the (common) law rewrote the land in the language of private property.[11] Land law does not deal with land, but with "placeless property", othered, abstracted and disembodied from the physical or metaphysical being of the land itself, something also alluded to by Sinéad Mercier when discussing energy law.[12]

While legal geography is now a firmly established strand of research,[13] the relationship between transnational law and geography is far more intertwined than is often reflected in the current scholarship. Property rights have defined global power relations since the period of European expansion, and the institution of property, and how it has changed over time, has significantly altered landscapes and people-place relations in ways that have exacerbated environmental degradation, geographical disparities in wealth, and access to resources.[14] On the surface, legal geography (the study of law, its institutions, and norms in relation to space) may not appear to have much to do with legal history, but this is because landscapes (specific geographical spaces or places that are culturally inscribed, evolving out of relationships between land, law and community) have not been foregrounded in the history of law. This is unfortunate for two reasons: first, landscape change can only be meaningfully observed in the longue durée, which necessarily imports the temporal element; and second, landscapes are shaped by law and legal developments, in the sense of customary practices generating landscape dynamics as communities interact with their local environments, as well as extinguishing that dynamic through the creation of legal concepts such as property rights in land.[15] Law and history are therefore implicated in the concept of landscape, the legal origins of which connote a particular area of land as well as the relationships between people and that land over time.[16] By paying attention to the way in which geographic dis-

9 Strecker (2018).
10 Byer (2023).
11 Graham (2011); Byer (2023).
12 See the chapter by Sinead Mercier in this section of the volume.
13 Blomley/Ford (eds.) (2001); Peil/Jones (eds.) (2005); Braverman et al. (2014); Layard (2019).
14 Strecker (2019).
15 Olwig (2002); Peil/Jones (eds.) (2005); Strecker (2018); Byer (2023).
16 Olwig (1996).

parities shape human behavior and activity,[17] lawmaking can be rendered more geographically sensitive to place, or spatially just.[18]

The idea of law as neutral or universal in character is being increasingly challenged in light of its historical complicity in acts of genocide, slavery and colonialism, as well as the failure of contemporary law to provide meaningful redress for such historical crimes.[19] There is also increasing criticism of international law more generally for its role in perpetuating colonial patterns of inequality and racial capitalism,[20] for the "misery" created by international economic law,[21] and for the way in which international environmental law indirectly establishes new forms of global authority over land in ways that benefit some while marginalising others.[22] Legal geographers contribute to this critique by advocating for law's embedding in the local, eschewing universal or global approaches when the geophysical reality is complex, in terms of diverse ecosystems and natural resource endowments that vary from country to country. Local interactions with these environments produce cultural understandings of land and the environment.

Legal geographers' critique of law also extends to legal history.[23] The linear progressive trajectory often assumed in legal history fails to engage law in all its complexity, particularly the cultural relativity of law and its institutions.[24] Russell Sandberg has argued that countering the misuse of history, the "evolutionary functionalism" inherent in legal historical research, requires an exploration of space as an additional element in the critique of law.[25] Following this introduction, the below chapters addresses how the law erased spatial diversity in land use via the deployment of colonial conceptions of property, environment, and community, whether by the creation of reserves for people and nature, in the classifications of community, or the extraction of natural resources for energy.

17 Layard (2019).
18 Graham (2011); Bartel et al. (2013) 341.
19 Anghie (2007) 32.
20 Anghie (2007); Gathii (2007); Koskenniemi (2012, 2017); Tzouvala (2020).
21 Linarelli et al. (2018).
22 Dehm (2021).
23 Blomley (1994) 8.
24 Sandberg (2021) 8.
25 Sandberg (2021) 170.

2. Section overview

In "Reserving space: land, nature, and empire in the development of Commonwealth Caribbean environmental law", Amanda Byer shows how science and early environmental protection went hand in hand to create landscapes of injustice and reify abstract logics of property, where lived in landscapes were reconstituted as abstract space, in service of the metropole, something that continues via environmental governance today. Byer tracks the emergence of the colonial nature reserve in early law and policy creating the Grenada Governorate, the islands ceded to the British after the Seven Years' War, which opened the second phase of British colonial expansion into the Caribbean. Against the backdrop of imperial interests in absorbing land and perceptions of 'uninhabited' islands, Byer argues that colonial conservation law helped concretize the idea of a homogenous 'paradise', which was based on oppression of Native and enslaved peoples with the place-based knowledge to sustain those environments. The erasure of inhabited nature became the raison d'être of colonial science, which is foundational to environmental law. Byer considers the implications for vulnerable small island states in the region facing unique environmental challenges when environmental law continues to uphold protection of a 'placeless' nature, where the law's current relationship with the environment forecloses any possibility of environmental protection, because conservation is an extension, rather than a repudiation of property's extractive imaginary. In particular, the re-ordering and degradation of Caribbean-island environments inspired and informed the conservationist consciousness and ethos, which today underpins the abstract logic of international environmental law, a field also critiqued in the work of Usha Natarajan and Julia Dehm.[26]

In "Legislating 'community' in southern Africa's plural properties", Sonya Cotton discusses how colonial categorisations of community as hermetically sealed have influenced the law in five anglophone countries in southern Africa – Namibia, South Africa, Botswana, Zambia, and Zimbabwe. In a similar vein to Byer, she shows how this form of classification stemmed from the same mental practices of land mapping, collecting and taxonomizing of nature developed in the Caribbean, and demonstrated how the strong influence of classical scholarship in Europe's understanding of African identities

26 Natarajan/Dehm (eds.) (2022).

is in no small part due to the fact that the European "experts" who authored the material on Africa that served as epistemic repositories of knowledge (including dictionaries and ethnographic work) were typically educated in Europe and trained in philology, which meant that African societies were "clumsily strained" through a prism of ancient Greece, Latin and Hebrew.[27] Rather than view these repositories of accurate information, Cotton shows how much archival material may instead be read as psychological biographies of settler-colonial anxiety, with early Europeans in Africa overemphasizing their epistemic authority in compensation for feelings of alienation and lack of control. The upshot is that the legal meaning of community is grounded in an abstract ideal, originally a foreign export, that does not consider the social geographies of communities in practice.[28] Cotton argues that while there is recognition of communal land as an independent form of tenure to private and state ownership, such legal pluralism is "anxious", and modulated through legal positivism and/or deference to colonial discourses of "tribe" that renders the state the final authority on identification. Accordingly, this reflects the uncomfortable position of pluralism within post-colonial African countries, which may inscribe customary rights whilst simultaneously stripping communities of substantive self-determination related to communal land.

In "Competing Notions of Land in Colonial Kenya and the Impact on Present-Day Land Governance", Raphael Ng'etich focuses on the legacies of British rule on land governance in Kenya, particularly as regards the superimposition of exclusive property rights over customary collective forms of land use. Ng'etich addresses the tensions between the newly introduced notion of private land ownership in Kenya against pre-existing communal ownership. To achieve its objective of phasing out collective land use, the colonial enterprise deployed various strategies, including 'agreements' with communities to cede some of their land to the Crown, depiction of local land practices as backward and retrogressive, subjugation of customary law to statutory and common law, incentives to facilitate the private ownership

27 Gilmour (2006) 67–117; Errington (2001); Makoni/Pennycook (2005); Strommer (2015); Chimhundu (1992); Gordon (2021) 27–28. On the persistent relevance of classical and Christian scholarship in the creation of the foundations of international law, see Koskenniemi (2021).

28 Strecker (2018); Graham (2011).

of land, and moving communities to reserves. The result was that social systems were disrupted, and communities moved to the less productive and challenging terrains in the "reserves",[29] with several consequences for access to land (and attendant resources and services) into post-independence. As Ng'etich notes, independence did not change the fundamental aspects of land relations,[30] as the racial discrimination in the colonial state transitioned to class and ethnic domination in the post-colonial state.

Finally, in *"A haunting absence*: Tracing the origins of international energy law from the laboratory of Ireland", Sinéad Mercier traces the historical development of energy law from its origins in the colonial-capitalist treatment of land and natural resources beginning in 17th-century Ireland. An outlier in the discussions on colonialism, Ireland has an ambiguous relationship with the British Empire, as both victim and protagonist. It was, as Mercier notes in the title of her chapter, a "laboratory" for empire, because the techniques, primarily in the use of new property regimes of dispossession through imperial laws, were first developed here.[31] Mercier also cites Michael Cronin, who concurs that the Tudor experiment in (language) extinction and (territorial) extraction "made Ireland the ideal laboratory for a form of ecological dispossession that will be replayed endlessly in various corners of the Empire".[32] Ireland was England's first colony after all, and it was here that the process of surveying sought to measure and quantify all land, reducing it to what Brenna Bhandar terms "an amalgam of economic units […] estimating the value of people's productive output, the cost of their labor, and the value of stock ('wealth') of the nation".[33] Mercier illustrates how energy is "placeless in the law", in effect representing the ultimate disconnect from the land, and the limits of the earth, "with no responsibility to the places from which it is produced, or the people that produce it," a counterproductive legal situation that originated precisely in the colonial techniques that "transformed emplaced land into product" in the 1600s, when property law was being crystallized and sanctified. Mercier points out that despite the sources of the world's energy being from a concentrated number of places, the focus is on ensuring that energy – once

29 Okoth-Ogendo (2000) 6.
30 Manji (2020) 10.
31 Ohlmeyer (2004) 26–60.
32 Cronin (2019) 11.
33 Bhandar (2018) 40–43.

released from the land – becomes as fluid as possible. A proprietary regime similar to stocks and shares, she notes how energy can be bounced around from space to space, as a commercial product in a free market. This level of abstraction has facilitated a disconnect between cause and effect, with devastating consequences resulting in the climate crisis, degradation of local environments, and loss of cultural and biological diversity. Even in the realm of climate policy, carbon offset schemes would not be possible without an abstract logic of property rights, a logic that believes land (and its use) is an infinite tradeable commodity.

Cumulatively, the foregoing chapters illustrate the unquestionable way in which questions over the use of and access to land were framed within a property paradigm, how property is inextricably linked to empire, and how this 'property' was abstract and yet assumed to be superior to endogenous forms of land governance, forms that relied upon layered knowledge about particular places over time. The aim is not to romanticise the past, or erase any conflict in precolonial relationships with land, but rather to show categorically that colonial expansion went hand in hand with proprietary attitudes to land and people, which in turn not only shaped land relations in post-independence Ireland, the Caribbean, Kenya, and Southern Africa, but also shaped global property regimes underpinning land transactions, land use and access to land today. There is recognition of the value of a spatial turn in legal history scholarship, which increasingly focuses on examining the transnational effects of imperial interests.[34] These chapters thus contribute to new legal historical insights via the analysis of the interrelated touchstones of land, law and spatial justice in the British Empire.

In sum, adopting a landscape, law and justice lens to scrutinise property rights allows for a much broader appraisal of the law, one that incorporates research from historical geography and other disciplines, to analyse problems of land governance exacerbated and facilitated as they are by a narrow interpretation of property rights in land. This is particularly apposite given the centrality of land acquisition to the British colonial project. Empires absorb land, consolidate their power through the law, and by maintaining these uneven power dynamics across far flung geographies, drive spatial injustice.

34 Dorsett/McLaren (eds.) (2014) 9.

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Amanda Byer

Reserving Space: Land, Nature, and Empire in the Development of Commonwealth Caribbean Environmental Law*

1. Introduction

Nature has been an important vein of historical analysis, particularly in the context of European Empires (Dutch, French and British).[1] Imperial projects were land-hungry, and the absorption of land during colonisation led to a now recognised pattern of dispossession and genocide of Native peoples, accompanied by the degradation of the natural environment.

Islands figure prominently in the history of Western environmentalism, as they were often viewed as paradises and laboratories for experimentation.[2] The Caribbean islands were foundational to the development of the ecological sciences, conservation, forest management, and biodiversity[3] – and through the development of conservation mechanisms such as timber, rain and botanical reserves[4] – of conservation law. This marriage between the sciences and environmental law is often seen as necessary for securing environmental law's legitimacy.[5] This chapter challenges this assumption by exposing the spatially unjust circumstances under which this historical relationship between law and science was kindled. Empires facilitated the phys-

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1 Crosby (1986); Beinart/Hughes (eds.) (2009); Beattie et al. (eds.) (2015); Damodaran (2008); Mrozowski (1999); Schiebinger/Swan (eds.) (2005); Schiebinger (2004).

2 Halikowski Smith (2010).

3 Ferdinand (2021) 12; see also McNeill (2010); Scobie (2019); Grove (1996); Raby (2017); Gómez (2017); Drayton (2000).

4 Drayton (1993).

5 Humphreys/Otomo (2016).

ical environment's transformation into passive nature, separate from human habitation as an object for observation and experimentation, and exploitable as property rights. This, however, has threatened the very ecological integrity of the natural environment. The law's current relationship with the environment therefore forecloses any possibility of environmental protection,[6] because conservation is an extension, rather than a repudiation, of property's extractive imaginary.

The foundational status of islands and their environmental destruction (most notably in the Caribbean) to colonial conservation was first explicated in Richard Grove's definitive account of "green imperialism".[7] While relying on Grove's significant contributions, this chapter examines how science, as the trans-imperial conduit for knowledge about the environment, redefined complex nature around the world as detached from people, and considers the legal geographical implications of this transition from lived-in nature to abstract space in law for Caribbean nations today. A legal geographical approach explores these developments through the lenses of landscape and spatial justice. Landscape is a cultural geographical descriptor for a peopled place, specific to a locality, and relying on locally derived practices to maintain sustainable human-environment interactions. The loss of landscapes can lead to spatial injustice, whereby local peoples are displaced, either physically or through imposed constraints that impair their constitutive relationships with place.[8] This often has implications for their livelihoods, cultural identity and survival.

The aim of legal geography is thus to expose the "concealed, forgotten or prohibited connections between peoples and places."[9] Legal geography asks whether law's perceived abstract and neutral character is in fact evidence of law dismissing place.[10] This "spatial blindness", or at the very least spatial selectiveness, means that established legal categories may need to be reconciled with the reality of geography in order to be effective.[11] By challenging this putative universality of concepts, legal geography emphasises the need for localisation of the law – law must make room for local conditions, or

6 Natarajan / Dehm (2019); Natarajan / Dehm (eds.) (2022).
7 Grove (1996).
8 Mollett (2014).
9 Bartel et al. (2013) 343.
10 Layard (2016).
11 Layard (2019) 237.

forms of regulation must be rooted in local conditions of existence, in order to be effective.[12]

According to Nicholas Blomley and Joel Bakan, legal geographical analysis involves the identification of fixed legal and spatial representations, and exploring such implications; demonstrating the underlying social motives (and thus the non-objectivity) of these representations, and using these strands of the analysis to challenge the status quo in order to catalyse progressive change.[13] Legal geography thus examines systemic asymmetries of power – domination, exploitation, and marginalisation both in the world and with respect to access to law. Contexts can include racism, colonialism, homelessness and environmental justice.[14] 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".[15]

As Robyn Bartel et al have noted, ignoring geography has significant consequences; if we do not ask questions about the location of law's impact, and therefore also who it impacts on, its true destructive potential, including its capacity for enabling ecological collapse, may be dismissed.[16] Legal geography is therefore cognisant of the historical context of large-scale landscape change, examining material conditions, limits, and connections over time.[17] 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 paradigm shift, from "the alienation of people and place in law and geography to their necessary connection".[18]

The first part of this chapter outlines the material and cultural impacts of the colonisation process on Caribbean nature. I then consider how scientific developments as a response to these impacts informed the imperial project, embedding a concept of the environment as paradise that facilitated the propertisation of nature, its degradation, and the exclusion of local com-

12 Holder/Harrison (eds.) (2003) 4.
13 Blomley/Bakan (1992) 690.
14 Delaney (2016) 268.
15 Delaney (2016) 273.
16 Bartel et al. (2013) 341.
17 Bartel et al. (2013) 349.
18 Ibid.

munities. The legal geographical aspects of colonial conservation law are underscored by tracing the formative activities and decisions of lawmakers and the events influencing early colonial reserve legislation, drawing linkages between conservation and spatial injustice. I conclude with some thoughts on the ramifications of these practices for contemporary Caribbean law and policy in the age of the climate polycrisis. The focus of the analysis is on the British Empire, and its impact on the Lesser Antilles in the Caribbean, where some of the first colonial reserve laws were enacted.

2. Colonialism in the Caribbean and its impact on nature

This section offers a general impression of the environmental impacts of colonialism on the Caribbean region. The magnitude of colonialism cannot be truly understood without reference to environmental factors that illustrate the scale of the transition from landscape to space.[19] Europeans transformed the New World, what Alfred Crosby has termed the greatest biological revolution since the Pleistocene era, reshaping the land and histories of many places by raising plants on extensive plantations.[20] This was carried to an extreme on the Caribbean islands, where the entire land mass became devoted to plantation agriculture. This distinguishes these islands from the settler states and conquered territories in other parts of the British Empire and explains the unique spatial and demographic dimensions of the Atlantic slave trade as they apply to the Caribbean.[21] The Caribbean had been originally inhabited by Amerindian peoples and its environment subject to use and even degradation, but this occurred on a localised scale, which allowed the environment to recover and maintain its resilience.[22] In terms of the archaeological record, there appears to be great variability in land use during Amerindian settlement in this region, but nothing on the catastrophic scale that would occur following colonisation.[23]

19 Beinart/Hughes (eds.) (2009) 8. See also Crosby (1986); Hooghiemstra/Olijhoek et al. (2018); Castilla-Beltrán et al. (2018).
20 Crosby (1972) 66.
21 Beinart/Hughes (eds.) (2009) 9.
22 Jiménez Fonseca (2010) 191–192; Denevan (1992) 377.
23 Keegan/Hofman (2017) 42–43.

In the Lesser Antilles, arable land was used for horticulture, and marine resources exploited, and there was land clearance resulting in significant environmental change.[24] But no Amerindian communities in 1492 had developed the concept of private ownership in land as would be later articulated by English common law; land was a communal resource, to be utilised fully within the limits of their technology and with an eye to sustainability, for the long-term conservation of food security.[25] With the advent of colonialism, and the acquisition of land, the relationship between Amerindian communities and their environment was drastically altered. Diverse land use practices was also suppressed as more and more land was absorbed by the colonisers.[26]

Plantation agriculture in the Caribbean slave colonies resulted in a complete restructuring of the landscape through the removal of native peoples, the importation of West Africans as slave labour, and the manipulation of natural resources in such a manner as to maintain the planter/slave power dynamic.[27] All land suitable for sugar cane was deforested, and in some cases this meant that the entire island was reduced to sugar cultivation.[28] The industry required new technology and structures in the form of mills and transport such as rail and shipping and associated port infrastructure. Deforestation, soil loss and decline in soil quality transformed animal and plant communities.[29] The extreme land use and patterns of timber clearance made species recovery all but impossible, since their native habitats were being transformed into sugar plantations.[30]

At the end of the plantation agriculture period (1665–1833) in the English-speaking Caribbean, the lowland environment had been deforested, depleted in nutrients and invaded by alien species.[31] Capital-intensive plantation agriculture that was based on slave labour promoted very rapid environmental change in terms of deforestation, soil erosion, flooding, gullying,

24 Keegan/Hofman (2017) 210–211.
25 On land ownership practices predating colonialism, see Grove (1996) 285; Fitzpatrick/Keegan (2007) 29; Watts (1990) 77.
26 Watts (1990) 77.
27 Beinart/Hughes (eds.) (2009) 37.
28 Watts (1990).
29 Watts (1990) 438.
30 Ibid.
31 Watts (1990) 443.

local aridification and drying up of streams and rivers.[32] While a Caribbean-wide trend, these consequences dominated the ecosystems in the Lesser Antilles, where space for species survival was restricted, and "cane agriculture was at its most intense".[33] The transition to plantation agriculture was thus not democratic, inevitable or progressive in practice, in spite of claims of 'civilisation' and 'improvement' of land. Underlying the colonial mission was the reality of ecological upheaval. Empirical observations of the catastrophic effects of colonial plantation agriculture revealed that plantation policies were causing environmental damage.[34] This would have devastating consequences for Amerindian peoples, who were the original inhabitants of these landscapes.

3. The nature of empire: land improvement and the construction of 'paradise'

As Darina Petrova and Tomaso Ferrnado observe, separating people from place is critical to the project of creating nature as an object of scientific study and a legal concept.[35] This is accomplished via colonial violence, erasing spatially diverse uses in land by converting it to property for imperial interests. This process provides the grounds for the universalisation of nature and its detachment from local specificity and the place-making process.[36] Science and law are therefore complicit in the extinguishment of local landscapes during the colonial period. Reinforcing law's power and authority is achieved through emphasising law's adherence to these universal values, based on impartial reasoning.[37] This can be illustrated using the example of the Lesser Antillean islands of the Caribbean.

The Caribbean islands were originally perceived as paradise, an Eden or pastoral idyll.[38] In colonising lands in the Caribbean, the environment was socially constructed so that the "tropics were invented as much as they were

32 Grove (1997) 150.
33 Watts (1990) 447.
34 Grove (1997) 153–154.
35 Petrova/Ferrando (2022) 259–260.
36 Ibid.
37 Natarajan/Dehm (2019); Natarajan/Dehm (eds.) (2022); Anghie (2004); Fitzpatrick (1992); Gonzalez (2015).
38 Dillman (2015) 174–175 and 179.

encountered"; the idea of the tropics as "warm, fecund, luxuriant, paradisiacal and pestilential" was central to British colonial knowledge and was a critical ingredient in the larger colonising process.[39] But this understanding of nature was never informed by the realities of Caribbean ecosystems, and masked the violence and degradation of both people and land. So embedded was this belief in European cultural traditions of the 'Edenic' qualities of these islands that colonial authorities were wholly unprepared for the rapidity with which these places declined under plantation monoculture. Colonial governments therefore became environmentalists to extend the life of the Empire.[40] This required protecting 'paradise'.

The British Empire, unlike its European counterparts in the region, was concerned with presenting itself as an empire based on 'developing' land, rather than conquest or cultural domination.[41] Spain's initial success in extracting gold and other minerals had attracted other European nations to the Americas, but its results were not to be replicated by these countries. When these powers protested Spain's rights to the region, there was no precedent or international custom to reinforce European claims to the Caribbean or direct its interactions with Indigenous peoples, so they drew on ancient legal principles distilled from Roman private law to develop new international law.[42] *Res nullius* was one of the most influential Roman law principles, requiring that a thing acquired by occupation be *res nullius:* that the object acquired could not be someone else's property; it was the common property of all mankind. Ownership *(dominium)* could be acquired by capturing the object and putting it to some general agricultural use. *Res nullius* therefore provided the rationale for the establishment of *dominium* (lawful possession), which would be referred to as *terra nullius* in international law in order to legitimise possession.[43]

Land was therefore the medium through which Britain would accumulate wealth and property, its source of power. Britain focused on the exploi-

39 Damodaran (2008) 137.

40 Damodaran (2008) 131.

41 Pagden (1998) 34–35.

42 Welch (2014) 124, 128, and 129. Welch notes that the same principles that were appropriated in international law to discredit Spanish claims to possession of the Caribbean islands were also used, in addition to ideologies of natural rights, to deny sovereignty to the Indigenous peoples of the region. See also Tuori (2012).

43 Welch (2014) 129; Tuori (2012) 1028; Berry (2003).

tation of natural resources, an enterprise that was perceived as more enlightened and pacific in character.[44] Plantations and settlements were therefore necessary. This would determine the relationship with local peoples, since they were not to be converted or assimilated, but rather ignored or removed where necessary to enable access to land.[45] Britain's own experience with invasion and conquest had made it wary of claiming local laws and institutions were extinguished by a foreign power's entrée into new lands, believing that such measures heralded misfortune for conqueror and conquered alike.[46] Instead, British settlers were to be 'improvers' of the lands that they acquired, through agriculture and commerce. Only where newly colonised peoples demonstrated their inability to maximise land's potential through private property would it be acceptable to enclose such land. Therefore, their rights were to be respected, but their relations with land scrutinised and ultimately held unacceptable.

As Anthony Pagden notes, unlike the Spanish, the English were, therefore, predominantly concerned with securing rights not over peoples but over lands, which explains why the period of early contact and co-existence, when the settlers were dependent upon native agriculture subsequently transitioned to policies of either segregation or, when local populations appeared to threaten the existence of the settlements, attempted genocide.[47] Legal relations concerning land, and the rationale for land being characterised as unoccupied, were therefore implicated at the outset of British colonisation of the region.[48] In fact the *res nullius* claim is sometimes known as the agricultural argument.[49] Agriculture was considered the final stage of actualising nature's potential, requiring a high degree of co-operation found only among settled communities, whose activities would allow them to acquire by right of possession the land – the original inhabitants who were semi-nomadic and merely foraged could make no such claim.[50]

44 Pagden (1998) 36.
45 Pagden (1998) 37.
46 Pagden (1998) 41. The political culture of England, because it had itself been the creation of the Norman Conquest of 1066, was committed to the 'continuity theory' of constitutional law in which the legal and political institutions of the conquered are deemed to survive a conquest.
47 Pagden (1998) 41.
48 Pagden (1998) 42.
49 Pagden (1998) 43.
50 Pagden (1998) 46.

These arguments found their basis in natural law.[51] Relying on such precepts meant that any deviation from what were assumed to be universal conditions constituted a violation of those conditions, and "an alternative system of property ownership, land tenure, or rulership as practiced by the Amerindians would be not be regarded as an alternative, but simply as an aberration".[52] In fact, any resistance to improving these juridically and culturally 'vacant' lands would be in defiance of natural law.[53] It followed therefore from the English point of view that there was no conquest as these lands belonged to no no-one; they were created "quite literally, out of the State of Nature".[54]

The emphasis on agriculture as rational and enlightened meant that while formally there was recognition that Indigenous peoples should not be mistreated, the implication that their own relations with the environment (upon which their human rights and cultural identity depended) were irrational as a result of their primitive savagery, signaled that harmonious relations with European settlers would be all but impossible should they resist attempts to 'civilise' or settle them.[55]

Nicholas Canny observes that British presence in the Caribbean was at first indifferent, islands being occupied as sources of tobacco production and some bases for piracy in the 1600s.[56] Barbados' success as a sugar-producing island was wholly unexpected. After the 1640s there emerged a wealthy planter class not just in that island but in the Leeward Islands and Jamaica.[57] Such colonies therefore were based on white settlement, or colonies under white management which relied on enslaved Africans for a labour force – there would be little space for Indigenous populations.[58] It was often claimed that these islands were mostly uninhabited or unoccupied, but lack of evidence of settled agriculture does not mean that land was not in use. There is a

51 Pagden (1998) 37.
52 Pagden (1998) 44.
53 Pagden (1998) 46, 47 and 51.
54 Pagden (1998) 53.
55 Pagden (1998) 46.
56 Canny (ed.) (1998) 30.
57 Ibid.
58 Canny (ed.) (1998) 31–32.

paucity of data where firsthand Amerindian accounts of the colonial encounter as well as endogenous land use are concerned.[59]

In the 1700s, the mountainous islands in the Lesser Antilles were ceded to Britian, representing the second phase of British colonisation in the region.[60] These were the homelands of the Kalinago (then known as the Caribs)[61] and had been French colonies, adding a layer of complexity to the law.[62] Early attempts to sell land for plantations proved a challenging process, due to the topography of the islands, as well as the residents themselves,

59 Niddrie offers a good summary of English settlement in the region but it is very difficult to extrapolate (as per Niddrie and Murdoch) that Tobago was "a genuine desert island" Murdoch (1984) 561 or "unoccupied except by a few Carib Indians" – see Niddrie (1966) 68. Recent archaeological evidence is beginning to complicate the picture of land use in the pre-Columbian world, given the mobility of Amerindian groups throughout mainland South America and the Caribbean archipelago. See Hofman et al. (2019) 364, discussing the way in which Island Carib communities adapted settlement patterns to evade Spanish slave raiders by maintaining forested woodlands, and Keegan/Hofman (2017) 250. On Amerindian land use, settlement and conflict with European colonisers more generally, see Valcárcel Rojas (2016) 332; Anderson-Cordova (2017); Arranz Márquez (1991); Deive (1995); Ulloa Hung/Valcárcel Rojas (2016).

60 Settled territories were treated differently from territories that were conquered and ceded. In the settled territories (Barbados, Antigua and St Kitts and Nevis) the settlers took with them the English Common Law, the doctrines of English equity and the English Statutes so far as they were applicable to the conditions of the colony at the date of the settlement. In the conquered or ceded territories (Dominica, Grenada, Jamaica, Trinidad and Tobago) the English common law, the doctrines of English equity, and the Statutes of general application that were in force in England on a specified date were generally imposed sometime after the conquest. On the reception of the English common law in the Commonwealth Caribbean, see Marshall (1971) and Patchett (1973).

61 Kalinago is the term favoured today by their descendants in Dominica. "Carib" is used here as the historical term denoting the inhabitants of the Lesser Antilles in the 18th century.

62 Note Jebodh (2019) 21: "With regard to the conquered or ceded territories, the law in force at the time remained effective until modified by the action of the Sovereign, thereby giving rise to the establishment of statutory reception provisions in order for English law to become applicable. The prevailing law remained until the moment where the British Parliament enacted new laws for governance under the Royal Prerogative. Prerogative power would end at the time when a legislative assembly was established within the ceded or conquered territory, with the British Parliament no longer having the prerogative to legislate for the colony. This was evidenced in Campbell v Hall 98 ER 1045 (KB), where the Court of the King's Bench held to be invalid a proclamation by the King imposing an export tax on the inhabitants of Grenada, an island which had been conquered from France and was also subject to an earlier proclamation granting an assembly to the island."

who were believed to inhabit the best lands and refused to recognise British control of the island. While initially the formal position was to offer them compensation for the transfer of their land to English settlers,[63] the Caribs resisted at every turn, maintaining their autonomy until they were forced to negotiate a treaty resulting in their removal to a reservation.[64] The pace of development was 'frantic' as planters built aqueducts, dams and mills first on Grenada and then on the other islands.[65] However many of these plantations were operating at a loss, and often faced financial ruin.[66]

These plantations were speculative land ventures – thousands of acres controlled by oligarchs to whom vast sums of credit had been extended from investors and banking institutions, and this required the protection of property ownership, through clear property delineation via surveying and mapping to impose a sense of order, provide security and defence.[67] Data collecting missions about tropical environments were intended to improve crops yields so that the plantations could flourish, and source botanical medical supplies so that settlements and garrisons could withstand disease and provide a buffer against the Caribs.[68] These scientific collecting missions, along with surveying and mapping techniques, were the means by which Amerindian landscapes would be erased and property rights legitimised. The colonial nature reserve plays a specific role in the redefining of nature, the maintenance of slave colonies, and surveillance and destruction of the Caribs.

The earliest environmental legal interventions in the Lesser Antilles to preserve paradise thus concerned the creation of colonial reserves. Prior to the 1760s, laws were drafted in a piecemeal fashion, protecting rare island species and sources of food, timber and fuel. However, in the mid-1760s, there was a shift in the way administrators responded to ecological threats. A

63 Murdoch (1984) 561, referring to lands in St Vincent, then a neutral territory because of the inability of Europeans to successfully gain control of the island. See Treasury to the land commissioners, 8 Jan. 1768, The National Archives (UK), Colonial Office Files (hereafter cited as CO) 101/11, 434–436.

64 Murdoch (1984) 562.

65 Quintanilla (2004) 17.

66 Murdoch (1984) 570. As far as the land sales policy was concerned, the results were predictable throughout the Ceded Isles: planters ceased paying their instalments and the receiver, or his deputies, instituted lawsuits for the recovery of the money owed.

67 Quintanilla (2004) 18–19.

68 Welch / Finneran (2022) 196.

suite of forest reserve legislation, influenced by scientific research concerning deforestation-induced climate change, soon spread around the world, especially throughout the French, British, and Dutch empires.[69] A botanical garden was established in St Vincent in 1765 by then General Robert Melville for the collection of varieties with medicinal, nutritional and economic value and drew on local indigenous knowledge;[70] Alexander Gillespie states that this is the first commonly recognised environmental sanctuary, as in one established by the State, and not by an individual.[71] This was followed in 1776 by the first timber reserve in Tobago to prevent deforestation and attract rainfall. The King's Hill Enclosure Ordinance[72] legally established another timber reserve in St Vincent in 1791.[73]

These laws were based on desiccationism. Harri Siiskonen writes that since the late 17th century, natural philosophers had been developing what became known as "desiccation theory".[74] In the British and French colonies, this would provide the theoretical basis for conservation in the 18th century. Dessication refers to the drying up of surface water, a lowering of the water table and a decrease in rainfall. Desiccation was thought to be a result of human misuse, especially the shifting or extension of cultivation, which acts directly on surface and soil water availability and impacts negatively on rainfall. Human misuse was believed to derive from population increase.[75]

In the mid-18th century, the European scientific societies – the Royal Society, the Royal Society of Arts, the Académie des Sciences and, especially, the Royal Geographical Society – deployed and propagandised ideas about deforestation, desiccation and climate change to ensure large scale forest conservation.[76] The French naturalist and botanist Pierre Poivre, who had travelled widely in Asia and had knowledge of many tropical environments, pioneered the application of desiccation theories to tropical conditions. In

69 Welch / Finneran (2022) 133–134. The Main Ridge Forest Reserve Ordinance of 13th April, 1776 is considered the oldest legally protected forest in the Western Hemisphere. See Niddrie (1966) 76.
70 Welch / Finneran (2022) 196.
71 Gillespie (2007) 7.
72 Act no. 5, 1791 as amended in 1895 (St Vincent).
73 Grove (1997) 155.
74 Siiskonen (2015).
75 Siiskonen (2015) 283.
76 Siiskonen (2015) 284.

1763, he warned the scientific community about the dangers of deforestation, especially in tropical colonies, pointing out that it would lead to a decline in rainfall. Poivre's speech laid the foundation for forest protection policies in Dutch, French and British colonial island territories,[77] demonstrating the permeability between European Empires in linking diverse environments as imperial featureless space.[78] The scientific societies would have direct political influence on the development of new colonies though plantation agriculture, which required deforestation, land allocation and plant transfers across the Empire; Sir Robert Melville, the first governor of the Grenada Governorate, who had established the botanical garden in St Vincent, was influenced by climate theory and was himself a member of the Society of Arts.[79] Island forest protection programmes from St Helena, St Vincent, Barbados, Montserrat, and Mauritius – thus provided a basis and a replicable model for colonial conservation policy in the 19th century.[80]

Colonial ideologies of improvement stressed the appropriation of lands from local residents and the transformation of imperial environments into sources of economic and moral value, and private property regimes conferred ownership rights to advance these objectives.[81] Colonial authorities advanced the orderly exploitation and management of the environment through regulatory intervention, as the colonial state by definition and practice was designed to serve economic and political ends that were often at odds with the long-term interests of the colonised.[82] The conceptual threads of what was deemed appropriate land use for improvement, minimising climate impacts on that land to maximise yields, and controlling population growth for environmental health reasons had been brought together to develop a climate and forest planning framework that could be implemented in such a way as to displace and oppress local peoples. New conservation legislation such as the King's Hill Enclosure Ordinance

77 Damodaran (2008) 134.
78 Ibid.
79 Grove (1996) 269.
80 Siiskonen (2015) 284.
81 Beattie et al. (eds.) (2015) 9.
82 Richardson et al. (2006) 415.

was developed as a key instrument of colonial landscape control, to bring nature and people to heel.[83]

4. Reserving space, eliminating place: protecting paradise through landscape destruction and spatial injustice

Under the Peace of Paris, the constituent territories of the Grenada Governorate (Grenada, Dominica, St Vincent and the Grenadines, and Tobago) were ceded to Britain by France at the end of the Seven Years' War.

The settlement proposals of the Lords Commissioners for Trade were submitted to the Lords of the Committee for Plantation Affairs on 18th November 1763. In early 1764 they were laid before the Lords of Treasury and the King in Council, Lord Hillsborough representing the Lords Commissioners for Trade on the council. The proposals were issued as a proclamation on 1st March 1764, and approved as an Order in Council on 26th March of that year.[84] The proclamation stipulated that lands were to be immediately surveyed.[85] The strategy for the Grenada Governorate involved rapid development of sugar plantations, which required deforestation and major allocation of land and transfer of ownership.[86]

At the time of the formation of the Grenada Governorate, the colonial land policy in place, meant to secure rapid settlement, encourage productivity and ensure a crown revenue, was flailing due to inefficiency in local implementation and inadequate revenue.[87] The policy for disposal of Crown lands in the Ceded Islands in the West Indies was not to grant land free upon petition, as was typically practiced, but to sell it at public auction at a minimum price per acre, and in lots of a maximum size to prevent "engross-

83 Damodaran (2008) 134.

84 CO 101/1, no. 26, proclamation of 1764.

85 CO 101/1, no. 26, proclamation of 1764, p. 121: "Plan for the speedy and effectual settlement of His Majesty's islands of Grenada, the Grenadines, Dominica, St Vincent and Tobago and for the designated parts of H. M. Lands […] to H. M. Order in Council made upon the representation of the Commissioner for Trade and Plantations dated 3rd November 1763 and the alterations proposed therein by the reports of the Lords of the Treasury and Commissioners for plantation affairs of 25 Jan. and 4th Feb. 1764".

86 Grove (1996) 269.

87 Murdoch (1984) 550.

ment".[88] These grants were largely made, not by the governor of the colony, as had traditionally been the case, but by the Privy Council, operating through its Committee for Plantation Affairs and on the advice of the Board of Trade. Murdoch notes that there was a disconnect between those in Britain and an understanding of local challenges in the colonies.[89] Emphasis was placed on the new "soils" of these colonies in comparison to the exhausted environments in the old islands, emphasising the potential wealth, natural and economic, of the fertile Tropics.[90] These safeguards did not prevail because they were not informed by local understandings of the Caribbean landscape.[91]

Climate change was seen as a major threat to colonial economic projects,[92] because Barbados, then a cardinal node of the British Empire, was in the throes of an ecological crisis.[93] Thus as early as 1764, a system of reserves was established by the proclamation, incorporating conservation as an instrument of conquest and control:

> *such a number of acres* as the Commissioners should from the best of their judgement project *should be reserved in woodlands* to His Majesty's His Heirs and Successors in one or more different parishes in *each part of each island, respectively in order to preserve the seasons so essential to the fertility of the islands and to answer all public services as may require the use and expense of timber.*[94]

The relevant legislation addressing local climate change included the Grenada Governorate Ordinance of March 1764, the Barbados Land Ordinance of 1765 and the St Vincent King's Hill Enclosure Ordinance of 1791.[95] These laws echoed the language of the proclamation, and reference the need to attract rainfall to promote forest growth, which would later be repeated as the rationale for new laws that established forest reserves in the Empire.[96] In

88 Murdoch (1984) 550–551.
89 Murdoch (1984) 550.
90 Murdoch (1984) 559; Quintanilla (2004) 14, 15–16.
91 Quintanilla (2004) 15–16.
92 Grove (1996) 276.
93 Ibid.
94 Pro Co 101/1, no. 26, proclamation of 1764, p. 123, emphasis added.
95 Grove (1996) 266.
96 See the preamble of Grenada's Grand Etang Forest Reserve Ordinance 1906: "Where it is of vital importance for the conservation and promotion of the rainfall and water supply in the Island of Grenada that the forest growth in the vicinity of Grand Etang should be maintained and preserved […]".

the English-speaking Caribbean, The King's Hill Enclosure Ordinance constituted one of the earliest attempts at forest protection legislation in the English-speaking world based on climatic theory.[97] King's Hill bridged the gap between French physiocratic conservationism as developed on Mauritius by Pierre Poivre and evolution of a British colonial environmentalism.[98] Forest reserves were a strategy to reverse any possibility of soil exhaustion and timber scarcity as had befallen Barbados,[99] but the expertise informing the design of the reserves did not rely on local conceptualisations of nature. Soame Jenyns, a member of Parliament and the Society of Arts (which also contained members with interests in these islands) was highly influential in promoting the belief that forests on the Ceded Islands should be protected to enhance economic yields.[100] According to Grove, the survey and subdivision of the Ceded Islands into plantation plots and forest reservations was highly reminiscent of the laying out of the East Anglian fenlands by the Jenyns family, though Soame himself had never visited St Vincent and the fen landscape had nothing in common with tropical Caribbean environments.[101]

Richard Grove points out that the choice of St Vincent was expert-driven: the colony did not receive legislation because of its local conditions but because its island geography was deemed suitable for the imported technological assumptions of the available experts.[102] No indigenous conceptualisations of nature were considered relevant to its design. Desiccation-based forest legislation was attractive to Vincentian colonists because of concerns about supplies of ship timber, a problem that impacted the empire as a whole.[103] Reserves were therefore created in the specific historical context of expediting the Ceded Islands' absorption into the Empire, by facilitating the development and maintenance of plantation agriculture, at the expense of the local lived-in realities of Amerindian inhabitants, and the needs of later enslaved African peoples. As reserves were appendages of the plantation

97 Grove (1997) 160.
98 Grove (1997) 161.
99 Grove (1996) 279.
100 Grove (1996) 274–275.
101 Grove (1996) 275, 278, 279.
102 Grove (1996) 157.
103 Grove (1996) 155.

economy, they supported the engrossment of land, and through the provision of timber and medicinal botanical supplies strengthened the ability of garrisons to amplify surveillance efforts and encroach on Carib lands. The creation of the Tobago reserve had been a harbinger of what was to come, for as Grove noted, no concession was made for the consideration of common land, with the reserve itself being designated Crown land.[104]

Amerindian resistance to European colonisation had never abated. By 1700, the Amerindian population had been drastically reduced in the Lesser Antilles as a result of these conflicts.[105] St Vincent absorbed increasing numbers of escaped enslaved Africans, leading to the formation of a Black Carib identity on the island alongside the communities that remained Kalinago. Both groups, along with other communities in the Lesser Antilles would be engaged in land use conflicts, culminating in the Carib-English Wars on St Vincent and the defeat of the Caribs in 1797.[106]

Initially, the Caribs of St Vincent did not accept the concept of private property as laid out in the British proposals,[107] which reflected the policy that only those practicing settled agriculture could be considered legally entitled to claim sovereign rights over land.[108] This land use ideology justified the expropriation and colonisation of native lands,[109] since the Caribs were semi-nomadic,[110] and believed in a common or clan perception of landscape.[111] In the parceling of land to planters, town dwellers, and some small-scale farming for British settlers, no provision was therefore made for the Caribs. Large tracts of land were designated forest reserves on colonial maps. As Grove notes, mapmaking took on an oppressive quality, for what was omitted was as important as what was represented: cartographically the Caribs were excluded; within twenty years they ceased to exist as a separate

104 Grove (1996) 284.
105 Hofman et al. (2019) 363.
106 Ibid.
107 Grove (1996) 285–286.
108 As Grove observes, the 1764 Proclamation makes provision for planters, small-scale white settlers, reserves and even French settlers that swear an Oath to the Crown, but no mention is made of the Carib population, even when St Vincent and Dominica are named – see Proclamation no. 26 of 1764.
109 See Gonzalez (2015) 158 and, more generally, Anghie (2004).
110 Grove (1996) 286.
111 Grove (1996) 291.

population in Tobago,[112] and nature was reduced to empty and controllable space.

While legally the process of creating the Grenada Governorate can be understood through the proclamations, orders and other available legal documents, the legal norms anchoring the plantation economy, which was rife with inefficiency and financial loss, had implications for the environmental quality of the lived-in landscape. As Europeans encroached on Carib territories, no provisions were made for their survival, so that poverty, starvation and famine resulted.[113] Under the pretext of managing environmental health and security, forest management by colonial authorities became the means by which European settlements could be expanded and the Caribs suppressed. The Caribs rejected attempts to survey their lands and declared themselves autonomous. While the status of Carib land was still under dispute, lots were sold to English planters, and eventually the Caribs were forced to swear an oath of allegiance to the Crown.[114] Finally, the remaining Black Carib population was transported to Central America as a means of completely neutralising the threat to settler property.[115]

The Caribs were not the cause of inefficiency in the plantation economy. British plantation agriculture in the Caribbean rested on a complex and permanent system of borrowed capital, to finance the establishment of plantations, and short-term loans to cover the yearly overhead expenses, with profits on each year's crop going to pay off these debts. This system was vulnerable to environmental and economic factors affecting the crop, and planters in the Ceded Islands also had not realised that their plantations were long-term investments, with no immediate returns on the horizon.[116] As plantation agriculture was speculative and not in alignment with the capacity of local environments, plantations were frequently in arrears, especially in Dominica, and the underlying challenges with local Amerindian populations also made St Vincent difficult to settle.[117]

112 Grove (1996) 283.
113 Grove (1996) 280.
114 Murdoch (1984) 562.
115 See Taylor (2012). Today the descendants of the Black Caribs identify as the Garifuna. See also Palacio (2005).
116 Murdoch (1984) 569.
117 Murdoch (1984) 571, 573.

Initially, the Governorate was ruled from Grenada, which had become Britain's second largest sugar producer at the time, making planters anxious to replicate that success throughout the other Ceded Islands.[118] But this was not to be. Property law and environmental law were not rooted in the needs and limits of these environments, and a lack of understanding of these ecosystems quickly led to their decline.[119] Paradoxically, the Caribs' local knowledge of these landscapes had been relied upon to establish a foothold in these islands via the botanical gardens, but prioritisation of land use for commercial profit, along with abrupt large scale land change undermined the locally specific customary rules of commoning and land use practiced by the Caribs.

Nicole Graham emphasises that this dismissal of lived-in space makes law promote a lack of care for place.[120] Conservation in former colonial societies is thus hardly ever neutral, even when grounded in science, and especially where it concerns highly valued natural resources embedded in indigenous homelands. This is exclusive conservation, in which conservation is for the purpose of perpetuating colonialism, to the detriment of colonised environments and peoples.[121]

Creating reserves eliminated lived-in places, withholding the land from the communities that once inhabited them. Grove highlights that colonial conservation in the Eastern Caribbean was more about constructing a new landscape, through the displacement of 'primitive' peoples, since uncultivated forests represented wildness and lawlessness.[122] This was effected through the law, as land was reallocated and ownership transferred to European settlers. It was about 'claiming' and consolidating territory, organising economic space, and subduing unruly peoples, and the creation of forest reservations was often followed by the forced resettlement of peoples, starvation and famine.[123] Conservation therefore involved the biological reconstruction of the forest environment to serve the interests of the Empire.[124]

118 Quintanilla (2004) 17.
119 Beattie et al. (eds.) (2015) 15.
120 Graham (2010) 205.
121 Beinart / Hughes (eds.) (2009) 289.
122 Grove (1996) 280.
123 Ibid.
124 Ibid.

This was spatial cleansing,[125] since the evacuation of these places unmade the Amerindian landscape – it eliminated the cultural dimension of land (the presence of Amerindian peoples, evidence of their relations with the land, their practices and livelihoods, as well as their knowledge of these ecosystems). Henceforth, the Empire would be the filter through which the environment would be defined, valued, legitimised and understood.

Law's conservationist interventions were therefore profoundly influenced by the eco-imperialist ambitions it served.[126] Species were preserved in detachment from local needs.[127] Forest and botanical reserves supported priorities of the British Empire, and had no local legitimacy.[128] Indeed, by the 1800s, the creation of colonial botanic gardens had become standard administrative practice in the consolidation of new conquests of the British Empire.[129] The significance of this network of gardens lies in the fact that they were not simply clearing-houses for the transfer of economic crops, but the bases from which wide-ranging collecting missions were dispatched into surrounding territory.[130] Such botanical and scientific knowledge was necessary for maintaining imperial interests. A new scientific vocabulary containing words such as climate, deforestation and health concealed the economic and political machinations of Empire even as laws established reserves to facilitate imperial expansion.[131] The muzzling and masking of the landscape was therefore executed by the framework of these early conservation laws, and supported by mapmaking, surveying and reserving techniques which reframed the violent conversion of land use as administrative and technical processes of managing vacant space to enhance its fertility for the good of the Empire. The network of reserves (rain, timber and botanical) was thus used to exclude and then reconstruct the lived in landscape as wilderness or passive nature, which could be studied and exploited in order to maximise the plantation crop. The overlap between members of Parliament, Scientific Societies and investors in plantations in the Caribbean colonies ensured that land as a commercial asset would prevail over other uses

125 Herzfeld (2006).
126 Beinart / Hughes (eds.) (2009) 289.
127 Ibid.
128 Ibid.
129 Drayton (1993) 151.
130 Drayton (1993) 153.
131 Endfield / Randalls (2015) 25.

in the region, which had dire consequences for the Amerindian communities. In keeping with this idea of limiting land use to the propertied, enslaved communities were also denied access to nature as part of their dehumanisation. When enslaved Africans, who were alienated from their own landscapes, were introduced as foreigners to this new region, they lost their human qualities due to their race, and became 'things', dehumanised chattel appurtenant to the land, moveable property to be inherited and sold as the contents of an estate, with no recognised attachment to the environment.[132] Herzfeld remarks that belonging is couched in spatial terms, and local knowledge, rooted in lived experience, is resistant to the imperious claims of universalism and abstraction.[133] Recreating complex lived-in landscapes as inert space in nature reserves thus denied these communities a place in these landscapes – it denied them access to their homelands, the ability to create new homelands, and their spatial expressions as communities.

5. The legacy of reserving nature on Caribbean law and policy today

Colonial reserve legislation continues to impact Caribbean landscapes. When these colonies gained independence, the environment they inherited was degraded due to years of exploitation by colonial administration.[134] The production of knowledge about these environments had coincided with their exploitation and Indigenous dispossession under imperial regimes,[135] but law's aspatiality and neutrality provide a patina that has never been challenged in the Commonwealth Caribbean legal context, so that newly independent states continue practices of extraction and spatial cleansing in the name of progress and development.

What a spatial justice analysis of these historical developments reveals is that environmental and conservation law can mask spatial violence in the landscape, even where it is underpinned by scientific concepts and advances in botany, ecology and climate science. In fact, earnest data collection and experimentation can be drafted into the service of imperial interests and detach and erase local communities from their lived-in spaces. The preserva-

132 Johnson (ed.) (2005); Byer (2022).
133 Herzfeld (2006) 129.
134 Richardson et al. (2006) 415.
135 Ferdinand (2021) 187.

tion of an imagined domesticated 'wilderness' in the form of a reserve conveniently favours and upholds spatial cleansing practices at the expense of peopled places.[136] Such reserves represent a static, pristine and passive nature that never existed. It is therefore difficult to disentangle science, empire and conservation in the Lesser Antilles as they are linked by landscape destruction and legitimised by the law. Reserves are also created in the service of planters' property rights, to support the expansion of plantations and the profitability of crop yields, exclude other land uses, and defend these properties through maintenance of settlements and garrisons, and surveillance and elimination of undesired peoples under the guise of its public health function. This makes nature valuable only in terms of its commercial qualities.

The loss of the cultural dimension of land had profound implications for Amerindian peoples and later enslaved Africans, as neither culture had relied on ownership to define their relationship with the land. Nature continues to be defined in the law today as property, resisting alternative conceptualisations of land that draw on a lineage that existed for millennia, and predated the common law.[137]

What are the implications of a universal spatial definition of Nature as property rights, that relies on scientific findings for its legitimacy? For one, Nature is now a monolithic space, rather than inhabited multicultural places. In the EU, the complexities of ecosystems as lived-in spaces are lost in the prescribed remedies for addressing environmental protection, such as conserving Irish peatlands as carbon sinks, because there is lack of engagement with 'bog' communities (who have cut turf for fuel for centuries) on the cultural valuation of such sites.[138] This definition of the environment is problematic because it isolates human beings from nature, and pathologises the human relationship with nature as solely exploitative. At the same time,

136 For example, Antigua's Environmental Protection and Management Act 2014 defines "Protected area" as "an area of national significance based on the biological diversity located in the area and can be a wildlife or forest reserve" (s 2 of the EPM Act). The focus is on the study and conservation of "any ecosystem, flora, fauna or landscape" but no provision is made for the protection of heritage resources (s 54(1)(b)). This language is typical of the other reserve and parks legislation in the modern Lesser Antilles.

137 Laws that established colonial reserves of the former Grenada Governorate are still very much in force, such as the Grand Etang Reserve Act 1906 (Grenada).

138 On this topic, see Häyrynen et al. (2021); O'Riordan et al. (2016); Laffan/O'Mahony (2008).

science was regarded as infallible. Yet scientific developments share the abstract spatial logic of the colonisation process that dominates nature through the conversion of land to space and the reservation of that space for property owners.

Protecting passive nature upholds colonial ideas about space with implications for lived-in spaces, livelihoods, human rights, even sovereignty, territorial integrity and democratic citizenship, by relying on climate theory and conservation when promoting energy, climate and ecotourism projects.[139] It is the law that entrenches the idea that scientific conservation and ecology are neutral in nature, whereas a legal geographical analysis reveals the ways in which law is spatially blind to its impact on landscapes. This abstract logic in the law prevails and can enact spatial violence on communities closest to nature, even where they have not been physically displaced.[140]

Resource alienation can be cloaked in concepts of nature conservation, echoing colonial patterns of land use. Known as "green grabs",[141] these market transactions are also disconnected from the local geography in the manner of the first nature reserves, restricting local use and access to a homogenised nature necessary for meeting global targets for stemming biodiversity loss or climate-induced impacts.[142] As extensions of property rights, they 'reserve' the right to exploit nature at the expense of local needs and limits. They generate profits for elite interests, which are prioritised over local livelihoods. "New narratives of landscape are being constructed […] Green grabbing […] occludes people, livelihoods and social-ecological relationships from view, rendering lands open to new 'green' market uses."[143]

In the Caribbean, national parks and protected areas laws emphasise the value of protecting nature in terms of tourism assets and access for scientific research.[144] Reference is made to sustainable development for future gener-

139 Fairhead et al. (2012); Sheller (2009); Borras/Franco (2012).

140 Mollett (2014); Borras/Franco et al. (2012) 850, emphasises that the current trend relies on control rather than physical dispossession.

141 Fairhead et al. (2012).

142 Fairhead et al. (2012) 244 and 247.

143 Fairhead et al. (2012) 251.

144 "Protected area" is defined as a national park, nature reserve, botanic garden, historic site, scenic site or any other area of special concern or interest designated under section 3(1) of

ations,[145] but this is a generic definition, reflecting global economic concepts of development for the public good, detached from the reality of physical limits.[146] The Minister designates parks in his discretion, based on scientific criteria and not always in consultation with local communities, so the effectiveness of these parks in the local context is not clear, as environmental norms that reflect the lived-in reality of Caribbean environments are not prioritised in the law. This is concerning, because Caribbean islands continue to find themselves in the crosshairs of the climate crisis,[147] especially vulnerable to sea level rise, increased high energy events, flooding and food insecurity.[148] The region has always depended on its natural environment for survival – marine resources, agriculture and now tourism demand healthy and resilient ecosystems.

The 'green' turn in private sector investment, in which investments are made in projects that are aligned with positive environmental and climate change objectives, has begun in the region. These investments are specifically market-based responses to climate change that make use of mitigation strategies in the Global South to offset industrial and polluting activities in the Global North.[149] Increasingly, they are seen as forms of carbon colonialism and land grabs,[150] placing restrictions on local communities and the way they engage with their environments.

the St Kitts and Nevis National Conservation and Environmental Protection Act 1987. The Minister responsible for these areas is defined in the same section as "the Minister for the time being charged with the subject of Development", which indicates that national planning prerogatives are prioritised, and conservation plays a role in the national development agenda.

145 The protected areas legislation repeat the generic definition of sustainable development: see Grenada's National Parks and Protected Areas 1991 s 3(3); Dominica National Parks and Protected Areas Act s 3(2), See also Antigua's Environmental Protection and Management Act 2014 s 4(a) "environment managed in a sustainable manner", "protection of the environment for present and future generations"; and Schedule X to the Act defining national park: "Definition: Natural area of land and/or sea, designated to (a) protect the ecological integrity of one or more ecosystems for present and future generations."

146 On the problem of sustainability more generally as conceived in international development as a way for the Global North to manage its relationship with the Global South, see Mitchell (2011).

147 Baptiste / Rhiney (2016).

148 Giorgi (2006).

149 Lyons / Westoby (2014) 13.

150 Ibid. See also Bachram (2004).

This form of nature in stasis and its associated values do not reflect local realities in the Global South[151] and in the words of Keston Perry "entrench a coloniality of being";[152] rather than minimising and transforming that inherited vulnerability to environmental harm, these new initiatives are entrenching and exploiting it.[153] We are assured that "the science is clear"[154] [154] but offsets, debt for nature swaps and other forms of sustainable finance continue to displace residents from the Global South,[155] and current proposals for climate mitigation are reproducing the inequalities of colonialism.[156]

The Organisation of Eastern Caribbean States represents many of the states in the Lesser Antilles and the former Grenada Governorate. With additional funding from the European Union, and technical assistance from the Caribbean Natural Resources Institute, the OECS is developing its "Green-Blue Blue Economy Strategy and Action Plan", which would provide a more structured framework for implementation of a holistic, sustainable economic development plan, "combining green and blue strategies for sustainable development".[157] The Strategy notes that:

> A green economy is one which minimises ecosystem degradation, and is low carbon, resource efficient and socially equitable. Within this, a blue economy focuses specifically on coastal and marine resources. In an OECS green-blue economy, growth in employment and income levels is driven by investment into economic

151 For the significance of ocean geographies and 'grabs' of the seabed, see Braverman (ed.) (2022) and Ranganathan (2019).

152 Perry (2022) 562.

153 Wrathall et al. (2015).

154 et al. (2023): 'The State of Carbon Dioxide Removal', the first comprehensive global assessment of the current state of carbon dioxide removal published by the University of Oxford in 2023 addresses failure to solve the climate change problem as a matter of technological constraints. See https://www.stateofcdr.org/ (accessed 19 January 2023).

155 Lyons / Westoby (2014); Bachram (2004).

156 Hickel / Slameršak (2022); Ciplet et al. (2022). The Intergovernmental Panel for Climate Change's sixth assessment report also names colonialism for the first time as a historical and ongoing driver of climate change. See the Working Group II contribution to the sixth assessment report: IPCC (2022), https://www.ipcc.ch/report/sixth-assessment-report-working-group-ii/ (accessed 19 January 2023).

157 Joint press release of OECS and CANARI, https://canari.org/wp-content/uploads/2019/07/OECS-and-CANARI-Green-Blue-Economy-Strategy-and-Action-Plan.pdf (accessed 18 December 2022).

activities, assets and natural infrastructure which conserve biodiversity and ecosystem services that are critical to OECS countries and territories.[158]

Detached from local cultural contexts, this language appears sound. But as Perry explicates, debts held by bondholders, private investors, or multilateral agencies can be exchanged as forms of investments in "nature conservation" and "environmental projects".[159] In this process, the debtor country is supervised by a trustee or third party, such as the IMF or environmental NGO, who acts on behalf of the creditor to ensure investments meet environmental sustainability objectives. Environmental objectives and criteria for assessing sustainability appear to be defined in collaboration with this third party, which is not actually subject to the laws of the debtor country, while marginalised workers and communities from that country are distanced from decision-making power to determine fiscal or 'development' goals and environmental priorities.[160] The new plan for a Blue Economy in the Eastern Caribbean, which builds on the Green-Blue economy, states as its objective the creation of a model economy[161] that can be replicated around the world, reinforcing yet again that this region is a placeless template upon which environmental milestones can be generated for the global community. New instruments for the blue economy are thus simply extending the extractive frontier of colonial Caribbean nature to the sea.[162]

These new forms of spatial injustice are making use of old narratives from the colonial conservationist era. Communities are not empowered to engage in negotiations concerning their environments; this reflects what Fairhead, Scoones and Leach have identified as two underlying narratives in the green grabs process: communities are often framed as "environmentally destructive, backward and disordered, needing reconstruction to conform with modernist visions of sustainable development or naturalized and romanticized as green primitives, part of increasingly globalized media spectacles."[163] These framings echo the colonisers' approach to Amerindian and enslaved African communities, providing the pretext for enclosing and withholding land in the name of environmental protection. This masking facilitates the

158 Ibid.
159 Perry (2022) 567.
160 Ibid.
161 The OECS Blue Economy Strategy and Action Plan (October 2021), executive summary ii.
162 Perry (2022) 562.
163 Fairhead et al. (2012) 251.

spatial disconnect between the Global North and the Global South, exploiting geographic disparities that exacerbate local impacts and ultimately undermine sustainable people-place relations.

New proposals for resolving environmental problems rely on a placeless interchangeable nature where the same practices and mechanisms can be implemented. Though climate change is no longer framed in terms of dessicationism and deforestation, environmental protection laws remained shaped by the logic of the early European conservationists. The development of land has been subject to strategies that seem to rely on a natural environment that is passive and malleable, advocating for sustainable ecologies while exacerbating conditions that make people and place vulnerable through an extension of the extractive logic.[164] This reflects a particular legacy of land use, patterned on colonial constructions of nature as easily exploitable. How will the application of generic legal instruments that conceive of a homogenous nature resolve differentiated impacts generated by uniquely place-specific manifestations of global environmental problems?

6. Conclusion

This article has examined the way in which the British Empire abstracted various environments as vacuous space or wilderness, aided by imperial collecting missions and the transfer of scientific knowledge, and then depoliticised colonial violence via the deployment of (environmental) legal concepts and mechanisms, transforming understandings of lived-in nature to a nature that is defined by tradeable property rights that exist today. In particular, the re-ordering and degradation of Caribbean Island environments inspired and informed the conservationist consciousness and ethos, which today underpin the abstract logic of international environmental law.

The unpeopling of nature in the Lesser Antilles was facilitated by the use of colonial reserve legislation, which affirmed the prioritisation of land for plantation agriculture, eliminating local land uses, and disconnecting people from their local geography. Colonial conservation thus perpetuated a placeless nature upheld in the law, to the detriment of colonised environments and peoples who in actuality sustained nature for their livelihoods and

164 Sheller (2021) 1442.

continued way of life. The uptake of this placeless nature in international environmental law demonstrates the significance of Caribbean landscapes, which were sacrificed at the altar of environmentalism, the ecological sciences, and environmental legal mechanisms to generate a new spatially unjust ontology.

Places differ by geographic location, by culture and demographics, so a spatial justice analysis of the environment rejects notions of generic nature in favour of lived-in spaces that are locally encoded through human practices and interaction with specific environments over time. A lived-in space or place reflects locally unique and dynamic relationships with nature that rely on local knowledge and limits to sustain such places and peoples. Prior to the consolidation of land under Western Empires, most places reflected complex uses and relations with land, acting as a base for identity and common survival, otherwise known as landscape. Legal geography emphasises not just who but where is marginalised in struggles for domination and power – in this context, the centrality of the Caribbean to modern environmental law has been overlooked and has implications for spatial justice today.

I have argued, using a legal geographical lens, that Caribbean commonwealth environmental law is rooted in colonial ideas about nature as vacuous space, which required the extinguishment and depopulation of landscapes. The introduction of the common law was instrumental to the reordering of the Caribbean landscape and entrenching control of land for plantation agriculture, which caused ecosystems to deteriorate. Forest reserves were used to stem the ecological decline in these colonies, in order to maximise economic exploitation. In maximising economic exploitation, other uses of land, particularly the cultural dimension, were eliminated. Reserves by definition were intended to support spatial cleansing prerogatives of the Empire to create a static nature for collection and experimentation, withholding access and use of land from other people in the landscape. This understanding of nature, and the means of protecting nature (conservation) are therefore colonial and exclusionary by definition and must be deconstructed.

Reserving space is thus a form of spatial injustice. 'Paradise' denies local people connections to nature and suppresses community cohesion. A spatial justice filter invites a more rigorous analysis and would caution against homogenised and commercialised views of nature. New paradigms that are being taken up in environmental law, such as rights of nature, re-wilding and earth jurisprudence, as well as environmental and climate justice, may

be entrenching binaries that view Man as external to or a primitive form of nature in favour of wilderness, which never existed and conveniently ignores the lived-in experiences of people closest to nature. Proposals for the green economy should therefore attract greater scrutiny in light of the spatial justice considerations outlined in this chapter.

Relations with nature have endured, but these reimagined and reclaimed understandings of nature continue to be undervalued in a legal system that was designed to exclude them. Pluralising the law is necessary to arrest the unitary definition of environment in the law, and is decolonial, as this imposed singular definition became entrenched during the consolidation of the British Empire which erased people and place. New perspectives that restore the diverse relationships of marginalised and oppressed peoples with nature[165] will be important to the realisation of environmental and ultimately spatial justice.

This would accommodate diverse spatial definitions, since law's dismissal of spatial diversity, or people-place relations has consequences for community cohesion and ecological resilience. Without place specificity, small island developing states such as those in the Caribbean will be unable to address the local manifestations of the climate crisis and incorporate a vision of sustainability that is driven by the region's own cultural values and limits. A reconceptualisation of nature in the law that does not destabilise or degrade place means that nature must be emplaced, rejecting the vacuity of space, and embracing pluralistic values in the environment.

Abbreviations

CANARI Caribbean Natural Resources Institute
OECS Organisation of Eastern Caribbean States

165 Ferdinand (2021) 12.

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Sonya Cotton

Legislating "Community" in Southern Africa's Plural Properties*

1. Introduction

Official legal pluralism, or the institutionalised coexistence of state and non-state normative orders – such as religious or customary laws – is characteristic of post-colonial African legal systems.[1] This is especially the case for former British colonies that applied the system of "indirect rule", whereby African rulers – frequently appointed by colonial administrators – governed "native" communities through a distorted version of African Customary Law (ACL) that accorded to European moral standards and preconceptions of African society.[2] Despite its contested[3] and – in certain cases – invented origins,[4] customary laws, rather than state laws, often enjoy a de facto normative monopoly on communities, particularly in rural regions of Africa.[5] Further, the recognition of customary laws on the basis of equality with transplanted colonial laws is perceived as a hallmark of post-colonial legal reform, embodying the principles of group rights and the right to culture valued within African traditional communities.[6] However, the legitimacy of customary laws does not merely pertain to cultural freedoms, but also has material consequences for land use and ownership. Anglophone African countries widely recognise customary (also called communal, traditional, and tribal) land alongside conventional forms of freehold and leasehold

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1 Merry (1988).

2 Bond (2008) 300; Táíwò (2010) 40–41; Amoo (2020) 21.

3 Diala (2021).

4 Mamdani (1996).

5 Wily (2011).

6 Bennet (2009). See also Article 5(2) of the African Union's Charter for African Cultural Renaissance (2006).

tenure. In contrast to the latter types of property, access to customary land is predicated on one's identity and accepted status as a member of a traditional or customary community.[7]

From a human rights perspective, the legal effects of the recognition of customary title in anglophone Africa has been mixed. Bolstered by a growing body of international jurisprudence recognising that land for indigenous peoples is not merely an economic entity, but also inextricably connected to its spiritual, socio-cultural, and ecological properties,[8] traditional communities in Africa have successfully approached the courts to safeguard ancestral land against extractivist industries and/or state appropriation.[9] At the same time, multiple factors – such as lacunae in the law, lack of formal title, and unilateral actions taken by traditional leaders without the consent of their constituent communities, to name a few – make communal land particularly vulnerable to land grabs, resulting in widespread dispossession and inability to access the legal remedies available to ordinary citizens.[10]

In the context of accelerated globalisation, where rural land in lower- and middle-income countries is particularly attractive for extractive industries and agri-businesses, there is a dual incentive for African countries to affirm traditional systems of knowledge denigrated under colonial rule, whilst maintaining control over customary lands in so far as it is economically and politically advantageous. Describing a comparable situation in the Americas, Forte observes how, as indigenous title becomes established in mainstream international law as an alternative to state or private land, there has been a "growing anxiety on the part of states as they attempt to define, identify, and manage the explosion in Indigenous self-identification".[11]

This chapter explores how this "growing anxiety" is managed in five neighbouring southern Africa countries that reflect the British practice of indirect rule, namely Namibia, Botswana, South Africa, Zambia and Zimbabwe. It furthermore unpacks the ways in which these strategies are not

7 Cousins (2007).

8 Cotula (2015). See also Strecker (2018), 168 ff. *Sawhoyamaxa Indigenous Community v Paraguay* (2006); *Saramaka People v Suriname* (2007).

9 *African Commission on Human and Peoples' Rights v Kenya* (2017) ("*Ogiek*"), *Baleni v Minister of Mineral Resources* (2018). On "extractivism" see Kröger (2022).

10 Claassens/O'Regan (2021); Kepe/Hall (2018); Manson/Mbenga (2011) 110; Wily (2010).

11 Forte (2013); Bhandar (2018) 150–151.

grounded in local realities but rather aim to constrain the capacity for a grassroots legal pluralism, inadvertently employing colonial ontologies of land governance in Africa.

Following this introduction, Section 2 explores the relevance of "community" with respect to communal land rights in anglophone Africa. This includes a discussion of the position in the region of international indigenous people's rights, which provides the normative basis for many community land claims in the absence of formal title. While international indigenous people's rights are increasingly being referenced in African jurisdictions with respect to the collective land rights,[12] I argue that there has been insufficient engagement with what it means to be a community, despite the importance of this concept to the collective legal personhood. The remainder of this section looks at the lay meaning of community. Section 3 looks at the contemporary statutory definition of "community" in five neighbouring southern African countries with respect to customary land. Particularly it asks the following two questions: who qualifies *for* the protected status of community and who/what *qualifies* for/as communal land. It argues that despite affirming legal pluralism; in practice communities are defined through a prism that limits and curtails the type of pluralism that is allowed, and customary land is regulated in a manner that does not, for the most part, afford communities agency in self-identification or self-determination. Section 4 discusses the ways in which the statutory understanding of communities, including the ways in which they are allowed to use customary land, reflect Occidentalist and colonial (mis)interpretations of Africa. It also reflects on the appropriateness of the company as a model for community. Finally, section 5 summarises the arguments of the chapter, and, drawing on the decolonial scholarship of Mbembe, Mignolo and Federici, argues for a purposive understanding of "community" based on an ethic of repair, restitution and reparation, embedded in the local landscape.

The purpose of this chapter is not to engage in debates about the legitimacy of indigeneity as a legal status,[13] or comment on communities who identify as indigenous or employ strategies of international indigenous peoples' rights,[14] but rather to invert the ethnographic gaze towards normative

12 *Ogiek*; *Baleni*; Gilbert (2017).
13 Young (2020); Kuipa (2017); Povinelli (2002).
14 Lehmann (2007).

Eurocentric ontologies of "community", which, as will be argued, continue to haunt postcolonial legal systems. This is relevant to critical legal geography perspectives, which, in contrast to much traditional legal scholarship, reject a despatialised understanding of law as neutral, universal and/or based on a teleology of progress.[15] Instead, legal geography pays attention to the way in which law and space are co-constitutive, mapping the borders of social reproduction, which includes the (post)colonial demarcation of collective identity.[16]

2. The spatial idea of "community"

a) Ordinary meaning of community

In the ordinary sense of the word, "community" is commonly connotated spatially.[17] This is seen in the 10th edition of the Concise Oxford Dictionary provides the following definitions of community, ranked by the dictionary in order of its perceived relevance and applicability:

1) "A group of people living together in one place, especially one practising common ownership;"
2) "A place considered together with its inhabitants: a rural community;"
3) "The people of an area of country considered collectively; society;"
4) "A group with something in common;"[18] and, finally,
5) "A group of interdependent plants or animals growing or living together".[19]

Here, the first three meanings relate to notions of physical space, property/ownership, and social identity. The fourth meaning is general and allows for the metaphorical and despatialised use of the term (as in the phrase "LGBTQ+ community").[20] Like the first three definitions provided, the fifth sense of "community" is grounded in place and space. However,

15 Sandberg (2021) 169–171; Bennet/Layard (2015). See the introduction in this volume.
16 Sandberg (2021) 181; Bennet/Layard (2015); Blomley/Bakan (1992).
17 On such metaphorical uses, see Mulligan (2015) 349 on grounded verses projected communities.
18 10th edition of the Concise Oxford Dictionary, 289.
19 Ibid.
20 Ibid.; Hopper (2003) 3.

unlike the other entries, its defining characteristic is interdependence, "a group of interdependent plants or animals growing or living together", and its use is constrained to ecology ("plants or animals").[21] The implication is that this defining community through interdependence is esoteric and specialised. And yet, this latter definition is most reflective of indigenous and non-Western cosmologies;[22] as well as a growing body of scholarship rejecting the post-Enlightenment distinction between nature and culture as both qualitatively incorrect and normatively harmful, having provided the ideological foundation for colonialism, capitalism and environmental destruction.[23]

Still, the sense of "community" as connoting a stable spatial and political entity – often relating to anthropocentric notions of exclusive possession – remains salient within international law. This is most obvious in the metaphor of the "international community" as comprising the totality of sovereign nation states, despite widespread critique of the latter as the unmarked and default subject of international law.[24] Particularly within the last few decades, "community" in international law has also come to establish categories of rightsholders, particularly land-dependent groups and indigenous peoples, who are often antagonistically positioned within the nation-state.[25] Yet the term "community" in this sense remains largely undefined.[26] When qualified with the adjective "local", community is widely used in the same context as "indigenous peoples".[27] Despite the efforts of a few legal scholars arguing for a normative distinction between these two categories,[28] in practice these terms are frequently discursively interchangeable, allowing for example, groups with tribal identities to benefit from indigenous peoples'

21 10th edition of the Concise Oxford Dictionary, 289.
22 Deloria (2003); Todd (2016); Elechi (2006); Tănăsescu (2020).
23 Graham (2011); Olwig (1996); Davies (2020). See also the chapter by Byer in this section of the volume.
24 Lixinski (2019); Francioni (2014); Cotula (2015); Benda-Beckmann / Turner (2018).
25 Cotula (2015); United Nations Declaration on the Rights of Indigenous Peoples (2007) ("UNDRIP").
26 Hossain (2016) 119.
27 E. g. Article 8(j) of the UN Convention on Biological Diversity (1992); FAO (2016); 2021 Operational Guidelines for implementation of the World Heritage Convention I(C)(12).
28 Cocks (2006).

rights.[29] This is particularly relevant to contexts where communities became dispossessed and racialised through the process of settler-colonialism but are unable to prove first occupation in an area.[30] Still, the recipient communities of indigenous peoples rights requires additional discussion in the context of southern Africa, where, in contrast to former British colonies such as Australia, Canada, USA and New Zealand, European settlers and their descendants in comprise numerical minorities of the population.[31] As such, communities in Africa potentially pose a greater threat to state monopoly of land, creating incentive to curtail and streamline potential land claimants, as well as to prescribe acceptable forms of land use.[32] The following section further unpacks this dilemma, particularly the meaning of "community" with respect to indigeneity in legally pluralistic Africa.

b) Community and indigeneity in Africa

Given the potential risk of indigenous title to State monopoly over arable and resource-rich lands, various African governments have fiercely protested the need for a special protected status of indigenous communities in Africa on the grounds that "everyone is indigenous".[33] However, in no small part due to the activism of NGOs and indigenous groups,[34] this perspective has been rejected by various African jurisdictions which recognise indigeneity as a status for protection.[35] This is further reflected in the recent judgement at the African Court on Human and People's Rights, which found that in expelling the Ogiek from their ancestral land, the government of Kenya

29 *Moiwana Village v Suriname* (2005); *Samaraka People v Suriname* (2007); *Comunidad Garífuna v Honduras* (2015).

30 *Moiwana Village v Suriname* (2005) and *Saramaka People v Suriname* (2007) at the Inter-American Court of Human Rights; AHPR/IWGIPA (2005).

31 E. g. *Mabo v Queensland* (1992); *New Zealand Maori Council v Attorney-General* (1987); Veracini (2011).

32 Gilbert (2017); Odendaal (2021) 10–11.

33 Gilbert (2017) 3. See also Crawhall (2011) for a discussion on African political concerns around UNDRIP at the General Assembly.

34 Crawhall (2011); Murray (2011).

35 Gilbert (2017); *Baleni* (2018); also s 1 of South Africa's Interim Protection of Informal Land Rights Act (1996).

had violated that community's rights as indigenous peoples.[36] An authoritative definition of indigeneity for the African context comes from the African Commission Working Group of Experts on Indigenous Population/Communities, which understands the concept as not merely applying to the groups who historically were first present in the region, but being predicated on, among other factors, self-identifying as indigenous, experiencing institutional marginalization and living traditional lifestyles distinct from mainstream society.[37] Since this conception does not rely on neatly bound ethnic identities, it better reflects the dynamism of precolonial identity-formation.[38] Likewise, it accommodates the phenomenon whereby indigeneity was not an ontological state of existence, but instead emerged in relation to settler-colonialism, whereby the status and rights of local communities were defined by colonial laws shaped by European racial cosmologies.[39]

While there is considerable exploration of the legal dimensions of "indigeneity",[40] the legal discourse around defining "community" is less well developed, despite the latter concept being central for determining the legal standing of claimants in land-related cases.[41] In South Africa, it is widely recognised that the demarcated boundaries of traditional African knowledge, including ethnic boundaries, was shaped by colonial and racist stereotypes, and as thus cannot be relied upon to give accurate representations of traditional communities.[42] Likewise, it is widely acknowledged that the legislation of African communal identity was inextricably linked with colonial statecraft, sowing animosity between "tribes" to prevent collective resistance to Europeans; placing indigenous peoples in strategically situated "reserves"; as well as keeping the "natives" in check in a way that used minimal colonial resources yet ensured labour supplies for the colonisers.[43] This necessitated that African communities be understood as "monarchical, patriarchal, and authoritarian. It presumed a king at the centre of every

36 *African Commission on Human and Peoples' Rights v Kenia* (2017).
37 ACHPR/IWGIA (2005).
38 Keese (2019).
39 Odendaal (2021) 9–11.
40 Engle (2010); Rösch (2017); Veracini (2011).
41 Diala/Cotton (2021); Averweg/Leaning (2015); Kepe (1999).
42 Bennet (2009); Himonga/Diallo (2017); Manson/Mbenga (2012).
43 Mamdani (1996); Dedering (2006); Friedman (2005); Chimhundu (1992).

polity, a chief on every piece of administrative ground, and a patriarch in every homestead or kraal".[44]

Recognising the colonial distortion of African traditional society, South African judges have recognised that in practice, communities do not necessarily conform to these immutable fictions of customary law, but are constantly adapting and contesting the meaning of custom in response to new circumstances.[45] Judge Moseneke, at the Constitutional Court of South Africa, attempted to grapple with the meaning of community as it pertained to claimants seeking land restitution:[46]

> [W]hat must be kept in mind is that the legislation has set a low threshold as to what constitutes a "community" or any "part of a community". It does not set any pre-ordained qualities of the group of persons or any part of the group in order to qualify as a community. This generous notion of what constitutes a community fits well with the wide scope of the "rights in land" that are capable of restoration. These rights, as defined, go well beyond the orthodox common law notions of rights in land. They include any right in land, whether registered or not; the interests of labour tenants and sharecroppers; customary law interests; interests of a beneficiary under a trust; and a beneficial occupation for a continuous period of not less than ten years before the dispossession. The legislative scheme points to a purpose to make good the ample hurt, indignity and injustice of racial dispossession of rights or interests in land that continued to take place after 19 June 1913.[47]

Despite this progressive understanding of community, which acknowledges the need to look further than traditional common law doctrine, Moseneke does not say what a community *is*, only the liberal lens through which these land claims must be assessed.[48] Furthermore, subsequent cases and statutory developments illustrate that this definition was by no means universally endorsed nor consistently applied in South Africa's legal system.[49] For instance, lower courts have rejected the application for land restitution on the grounds that appellants were not a proper community,[50] a matter that is becoming increasingly apparent as revivalist and newly recognised Khoi and San indigenous communities approach the courts to litigate land

44 Mamdani (1996) 39–40.
45 *Mabena v Letsoalo* (1998).
46 *Department of Land Affairs v Goedgelegen* (2007).
47 Ibid. at para 41.
48 Personal correspondence with Donal Coffey (2023).
49 As well as other southern African countries, for instance see *Tsumib v Namibia* (2022).
50 *Elambini Community v Minister of Rural Development and Land Reform* (2018).

disputes.[51] It thus remains useful to broadly interrogate the normative underpinnings of "community" to understand the ontological forces that shape the recognition and misrecognition of claimants in land disputes.

3. Anxious pluralisms

The previous section discussed the normative (and spatial) understanding of "community" and the problem that new protections for "local communities" in international law represent in the context of legally pluralistic Africa. It also argued that despite being closely related to indigenous peoples' rights, the "community" as a legal subject and rightsholder remains considerably less explored, which, given the colonial distortion of African identity, is particularly problematic. With respect to five anglophone countries in southern Africa – Namibia, South Africa, Botswana, Zambia, and Zimbabwe – this section unpacks the national legislative language used to define, constrain and shape "communities" with respect to the rightsholders and occupants of customary/traditional/communal lands. The following sub sections do so with respect to two guiding questions: (1) Who qualifies (as a) community – in other words, what statutory guidance is given, if any, to demarcate, define or identify the collective rightsholders of customary land? (2) Who/what qualifies communal land? The second question examines who owns (or at least who is able to exert the highest epistemic authority over) communal land,[52] as well as the statutory mechanisms designed to govern that land. The latter is entrenched in particular ideologies of property/land use, which, as I will argue, further shapes the legal meaning of community. I refer to these strategies collectively as "anxious pluralisms", since they reflect the dual incentives of postcolonial African countries to affirm legal pluralism, and at the same time frantically constrain its effects, particularly with respect to collective land rights.[53]

51 Ellis (2019). This is also exemplified in the ongoing litigation in Cape Town to stop the development of Amazon's African headquarters, which increasingly hinges on whether litigants are "legitimately" indigenous. *Observatory Civic Association & Goringhaicona Khoi Khoin v Liesbeek Leisure Properties Trust* (2021); *Khoin and Others v Jenkins and Others* (2022).

52 This draws on notions of hermeneutical injustice, as discussed by Fricker (2007).

53 This analysis focuses on laws, rather than policies. The countries discussed, for instance, have experimented to various degrees with Community Based Natural Resource Management policies, which have attempted to devolve the management of natural resources,

a) Who qualifies (as a) community?

Namibia

Namibia's Traditional Authorities Act of 2002 (henceforth "TAA") defines "traditional community" as an:

> [I]ndigenous homogenous, endogamous social grouping of persons comprising of families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, who recognises a common traditional authority and inhabits a common communal area, and may include the members of that traditional community residing outside the common communal area.[54]

The insistence on homogeneity (including shared ancestry, language, cultural heritage, customs, and so forth) reflects a Westphalian and Eurocentric understanding of the world as comprising bound, mutually exclusive categories.[55] The stipulation that traditional communities recognise a common traditional authority furthermore reflects colonial practices of statecraft through "indirect rule".[56] With respect to its understanding of traditional community, Odendaal and Werner observe that the Act was written with particular notice to Namibia's Oshiwambo-speaking groups (comprising over 50% of the population), whose traditional structure "is characterised by a hierarchical authority structure with a single representative leader for a large group".[57] However, this definition by no means applies to all ethnic minorities, such as San communities, who traditionally, rather than recognising a single traditional leader, are egalitarian with internal checks and balances to prevent centralised despotism.[58]

Following the logic of the TAA, to be recognised as a traditional community meant that certain communities were required to compromise their own traditional values and systems of organisation, for example appointing

such as wildlife and biodiversity, to communities (Nelson 2010). However, drawing on critiques that these policies have ultimately not empowered local communities (Murombedzi 2010; Rihoy/Maguranyanga 2010), this chapter focuses instead on acts of legislation governing the demarcation of collective identities in the context of land rights. The latter, arguably, represents a far greater risk to state monopoly over land.

54 S 1 Namibia's Traditional Authorities Act ("TAA") (2002).

55 Mbembe (2018); Bak McKenna (2022) 29.

56 Mamdani (1996) 90.

57 Odendaal/Werner (2020) 4.

58 Dieckman (2020) 101; Koot/Hitchcock (2019).

someone in the community as a traditional leader where customarily such a post did not exist.[59] Furthermore, despite providing for the removal of traditional leaders,[60] the TAA may in fact exacerbate the difficulty in doing so. This is because the traditional leader is the paramount authority over the customary law of that community, and yet it is through customary law that the traditional leader can be removed.[61] The TAA thus seems to depend on a circular logic that essentially allows the person empowered to dictate the community's customs to be the person in charge of removing his or her own leadership, with minimal checks and balances to prevent corruption.[62]

59 Certain sections of the Act, such as sections 4(1)(b) and 5(10), allude to the fact that some communities do not have "chiefs" or a royal family from which a leader can be appointed. However, recognizing a traditional authority is a named requirement for being recognized as a traditional community by the Act (as per section 1), and hence it is impossible to be a traditional community in terms of the Act without appointing someone to the role of traditional leader. Thus, where no such leader exists, they must be found.

60 S 8 TAA.

61 S 8 (1) TAA on the removal of traditional leaders. Conversation with Peter Watson, legal researcher and consultant for Legal Assistance Centre, 7 November 2022, Windhoek, Namibia. Watson also observes that this argument is, at present, based on conjecture, since this issue has not yet been tested in court directly. Nonetheless, to his understanding, no traditional authority has, at present, successfully been removed by their community.

62 A possible exception to the lack of checks and balances is section 5(10) of the Act, which states that where traditional communities have no customary law regarding appointing a traditional leader, or there is uncertainty or disagreement regarding the customary law applicable, "[t]he members of that community may elect, subject to the approval of the Minister, a chief or head of the traditional community by a majority vote in a general meeting of the members of that community who have attained the age of 18 years and who are present at the meeting". Still, this leaves much to be desired. There is neither a positive obligation to hold democratic elections for a traditional leader, nor any guidelines to ensure transparency in the election. The stipulation that those "present at the meeting" may elect a traditional leader is open to corruption, and furthermore does not regard the geographic and economic reality of Namibia, particularly rural areas, whereby population is sparce and roads are often in poor condition. Furthermore, s 3(4) of the Act imposes fines and/or imprisonment sentences to members of the community who recognise a traditional authority besides the one established through the Act. In practice, this may create a chilling effect within the community, disincentivizing potential dissenters from straying outside the borders of the traditional authority, irrespective of the latter's legitimacy. In my own fieldwork in Namibia September 2022, I was informed by several unrelated people that traditional leadership, including their appointment, is often blurred with party politics. See also Friedman (2011) at 167 and Koot/Hitchcock (2019) 63.

The shortcomings in the Act have contributed to the unjust treatment of indigenous people by Namibia's courts, seen in *Tsumib and Others v Namibia and Others*, one of the first and only ancestral rights claims to be litigated in independent Namibia.[63] The applicants belonged to the Hai//om people, the largest San group in Namibia, who traditionally were hunter-gathers in the region of the country that today houses Etosha National Park, a major tourist attraction.[64] Following Germany's annexation of Namibia (then German South West Africa), the Hai//om people were permitted to remain in the area and practice their traditional lifestyle, including after the demarcation of the area as a Game Reserve in 1907.[65] However, starting in 1954, the apartheid South African government (who effectively treated Namibia as its own colony following Germany's defeat in World War One) forcibly removed the Hai//om people from Etosha in order to preserve the "purity" of the park's natural environment, thereby forcing the community to give up their traditional subsistence to work as poorly-paid labourers in surrounding farms.[66]

In 2015, eight members of the Hai//om community approached the court requesting permission to represent their people in order to claim rights over their land, which included two parts of the Etosha National Park, drawing on their rights as indigenous peoples under international law.[67] Their application was rejected in the High Court due to the fact that the traditional leader registered under the TAA was not joined to the proceedings, meaning that the applicants lacked legal standing to represent their community.[68] The Supreme Court of Namibia upheld the High Court's decision that the claimants lacked the locus standi to proceed, albeit departed from the logic that the TAA fundamentally precluded the possibility for members of the community to litigate without the traditional leader.[69] Instead, the Supreme

63 Odendaal (2021) 15; Dieckmann (2020). I say "one of the first" in acknowledgement of former unsuccessful efforts by the Rehoboth community to litigate against the state for their traditionally held land. *Bastergemeente v Government of the Republic of Namibia* (1996).

64 Odendaal (2021); Dieckmann (2020).

65 Dieckmann (2020) 97.

66 Dieckmann (2020) 98–100.

67 Odendaal (2021).

68 *Tsumib* (2022); Odendaal (2021).

69 However, it must be stated that the reason for rejecting this interpretation was vague and unclear, stating that such an outcome was not part of the "intention" of the Act, and that

Court reasoned that the claimants had not sufficiently established the need to broaden Namibia's (extremely narrow) rules on legal standing, and argued that the claimants instead could have pursued other means to have their requests addressed, including changing "the customary law" of the community, or forming an "unincorporated voluntary association". While it is beyond the scope of this chapter to fully go into why these alternatives are neither realistic nor viable, two brief points shall be made. Firstly, as discussed, the TAA disproportionately empowers the authorised traditional authority to make epistemic decisions relevant to the customary law of the community, meaning that the suggestion to "change the customary law" from within is not feasible. Secondly, the "unincorporated voluntary association" is a legal fiction used largely with respect to non-profit organisations and requires a technical knowledge of the common law that may be unavailable to people experiencing extreme marginalisation, lack of infrastructure and poverty.[70] In focusing on the technical minutiae of its own common law, the Supreme Court ignored the socio-political context in which this claim emerged, and ignored its obligations to international laws on indigenous peoples.[71]

South Africa

Despite the recognition that customary law must be recognised on its own terms, and not through the prism of Western laws,[72] the interpretation of the legal meaning "community" in South Africa is often contradictory, oscillating between inclusive definitions that provide for bottom-up identification while also perpetuating apartheid ontologies of "tribes" in later attempts to demarcate and define customary identity.[73] Traditional leaders

the power of the traditional authority was limited by the independent rights of the community, as well as by the terms of the Act itself. As discussed earlier, this argument fails to capture the contradictions in the Act – including the lack of checks and balances – or account for its social consequences, whereby it creates vast disparities between community members and their prescribed leaders. *Tsumib* (2022) at para 45.

70 On the socio-economic conditions of the Hai//om, see Koot/Hitchcock (2019) 61–62.

71 On Namibia's monist constitutional model with respect to international law, see Odendaal (2021).

72 *Bhe v Magistrate*, *Khayelitsha* (2005) at paras 87 and 90; *Gumede v President of South Africa* (2009) at para 20.

73 On the latter, see Claassens (2019).

are paid a salary by the state, with kings and queens receiving the highest numeration,[74] which further speaks to the institutionalised position of traditional leadership despite the fluctuation in legislative meanings of community.

A number of laws passed shortly after the transition from apartheid to democracy include broad definitions of community, reflecting the desire to democratise land governance according to constitutional values of human rights and dignity.[75] The Restitution of Land Rights Act of 1994 defines community as "any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group".[76] Likewise, the Communal Property Act (CPA), established for land restitution claimants to form juristic persons in charge of governing communal land, defines community as a "group of persons, which wishes to have its rights to or in particular property determined by shared rules under a written constitution and which wishes or is required to form an association as contemplated in section 2".[77] Another broad definition is found in the 1996 Interim Protection of Informal Land Rights (IPILR), which defines community as "any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group".[78] Used in conjunction with international law, this latter law has been successfully used by customary communities to defend unregistered land title from appropriation by mining companies, some of whom were working in conjunction with the communities' own traditional leaders.[79]

At the same time, there has been concerted efforts to streamline and standardise "community" to empower traditional leaders at the expense of communities, thereby reinscribing Apartheid and colonial methods of land governance for rural black South Africans.[80] The Traditional Leadership and Governance Framework Amendment Act (henceforth TLGK) of 2003 extends recognition of the "tribes" and "tribal authorities" established under

74 Proclamation Notice 73 (2022).
75 Kingwill (2021) 194–195; *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority* at para 31.
76 Restitution of Land Rights Act 22 (1994).
77 S 1 Communal Property Act 28 (1996).
78 Interim Protection of Informal Land Rights Act 31 (1996).
79 *Baleni* and *Maledu*.
80 Claassens (2019); Kepe/Hall (2018); Duda/Ubinck (2021); Pienaar (2017) 21–22.

Apartheid, maintaining the boundaries of former Bantustans.[81] The TLGK further reifies the centrality of traditional authority in the recognition of the community, stating that a "community may be recognised as a traditional community if it is subject to a system of traditional leadership in terms of that community's customs; and observes a system of customary law".[82]

The TLGK was replaced by the 2019 Traditional and Khoi-San Leadership Act (henceforth "TKSLA"), which defines traditional community as:

(a) [A] system of traditional leadership at a senior traditional leadership level recognised by other traditional communities;
(b) observ[ing] a system of customary law;
(c) recognis[ing] itself as a distinct traditional community with a proven history of existence, from a particular point in time up to the present, distinct and separate from other traditional communities;
(d) occup[ying] a specific geographical area;
(e) hav[ing] an existence of distinctive cultural heritage manifestations; and
(f) where applicable, [having] a number of headmenship or headwomenship.[83]

Despite for the first time acknowledging the existence of Khoi and San communities alongside other South African customary communities, the Act reifies apartheid and colonial conceptions of "community" as something that is culturally and spatially fixed, and predicated on a hierarchical system of traditional authority, irrespective of the applicability of these features to the social organisation to indigenous groups.[84] Furthermore, the conceptualisation of indigenous community, which gives disproportionate power to traditional leaders, has the capacity to undermine the flexibility and capacity for bottom-up decision making permitted by the IPILR, reinscribing apartheid "tribal" systems.[85]

Consequently, the Act was recently challenged in South Africa's Constitutional Court.[86] The applicants of this case, comprising largely activists and grassroot organisations, argued that the TKSLA pooled legal capacity and

81 S 28 TLGK. Buthelezi/Vale (2019) 10.
82 S 2 TLGK; Duda/Ubinck (2021) 142.
83 S 3(4) TKSLA.
84 Puckett (2013); Ellis (2019); Mamdani (1996) 39–40.
85 Claassens/O'Regan (2021) 165–166.
86 *Mogale v Speaker of the National Assembly* (2023).

decision making power disproportionately into the hands of traditional leaders, thus stripping the community of their rights to impact and give / withhold consent to decisions relating to the land on which they lived – inadvertently, reinstalling apartheid-era Bantustan governance in rural areas.[87] The case was decided in favour of the applicants, not on the merits of the substance of the TKSLA, but rather in recognition that there had not been meaningful public consultation from the government.[88] Despite the importance of this decision for democracy, there is once again statutory ambiguity regarding who can be legible as a traditional community in the eyes of the State.[89]

Zimbabwe

The definition of "community" in Zimbabwe is, according to the 1998 Traditional Leaders Act, "a community of persons who, according to customary law, fall under the jurisdiction of a chief".[90] This again reifies hierarchical leadership as the basis for customary community, a matter that conveniently places the State in control of customary land, since traditional leaders are appointed by the president and receive a salary from the government.[91] Further, section 2 of the Act gives the president considerable liberty to define and (re)adjust the boundaries of communal land "in any […] manner that he thinks appropriate",[92] which invites comparison with the 1927 Native Administration Act of colonial South Africa, that allowed the minister to manipulate or even create tribal boundaries strategically.[93]

87 *Mogale* at paras 8 and 43. See also Claassens / O'Regan (2021) at 165 who made similar arguments.

88 *Mogale* at para 45.

89 This ambiguity is compounded by the discreet removal of the definition of "community" from South Africa's environmental legislation. For instance, section 1(d) of South Africa's National Management Amendment Act (2008) defines "community" as "any group of persons or a part of such a group who share common interests, and who regard themselves as a community; and (b) in relation to environmental matters […] means a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law". This definition was subsequently removed by section 1(d) of the National Environmental Management Laws Amendment Act (2014).

90 S 2 Traditional Leaders Act 25 (1998).

91 S 3 ibid.

92 S 2 Rural District Councils Act 8 (1988).

93 Mamdani (1996) 67.

Botswana

In Botswana, the "tribe", rather than the "community", is the official idiom through which the regulation of customary land tenure is expressed.[94] Botswana's Constitution recognises eight tribes of the Tswana ethnic group, the dominant population of Botswana.[95] Customary leaders act as public officials, fulfilling ministerial obligations in addition to customary ones and are paid a salary by the State.[96] In effect, Botswana has standardised and codified customary identities, which were dynamic and overlapping before colonisation.[97]

That "community" is understood as a tributary of "tribe" is seen in the Customary Law Act of 1969, which provides a definition of "tribal community" as "any community which is living outside a tribal territory but is organized in a tribal manner".[98] Botswana's Bogosi Act of 2008 prescribes the conditions in which tribal communities can be recognized as a tribe.[99] The final decision ultimately lies with the Minister, who when consulting with the "tribal community" in question takes into account "the history, origins, and organisational structure of the community, and any other relevant matters".[100] Despite the potential for legislative recognition and formal inclusion of communities outside Botswana's recognised tribes, Bishop expresses doubt that this framework is "culturally appropriate" – let alone logistically possible – for communities not identified in the Constitution,

94 However, a definition of "community" exists at a policy-level in environmental management. Botswana's Community Based Natural Resources Management Policy (2007: ii) defines community as, "[A] group of people bound together by social and economic relations based on shared interests," which, for the purposes of the Policy, "may consist of a diverse group of people, living in one or more settlements, with varied socio-economic interests and capabilities sharing an interest in the management and sustainable use of natural resources in their common area".

95 S 78 Constitution of Botswana (1966). Also, Botswana's Mineral Rights in Tribal Territories Act 31 (1967). The Act further includes eight schedules of memorandums of agreement between the President of Botswana and the respective Chief of these tribes, with the effect of bestowing mineral rights to the State. Werbner (2002) 676.

96 S 17 Bogosi Act; Manatsha (2019).

97 Werbner (2002); Wilmsen (2002) 827–829.

98 S 2 Customary Law Act of Botswana (1969).

99 S 3 Bogosi Act (2008).

100 Ibid.

namely San and pastoral communities, whose social organisation is not "tribal" but characterised by mobility and horizontality.[101]

Finally, Botswana's statutory regulation of customary law retains a repugnancy clause, a colonial proviso whereby African customary law was permitted to govern Africans in so far as it did not offend Victorian standards of respectability and decency (or, as it was worded, "natural justice and morality").[102] The repugnancy clause is seen in Botswana's definition of customary law as "the customary law of that tribe or community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice".[103] While conspicuously used as a means to curb harmful customs and cultural practices (particularly related to polygamy and other personal law matters), in practice, the repugnancy clause was a function of indirect rule, ensuring that African culture was constrained in the borders of Western interpretation, and thus inherently regarded as deficient and inferior.[104] Thus, the continued existence of the repugnancy clause in contemporary Botswana suggests state anxiety about traditional leaders' normative monopoly on communities, despite the latter's power being codified during colonialism.[105]

Zambia

While customary law is a protected source of legal authority in Zambia's Constitution,[106] and customary land is identified as a system of tenure,[107] there is to my knowledge no concise statutory definition of "community" in Zambia's written laws with respect to customary land.[108] Still, like the other

101 Bishop (1998) 120–121; see also Molebtsi (2019) 48; Gilbert (2017); Ellis (2014); Hitchcock (2006).

102 Banda (2005) 16.

103 S 2 Customary Law Act of Botswana. See also s 2 Bogosi Act.

104 Mamdani (1996) 115–117.

105 Morapedi (2010); Manatsha (2020).

106 S 7(d) Constitution of Zambia.

107 S 254 Constitution of Zambia.

108 Rather, the definition of "village" in Registration and Development of Villages Act is functionally almost identical to the other definitions of community in the other countries examined, particularly Zimbabwe. The Act, in section 2, defines "village" as "means a settlement in a rural area of which there is a Headman recognised as such by all or a majority of the villagers and their Chief under their customary law, and 'villager' shall be

countries discussed so far, it is evident that it is conceived with respect to traditional authorities, who must first be approved by the president and are then paid a salary by the state.[109] That customary communities are imagined in a top-down manner is affirmed in the policing role of the Chief who is "required to take reasonable measures to quell any riot, affray or similar disorder which may occur in that area".[110] Zambia's Land Act of 1995 furthermore recognises that any customary land rights held prior to the Act remain valid, and these may not be infringed upon by any other law, however this right is contingent on permission from the relevant authority.[111]

Discussion

For the most part, with the exception of certain legislation in South Africa, "community" is widely constructed with respect to traditional authorities, whose roles and powers are prescribed through legislation, and who often receive renumeration from the State. Likewise, community is affixed to specific territories zoned as communal / tribal land. This results in the erasure of communities who do not fit within these categories, for example San peoples, but also communities whose rights in land were violated through unilateral decisions taken by their traditional leader.[112] It furthermore forecloses self-identification as a means of establishing a community, contradicting international guidelines on indigenous peoples' rights.[113]

Namibia and South Africa provide the most detailed ethnographic criteria of what it means to be a customary or traditional community, perhaps a

construed accordingly". Here, village refers to the collection of people who practice customary law as determined by their traditional authority (a headman, who is governed by a Chief). It is also spatially affixed. However, the Act in other ways departs from the other counties' understanding of community, requiring each village's respective traditional leader to record the movement and details of villagers. Thus, in contrast with other countries examined, status on customary land is delinked from a particular ethnic identity, but more related to the land itself. See section 4.

109 S 8 and s 3 (2) The Chief's Act of Zambia.

110 Ibid., s 11. This top-down approach is further seen at a policy level with respect to environmental governance. Lubilo / Child (2010).

111 S 7 and 9 Zambia's Lands (Amendment) Act (1996).

112 See section 3.2 below.

113 Art. 1(2) ILO 169 (1989).

114 Bhandar (2018) 1–4.

legacy of the previous apartheid regime, which, more so than colonies used primarily to extract resources to the metropole, meant that white settlers were more inclined to exert greater levels of epistemic authority over the identification and subsequent disposal of indigenous peoples.[114] At the same time, in South Africa, certain pieces of legislation, particularly those passed in the early years after apartheid define community in terms of structure rather than form – that is through possessing "shared rules" and / or a particular relationship to land – rather than a through a normative description of ethnic identity. Its corresponding structures of land governance, namely the communal property association, is discussed in more detail in the following section, which considers the statutory guidance for the administration of communal lands, and its ideological meaning in terms of acceptable land use.

b) Who / what qualifies as communal land?

Zimbabwe

Despite the Constitution of Zimbabwe providing wide discretion to traditional leaders in ruling communal land,[115] at a statutory level, communal land is strictly regulated by the government. All communal land is vested in the president,[116] who in turn appoints chiefs – the highest rank of traditional authority.[117] Traditional leaders are required to cooperate with Rural District Councils, which are bodies corporate[118] who have overall authority over the use and allocation of customary land.[119] These Councils are affectively governmental offices, and enjoy the power to create by-laws.[120] Ultimately, traditional leaders play both a cultural and administrative role, assisting the State with tasks that range from law enforcement to tax collection.[121] While communities are not in charge of their boundaries or membership, there are some statutory measures in place to provide for grassroots participation in rural governance: for instance district council members are sup-

115 Article 282(2) Constitution of Zimbabwe (2013); Tsabora / Dhliwayo (2019).
116 S 3 Communal Land Act of Zimbabwe (1982).
117 S 3(1) Traditional Leaders Act (1998).
118 Ibid. Rural District Councils Act (1988).
119 Ibid., s 26.
120 Ibid., s 88.
121 Zimbabwe Constitution article 282 1(a) and (b). Traditional Leader's Act 5(1)(f).

posed to be democratically elected,[122] and through the village there exists a platform for adult members of the community to be in dialogue with the traditional leaders and district councils.[123] Still, the regulation of customary land and the borders of "community" reflect a top-down system of control, with little recourse to protect communities members from land grabs and dispossession.[124] This has been made apparent in the government's decision in 2021 to evict thousands of Shangaan people from their ancestral land in Chilonga to make space for large-scale lucerne farming.[125] It is further seen in Zimbabwe's Environmental Management Act, which, despite acknowledging the bidirectional relationship between communities' well-being and environmental sustainability,[126] nonetheless considers the consultation of affected communities in developments to be an option that is taken at the discretion of the Director-General.[127]

Zambia

In Zambia, like in Zimbabwe, customary land is vested in the President.[128] In terms of land governance, Chiefs, subject to the Constitution and so long as it is not "repugnant to natural justice and morality", enjoy significant discretion to govern customary land.[129] For instance, their permission must be granted to alienate parts of customary land into private leasehold land.[130] However, this office may be abused at the expense of the community, as seen in the recent case, *Asa Lato and 30 Other Village Owners v Chibale and Others*, where a traditional leader sold customary land without consulting his community.[131]

122 Constitution of Zimbabwe article 275(2)(b).
123 S 14 Traditional Leaders Act of Zimbabwe.
124 CCMT (2014) 14.
125 Marewo/Ncube/Chitonge (2021); Gwerevende (2023).
126 S 4 Environmental Management Act (2002).
127 S 100(3) Environmental Management Act.
128 S 3(1) Zambia's Lands (Amendment) Act (1996); s 8 The Chief's Act of Zambia.
129 S 10(1) The Chief's Act of Zambia.
130 Murombedzi et al. (2017).
131 Daka (2019).

Botswana

Unlike Zimbabwe and Zambia, communal land in Botswana is officially vested in land boards in trust for the country's citizens.[132] Botswana's land boards are bodies corporate, capable of suing or being sued in their own name, whose authority over land includes granting, cancelling and modifying land rights, as well as authorizing transfers of tribal land.[133] They receive their funding through a combination of government payments, grants and donations, income through its investments, as well as through charging fees for their services.[134] With the exception of mineral resources, which vest in the State, the State is required to make an application to the land board if it requires tribal land be repurposed for public purposes.[135] The high status of land boards is further expressed in the strict confidentiality requirements that, at the risk of fines or imprisonment (and unless required for legal reasons), all members and people assisting land boards must "observe and preserve the confidentiality of all matters coming before the land board, and such confidentiality shall subsist even after the termination of the term of office or mandate of such member or other person, as the case may be".[136]

The extensive power of land boards in Botswana reflects the fact that the latter were conceived of as a replacement in function to the Chief, who previously served British colonial interests by keeping the local population in check.[137] The shift in authority from Chiefs to land boards reflected the perceived need for modernisation of the rural populace (reflecting Botswana's postcolonial trajectory towards Bureaucratism and privatisation); as well as the desire to weaken the monopoly over customary land previously enjoyed by traditional leaders.[138] However, Manatsha critiques the top-down process by which this change was implemented, observing that this failed to capture the lived realities of communities to whom customary laws continue to have significant normative sway.[139] Similarly, various authors critique

132 S 4 Botswana's Tribal Land Act (2018).
133 S 5(1) Botswana's Tribal Land Act.
134 S 18 ibid.
135 Ibid., s 29. S 2 of Mineral Rights in Tribal Territories (1967).
136 S 16 Tribal Land Act.
137 Ng'ong'ola (2019) 6; Mamdani (1996) 46–47.
138 Ng'ong'ola (1992) 148–149; Manatsha (2020) 111–115.
139 Manatsha (2020) 112; Morapedi (2010) 226.

Botswana's approach to land governance as favouring economic development in the abstract at the expense of social equity and uplifting the country's most marginalised.[140]

Namibia

Customary land in Namibia is vested in the State "in trust for the benefit of the traditional communities residing in those areas".[141] Traditional leaders may also, with the consent of community members, own assets in trust for the community.[142] However, like in Botswana, many powers over land previously held by traditional leaders have been statutorily transferred to Communal Land Boards (CLBs) established in the Communal Land (Reform) Act and paid by the government.[143] Indeed, Chiefs are barred from joining CLBs, precluding their ability to monopolise influence over customary land.[144] All Board positions are elected by the Minister, with the exception of representative of the traditional community, who may be elected by the traditional authority.[145] Traditional leaders are permitted to grant and cancel usage rights over communal land, however to have legal effect these rights must be ratified by the CLB.[146] CLBs are also empowered to recognise or reject individual applicants who held customary land rights prior to the commencement of the Act, with written permission of the recognised traditional authority.[147] If the CLB doubts the validity of the applicant, or if they find there is a conflict of interest, they are empowered to reject the application and/or alter the location and boundaries of the land.[148] Failure to approach the Board in the prescribed time results in the applicant losing their customary land rights.[149]

140 Malope/Batisani (2008); Molebatsi (2019).
141 S 17 Namibia's Communal Land Reform Act 5 (2002).
142 S 18 TAA.
143 Ss 2–3 and 11 Communal Land Reform Act.
144 Ibid., s 5 (b).
145 Ibid., s 4 (5).
146 Ibid., s 21 and 24(1).
147 Ibid., s 28.
148 Ibid., s 28(9) and (10).
149 Ibid., s 28(13).

The modernising agenda behind Namibia's regulation of customary land is laid out in the Communal Land Reform Act, whose purpose is "promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities."[150] This is reflected in the CLB's make-up, comprising – among others – representatives of organised farming, and civil servants representing regional government, land matters, environmental matters and agriculture.[151] Thus the Board reflects the colonial/modern "ideology of improvement", whereby economically productive land use is privileged over all other values of land, including its socio-cultural and ecological meanings.[152] At the same time, freehold ownership is forbidden over any part of communal land,[153] which extends to a blanket prohibition of putting up fences.[154]

On the one hand, the prohibition of fences provides, at least in theory, a legal mechanism against illicit alienation and enclosure of communal land, thereby protecting land-dependent communities from certain types of exploitation and dispossession.[155] On the other hand, the prohibition of fences reflects colonial oversimplification of African tenure systems as equivalent with the European commons, thereby neglecting the former's characteristic adaptability and the networks of duties and relationships that structured precolonial tenure systems.[156] With respect to the Americas, Engle critiqued the phenomenon that – through obtaining state recognition as indigenous peoples – indigenous culture and livelihood is essentialized, limiting indigenous people's right to self-determination and to "freely determine their political status and freely pursue their economic, social and cultural development".[157] Drawing on this argument, while acknowledging the need for legal frameworks to protect people dependent on communal land, the TAA inadvertently perpetuates a colonial paternalism that inhibits the capacity for organic change and flexibility at a grassroots level.

150 S 17 (1) Communal Land Reform Act.
151 Ibid., s 4.
152 Bhandar (2018).
153 S 17(2) Communal Land Reform Act.
154 Ibid., s 18.
155 Kashululu et al. (2020).
156 Cousins (2007); Peters (2009); Mamdani (1996) 139–140; Moguerane (2021) 165.
157 Article 3 of UNDRIP (2007); Engle (2010).

South Africa

In South Africa, most customary land is found in the former Bantustans, imposed ethnic homelands that forced black South Africans into an artificially tribalised environment.[158] Following the end of apartheid, the borders of these Bantustans (and too frequently its power structures) have remained largely unchanged.[159]

While attempts to pass laws that exclusively place customary land in the hands of traditional leaders have been struck down, in practice, Claassens observes that "government has treated traditional leaders as landowners with the sole authority to represent the rural people residing within the apartheid boundaries that the TLGFA reinstated."[160] In other cases, the title for customary land is held by Communal Property Associations (CPAs), which are juristic persons comprising members of the community and governed according to a constitution. In theory, CPAs provide mechanisms for inclusive decision-making and democratising rural land governance, but in practice, CPAs face a host of challenges, including lack of institutional support and reliance on legal technicalities often not available to communities.[161] In addition, there is considerable ambiguity regarding the hierarchy between traditional leaders and CPAs, often resulting in antagonism and conflict between these different structures of governance.[162]

The centrality to the CPA of the membership list, which determines who is part of the community and hence a beneficiary of customary land, is another obstacle to human rights and dignity in customary land governance.[163] In the aftermath of Apartheid's forced removals, the determination of community members, including the criteria by which members are identified, encourages tension and conflict, cleaving "outsiders" from "insiders" amongst people already experiencing marginalisation.[164] Despite the intention of CPAs to emancipate communities from apartheid structures of tradi-

158 Mamdani (1996).
159 Cousins (2007) 288; Claassens (2019).
160 Claassens (2019) 77.
161 Barry (2011); McCusker (2002); Weinberg (2021) 220.
162 Sjaastad et al. (2013); Pienaar (2017); Ntshona et al. (2010) 358; Mnwana (2021) 73.
163 S 5 Communal Property Associations Act (1996).
164 Barry (2011); Sjaastad et al. (2013); Kingwill (2021) 191; Mnwana (2021) 76; Weinberg (2021) 217, 220–224.

tional leadership and promote bottom-up governance, CPAs cannot depart entirely from Western ideas of property,[165] which conceives of rights in land as alienable, exclusive and abstract.[166] Not only does this embed indigenous land rights within a Eurocentric paradigm of property, but promotes hostility and social friction, following critiques that the Western conception of property is structurally incompatible with an ethic of care, mutuality and sustainability.[167]

Discussion

This section has briefly unpacked the statutory and legal actors and instruments that prescribe the administration of communal land in five southern African countries. For the most part, customary land is held in trust for the community by the State, traditional leaders, or land boards, but not by the community itself. South Africa's CPAs, which allow for the registration of communal property in the name of a demarcated community, is an exception. However, as discussed above, the potential for CPAs are constrained by lack of institutional support, coupled with a conceptual foundation in Western property law that may promote social conflict, contrary to the post-apartheid project of reconciliation and restoring dignity to dispossessed people.[168]

Based on the above analysis, two general models of communal land governance can be identified, graphically illustrated below in Figure 1. These are by no means mutually exclusive but reflect a spectrum of legislative approaches to managing the anxiety of legal pluralism. Zimbabwe and Zambia represent what I am calling the "state-traditional leadership model", where traditional leaders, appointed by the president and acting for the State, administer customary lands. On the other side of the spectrum is what I am calling the "neoliberal managerial model", where bodies corporate, typically in the form of land boards, administer communal land. This model, represented here by Namibia and Botswana, reflects the State desire to "modernise" customary tenure so that they operate alone the lines of corpo-

165 Weinberg (2021) 224–225.
166 Graham (2011); Bhandar (2018).
167 Davis (2020); Graham (2011); Shoemaker (2019).
168 Atuahene (2016).

rations. It reflects the ideology of improvement, that values economic productivity over the multiple other values people may attach to a landscape.[169] South Africa, with the continued high position of traditional leaders as well as the adoption of neoliberal land policies that disproportionately privilege agrobusinesses,[170] reflects a mixture of both models.

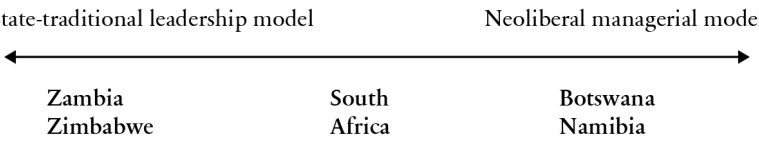

Figure 1. Statutory approaches to regulating customary land.

As will be developed in more detail in the following section, both models are consistent with colonial epistemologies of community and property: the state-traditional leadership model sees African sociality as predicated on neatly defined and hierarchically organised "tribal" units, a fiction necessary to give effect to indirect rule.[171] As seen in the previous section, the neoliberal managerial model does not necessarily depart from this understanding – seen, for instance, in the detailed ethnographic criteria Namibia requires to be legible as a customary community. Instead, the neoliberal managerial approach to governing customary land has a strong normative agenda towards development, perpetuating a paternalism evocative of the colonial civilising mission.[172] Furthermore, as seen with respect to the cases briefly discussed above, as well as by a wealth of literature examining customary land rights in these five countries, neither statutory approach is especially effective at protecting communities against large scale dispossession of customary land.[173] Even South Africa's CPAs, which arguably go the furthest to develop a mechanism that may give effect to grassroots demo-

169 Bhandar (2018).

170 Hall/Kepe (2017); Sebake (2017).

171 Mamdani (1995); Scott (2009) 239–253.

172 Tzouvala captures this dynamic in her argument that the colonial "standard of civilization" is animated by two competing logics, namely the logic of improvement verses the logic of biology. See Tzouvala (2020). Also Bhandar (2018); Bielefeld (2016); Kepe/Hall (2018).

173 Marewo et al. (2021); Gwerevende (2023); Claassens (2019); Bishop (1998); Dieckmann (2020); Chitonge et al. (2017), and so forth.

cratic governance of customary land, reflect the limits of imposing corporate structures on communities and customary land.[174]

4. Mapping the meaning of "community" from the metropole

The previous section considered the mechanisms by which five southern African countries regulate its legal pluralism, including the manner community is defined, and the statutory constraints placed on the use and management of customary land. I argued that these strategies reflect neo-colonial epistemologies of African social life, creating idealised legal fictions that may be unattainable, undemocratic, and open to exploitation. Put another way, the legal meaning of community is grounded in an abstract ideal, originally a foreign export, that does not consider the social geographies of communities in practice.[175] This section develops this argument, identifying certain characteristics of legal "communities" common to southern African legal systems within their historical and epistemological context.

a) Occidentalism and the invention of tribes

The concept of Occidentalism is useful in making visible the unequal geographies of epistemic power that have shaped the meaning of community in southern Africa. Vlassopoulos defines Occidentalism as:

> [T]he ideology that there exist clearly bounded entities in world history, such as the West, the Orient and the primitives […] that there is a pattern in human history, which leads to the evolution of the modern West, which is the natural path of history, while the history of the rest of the world is a story of aberrations that have to be explained; that the whole world is actually following the lead of the West and one day it will manage to assimilate; that the conceptual tools and the disciplines created by the West are in some way the natural way to organise experience and

174 This can be seen also in the aftermath of the famous South African land restitution case, *Alexkor v Richtersveld* (2003), in which the Richtersveld traditional community was granted mining title held in conjunction with a mining company. Since then, the assets awarded remain held up in various trusts and corporate entities, whose operation remains murky and overwhelmingly not to the advantage of the community. Personal correspondence with Marthinus Fredericks (6 July 2023). See also *Louw v Richtersveld Agricultural Holdings Company (Pty) Ltd* (2010); *Alexkor v Richtersveld Mining Company* (2017).

175 Strecker (2018); Graham (2011).

> analyse reality, and that the reality of the past, and the present outside the West, ought to be explicable in these Western terms.[176]

In a similar vein, various scholars have argued that "common-sense" rules relating to property and sovereignty were significantly shaped by Western imperialism and the resulting dispossession and appropriation of indigenous peoples' land and labour.[177] Mbembe observes that the period of European colonial expansion coincided with an intellectual moment obsessed with the identification, enumeration and standardisation of all social life so that "people and cultures were increasingly conceptualized as individualities closed in upon themselves".[178] It is in this context that the "community" emerged as a distinct ethno-cultural unit.[179] As Mbembe puts it, "The expansion of the European spatial horizon, then, went hand in hand with a division and shrinking of the historical and cultural imagination and, in certain cases, a relative closing of the mind."[180] This imposition of classificatory schemes upon human diversity lent a veneer of scientific respectability to European imperialism by cleaving the world into "civilised" and those requiring civilisation.[181]

While much scholarship on this phenomenon is located around the 17th to 19th century[182] – during the era of industrialization and capitalist modernity[183] – several concepts that provided the legal technologies of colonization can be traced to classical Greece and Rome, for instance *terra nullius* derived from *res nullius*, which justified the appropriation of lands not used "productively".[184] This classical period – particularly its symbolic role as an idealised account of premodern Europe[185] – is relevant for the Occidentalist

176 Vlassopoulos (2007) 19.
177 Miles (2013); Tzouvala (2020) and (2019); Bhandar (2016) 16–17.
178 Mbembe (2018) 16–17.
179 Ibid.; Bhanda (2018).
180 Mbembe (2018) 16–17.
181 Tzouvala (2020).
182 The 17th to 19th century as the starting point reflects scholarship about colonization in the English-speaking world. Walter Mignolo, for instance, who focuses on the colonization of Latin America, temporarily locates this time to the late Renaissance. Mignolo (2002).
183 Mignolo (2002).
184 Tuori (2015) 177 and 179.
185 On alternative readings of Aristotle's role in modernity, see Vlassopoulos (2007); Dietz (2012); Trott (2013).

construction of human development, as well as the criteria by which communities are politically and legally legible.[186]

In the context of the doctrine of evolutionary functionalism – which understands social progress as linear and evolutionary in nature[187] – it is easy to infer how colonising Europeans may have projected idealised accounts of their own history onto non-Western peoples. Aristotle's *polis* can thus be used to provide a hermeneutic for understanding societies outside Western modernity. In *Politics*, Aristotle distinguished between "lower" communities – namely the family unit and collection of family units (the "village") – and the most ideal type of community, the *polis* (cognate with the English word "politics").[188] A *polis* is smaller than a nation (*ethnos*), and requires common territory, a shared system of centralised governance, and is distinct from other polities.[189] Inferior communities were by nature interdependent, and required interaction with other communities through domestic economic activities for survival. In contrast, while economic activities occurred within the *polis*, the *polis* was conceived as a self-sufficient entity encompassing a hierarchical and centralised governance structure.[190]

The analogy of the *polis* as an internally complete and hierarchical structure was convenient for European engagement with African communities during the centuries of colonization. Firstly, it elevated the position of traditional leaders to an autocratic level, manufacturing the legitimacy of colonial treaties and facilitating indirect rule – to the extent that where communities did not have centralised traditional leadership, these positions were invented and/or distorted.[191] Secondly, the interpretation of the *polis* as superior to interdependent social groupings provides a rudimentary classification schema that justified which peoples could be left out, namely communities with fluid practices of identification and itinerant / non-sedentary social structures.[192] An example of this is the brutal treatment of nomadic San peoples in Namibia and South Africa and their exclusion in the racial

186 Shrinkhal (2019) 9; Vlassopoulos (2007); Mignolo (2012) 13.
187 Gordon cited in Sandberg (2021) 59–63.
188 Aristotle (1943) 31–33; Mathie (1979) 15.
189 Elden (2013) 21–52.
190 Mathie (1979); Deudney (2008); Leshem (2016).
191 Mamdani (1996) 54 and 81; Geschiere (2018).
192 Zhakupbekova (2019).

architecture of apartheid, which granted limited land rights in the form of "native" reserves only to those groups who were deemed sufficiently "civilized" (notably being sedentary and embodying hierarchical leadership).[193]

The strong influence of classical scholarship in Europe's understanding of African identities is in no small part due to the fact that the European "experts" who authored the material on Africa that served as epistemic repositories of knowledge (including dictionaries and ethnographic work) were typically educated in Europe and trained in philology, which meant that African societies were clumsily strained through a prism of ancient Greece, Latin and Hebrew.[194] Whether due to methodological ineptitude or strategic misrepresentation, a significant amount of epistemically authoritative texts, including "native" laws, has been shown to reflect European and colonial preconceptions of Africa.[195] Namely, precolonial societies that were pluralistic, multilingual and multi-ethnic became recognised as "tribes" (monolingual, monocultural and monoethnic) for the purpose of colonial identification and administration of native peoples.[196] Even precolonial societies that arguably reflect stable ethnic categories with a system of centralised authority, such as the Zulu Kingdom, significantly transformed during the colonial period, as ethnic boundaries and the role of traditional leaders became ossified under colonial rule according to European standards.[197]

Creating tribal cartographies was crucial aspect to colonial "divide and rule" tactics.[198] This is visible in the legislation of British South Africa, for instance the 1927 Native Administration Act which appointed colonies' governor-general "supreme chief of all natives", and allowed him to "divide", "amalgamate" or even create new tribes as he saw fit.[199] Since tribes were further conceived territorially, the creation and control of indigenous legal

193 Gordon (1992) 119–126. For a Botswanan example, see Wilmsen (2002) 929–931.

194 Gilmour (2006) 67–117; Errington (2001); Makoni/Pennycook (2005); Strommer (2015); Chimhundu (1992); Gordon (2021) 27–28. On the persistent relevance of classical and Christian scholarship in the creation of the foundations of international law, see Koskenniemi (2021).

195 Hamilton/McNulty (2022) 135; Hamilton/Wright (2017); Hamilton/Leibhammer (2009); Chimhundu (1992); Gordon (2021) and (1988).

196 Mamdani (1996) 140; Scott (2009).

197 Hamilton/McNulty (2022) 137–138; Hamilton/Wright (2017); see also Wilmsom (2002) on a similar phenomenon in Botswana.

198 Mamdani (1996) 90.

199 Mamdani (1996) 67.

identification was a technology used to control people's movement, or even strategically manufacture hostility between ethnic groups.[200]

Rather than repositories of accurate information, much archival material may be read as psychological biographies of settler-colonial anxiety, with early Europeans in Africa overemphasizing their epistemic authority in compensation for feelings of alienation and lack of control.[201] In this regard, Rachael Gilmour describes how the 19th century missionary-linguists tasked with creating grammars and spreading Christianity among indigenous peoples, put excessive amounts of faith in "scientific" classification schemes to compensate for the lack of control they experienced in their daily lives, as well as the humiliation of requiring assistance (social and linguistic) from the racialised subjects the authors believed to be inferior.[202] However, to credit this misrecognition only to colonial insecurity is to undermine the direct and deliberate role that categorising communities played in the functioning of colonies, as well as socio-political legacies they have left behind. The latter may be seen with respect to the discourse of "autochthony", a standard of authenticity that can be seen, for example, in Namibia's statutory definition of "traditional community" or South Africa's recently struck down TKSLA, and which frequently emerges in ancestral land disputes, particularly as groups formerly racialised as "mixed"/Coloured reconnect with their indigenous heritage.[203]

b) The role of autochthony in the community

Autochthony, meaning "born of the earth", refers to an unbroken spatial connection to a particular place and provides a normative foundation for "indigeneity".[204] The concept of autochthony emerged in Europe, providing a mythical foundation for ancient Greece in which gods inseminated the earth, which led to the birth of the first Athenian kings whose progeny was the city-state's first inhabitants.[205] The concept gained significant traction during the Persian conflict of 490–479 BCE, during which there was polit-

200 Ibid.; Wilmsen (2002); Blanton et al. (2001) 484.
201 Gilmour (2006); Chouchene (2020); Hölzl (2017).
202 Gilmour (2006) 20.
203 Geschiere (2011); Ellis (2014).
204 Elden (2013).
205 Forsdyke (2012).

ical incentive to create a shared identity among Greek city-states.[206] This produced a discourse of "pure" communities verses "mixed" communities, and, importantly, coincided with other narratives of origin.[207] Therefore, autochthony is neither intrinsic nor immutable to premodern societies, but should instead be viewed in terms of its political function in cleaving insiders from outsiders.[208]

The rhetoric of autochthony is frequently accompanied with violence.[209] This idea has a long tradition in Western political philosophy. Max Weber, considered the forefather of sociology, defines a political community as "a community whose social action is aimed at subordinating to orderly domination by the participants a 'territory' and the conduct of the persons within it, through readiness to resort to physical force, including normally force of arms".[210] In this way, "community" is necessarily reduced to a zero-sum, often violent, competition between groups wanting to dominate a particular territory[211] – an idea that was significantly shaped by Western interpretation of its own classical history.[212]

Much like the invention of the "tribe", the discourse of autochthony is relatively recent in Africa. Bøås and Dunn argue for large parts of history, "African social formations have generally been characterised by mobility and inclusiveness, with permeable and shifting boundaries".[213] Likewise, Mbembe observes that precolonial identities were shaped by a contextual and "itinerant territoriality" whose borders were "characterized by their extensibility and incompleteness".[214] He writes:

> Historically, attachment to Africa – to the territory, to its soil – was always contextual. In some cases political entities were delimited not so much by borders in the classic sense but by an imbrication of multiple spaces, constantly produced, unmade, and remade as much through wars and conquests as by the movement of goods and people […]. Strangers, slaves, and subjects could in effect rely on

206 Forsdyke (2012) 123.
207 Forsdyke (2012) 126.
208 Forsdyke (2012) 138.
209 Bøås/Dunn (2013).
210 Weber (1954) 338–340.
211 Weber (1954) 339.
212 Deudney (2008) 91–113. On Hegel's contribution to colonial thought, and its connection with Aristotle, see Táíwò (2010) 30–33.
213 Bøås/Dunn (2013) 5.
214 Mbembe (2018) 99–100.

> several different sovereignties at one time. The multiplicity of allegiances and jurisdictions itself responded to the plurality of the forms of territoriality. The result was often an extraordinary superposition of rights and an entanglement of social links that were not based on kinship, religion, or castes understood in isolation. Such rights and links combined with the signs of local belonging. Yet they simultaneously transcended them.[215]

Thus, rather than legal abstractions, the boundaries of identity were grounded in the social and spatial landscape, as "network[s] that operated according to the principle of entanglement".[216] In contrast, the discourse of autochthony has contributed to violent land disputes in Africa.[217] In the context of land scarcity, discourses of autochthony work to cleave "sons of the soil" from foreigners, strangers and immigrants.[218] Bøås and Dunn draw connections between the autochthon and the original idea of the citizen: both are members of gated communities who are legally entitled to monopolize resources of a given area to the (violent) exclusion of non-members.[219] This observation applies too to the social conflict engendered by South Africa's CPA's structure, which requires a definitive methodology for establishing who is and who is not a community member, ignoring the multiplicity of networks and interrelationships that emerge from living with other people in a particular landscape.[220]

c) The corporation as a model for community

The previous sections identified an Occidentalist construction of African communities as polities that functioned like proto nation-states, frozen in a state of sub-modernity, but (theoretically) the same social material out of which Europe's own modern states emerged.[221] This section briefly considers the other side of the spectrum, whereby communities are conceived as corporations, namely through land boards and communal property associations.

215 Ibid.
216 Ibid.
217 Bøås/Dunn (2013); Geschiere (2011).
218 Bøås/Dunn (2013) 8.
219 Ibid.
220 Olwig (1996).
221 Comaroff (2005).

In the context of neoliberalism, corporations play a major role in driving global capitalism, and increasingly have replaced the state in providing basic public services.[222] Consequently, it is argued that there is normative pressure for indigenous and traditional communities to organise as corporations to prevent theft of indigenous knowledge and to exercise their rights to Free, Prior and Informed Consent – often with ambiguous success.[223] However, in reshaping the "community" so that it can be an actor in a neoliberal global context, boundaries between member/non-members may become reified, both restricting the self-determination of indigenous peoples and rendering FPIC a tokenistic exercise for developers and states.[224]

In considering the extent to which the corporation serves communities, it is worthwhile to unpack the ways in which the former is neither an ahistorical nor a-geographic concept (i. e. conceived as placeless and abstracted), but, among its other uses, emerged as a tool of empire, notably associated with the Dutch East Indian Company and its competitors.[225] Prior to this, the history of corporations has a long history in Western Europe, for instance in the ancient Roman concept of *societas*, which allowed "individuals to bind together into a collectivity, whose existence and perpetuation was independent of any individual member".[226] Later, during medieval times, corporations were shaped by Christian theology, conceived as a "transcendent body" which existed on a higher spiritual plane than its individual members.[227]

In locating the emergence of corporations in the temporal, religious and geographic enclave of the West,[228] it is not my argument that corporations are fundamentally imported entities whose goal is the enclosure of African traditional communities. Instead, in thinking through the purposes and contexts in which corporations emerged, their roles in late-stage capitalism, and the way in which they were shaped in certain theological contexts, an opportunity is provided to critically question the affordances they provide;

222 Baars / Spicer (2017).
223 Comaroff / Comaroff (2009); Hayden (2003); Greene (2004); Rodríguez-Garavito (2011).
224 Hayden (2003); Rodríguez-Garavito (2011); Cuipa (2017); Engle (2010).
225 Brandon (2017).
226 Stern (2017) 25; Porterfield (2021).
227 Stern (2017) 22. See also Koskenniemi (2021) 103; Porterfield (2021).
228 Porterfield (2021).

and assess the extent to which this is the appropriate vehicle to express the diverse and place-based needs, values, and aspirations of communities.

5. Summary / conclusion

This chapter has explored the normative construction of "community" as a term conferring collective land rights but also inadvertently reifying colonial and Occidentalist standards of identification in postcolonial southern Africa. Section 3 of this chapter identified the way in which Botswana, Namibia, South Africa, Zimbabwe and Zambia define "community", and the statutory mechanisms that govern collectively held (customary) land. It argued that "community" is conceived largely from the top-down, requiring ministerial or presidential approval to be recognised. It is furthermore conceived as hierarchically organised and hermetically sealed. More explicit ethnographic criteria of communities are provided in Namibia and South Africa, arguably a legacy of apartheid's fixation on racial typology which, in the absence of any well-founded scientific criteria to establish immutable racial differences, relied on visual signifiers, determined by the (white) administrator.[229] With respect to who controls customary land (or the statutory mechanisms put in place for that purpose), I identified two patterns. On the one side, Zimbabwe and Zambia reflect a state-traditional leadership model, where traditional leaders, working with and supervised by the state, administer customary land. On the other side, Namibia and Botswana employ a neoliberal managerial model, where the power formerly enjoyed by traditional authorities has been transferred to land boards, who act as trustees for the community. This model reflects an ideology of improvement, whereby land is valuable above all for its productivity and economic potential. Both models rely on fictitious abstractions that do not consider the agency or specificities of communities at a grassroots level, including the plural meanings of land as embodying socio-cultural values and place-based meaning. As argued with respect to South Africa's CPAs, which were intended to democratise rural land governance and to give effect to the lived realities of communities, the imposition of legal fictions based on a corporate understanding of property are structurally ill-equipped for achieving spatial justice and / or meaningful self-determination.

229 Ss 1(xv), 5 and 10(5) South Africa's Population Registration Act (1950).

Section 4 discussed these normative qualities of "community" and their related system of land governance in more detail. The idea of "community" as "tribal"; affixed to territory; possessing hierarchical and centralised governance; premised on principles of exclusion (and hence adversarial in nature); and being closely associated with "autochthony" comes from a particular moment in European intellectual history. Defining non-Western "communities" with respect to Europe's interpretation of its own ancient past was used to justify colonial expansion. Later, when imported to the colonies, it served as an invaluable legal instrument used for racial and spatial engineering. Behind the paternalistic confidence in the superiority of Western civilization,[230] defining "community" may have also helped to manage the psychopolitical anxieties of pluralism, projecting order and authority over a world that otherwise might have seemed illegible.[231] Nevertheless, these ontologies continue to haunt postcolonial legal systems, straining groups with legitimate land claims through a standardising and normative prism of identification. Likewise, projecting corporate structures onto communities is not ideologically neutral, but "involve specific systems of relations" and "disciplinary and cognitive regimes" that shape social production.[232]

This raises additional questions: if dominant narratives of community defer to colonial ontologies, what could a decolonised or prefigurative understanding of community look like? It is beyond the scope of this chapter to do justice to this question, but I conclude with a brief deferral to some decolonial perspectives. Mignolo argues that the goal of decolonisation should not be merely to invert power relations so that formerly colonized peoples replace former colonial positions of power, but should instead expand the types of identities, thinking and modes of emancipation that are possible (or new "loci of enunciation").[233] Similarly, Mbembe advocates for the "radical dis-enclosure of the world",[234] engaging with and adopting a radical version of pluralism that goes beyond an understanding of diversity as a "multiplicity" of singularities, and includes an ethical orientation

230 Táíwò (2010) 133–137.
231 Gilmour (2006).
232 Federici (2018) 191.
233 Mignolo (2012) 5–8.
234 Mbembe (2018) 160; Gerber (2018).

towards repair, restoration and restitution.[235] As such, any subsequent legislative reform grappling with the meaning of "community" might be guided by the goal of "restor[ing] the humanity stolen from those who have historically been subjected to processes of abstraction and objectification."[236] Rather than seeking to restore an idealised past, Federici refers to the need to prefigure social-spatial relationships around the act of "communing" – a verb rather than a noun – implying a commitment to continuous engagement to social and environmental justice and community repair.[237] This cannot be an a-geographic process, reliant on abstract meta-narratives applicable to every situation,[238] but must be grounded in the realities and spaces of communities.

Unpacking "community" thus represents an opportunity to make transparent state considerations regarding who, legally, is allowed to stand on land.

Abbreviations

CCMT	Centre for Conflict Management and Transformation
CLB	Communal Land Boards
CPA	Communal Property Association
FPIC	Free, Prior and Informed Consent
TAA	Traditional Authorities Act of Namibia
TKSLA	Traditional and Khoisan Leadership Act of South Africa
TLGFA	Traditional Leadership and Governance Framework Act of South Africa
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

235 Mbembe (2018) 157–158; 180–183. Mignolo makes a similar argument, in Fraga (2015) 175–177.
236 Mbembe (2017) 182.
237 Federici (2018) 8.
238 Or what Scott (1998) calls "high modernist" ideology.

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Raphael Ng'etich

Competing Notions of Land in Colonial Kenya and the Impact on Present-Day Land Governance*

1. Introduction

Land governance remains one of the key challenges facing Kenya and reflects in all sectors – social, economic and political. Many efforts have been undertaken to resolve the challenge, but it still persists. The promulgation of the current constitution in 2010 was viewed as a gamechanger in governing all sectors of the country, particularly as it was seen to be a result of a people-driven process. However, the gains are yet to be fully realised.[1] In the case of land governance, for example, the reassertion that the radical / ultimate title rests with the people of Kenya as a nation, communities and individuals is very significant as one of the foundational concepts in addressing land issues. Unfortunately, as is discussed below, this is yet to be translated to the statutes and practice, especially in the situation of community land.

This chapter posits that the notions of land originating in and which were central to the construction of the colonial state still hold a key sway in the treatment of community land. Using a spatial justice lens and a settler colonial framework, the chapter traces the notions of land in precolonial, colonial and postcolonial Kenya and demonstrates that community land holding is still treated as a transitory phase to individualisation, and consequently, policy, law and practice is directed to that end. It does this by discussing the key land governance events. This section of the chapter sets out the layout of the chapter, while sections II and III address the spatial justice lens and the settler colonial framework respectively. Section IV traces

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1 Mutunga (2020).

the notions of land in precolonial Kenya. Section V traces the notions of land in colonial Kenya, while section VI traces the notions of land in post-colonial Kenya and their impact on land governance. The final section draws the conclusions of the chapter.

2. Spatial justice lens

In tracing the notions of land throughout the precolonial, colonial and postcolonial period, the chapter takes a spatial justice lens using the spatial justice theory as conceptualised by Edward Soja.[2] According to Soja, the spatial justice lens "refers to an intentional and focused emphasis on the spatial or geographical aspects of justice and injustice."[3] This implies "the fair and equitable distribution in space of socially valued resources and the opportunities to use them."[4]

Adopting spatial justice is not to abandon the other conceptions of justice. Spatial justice does not seek to replace the existing perspectives of looking at justice; it seeks to amplify and extend the existing concepts into new areas of understanding. This is because geography or space has not always been given due consideration in studying the various phenomena in society. Geography or space has been seen "merely as external environment or container, a naturalized or neutral stage for life's seemingly time-driven social drama".[5]

The above depiction of geography or space has partially been out of disciplinary precaution among geographers to avoid simplistic environmental, climatic and geographical determinism that dominated geographical thinking before and its role in colonialism and eurocentrism.[6] Additionally, it has been recently realised that the "neutral stage" treatment of geography or space is a missed opportunity to gain more diversified insight into human activity and the world. This has led various researchers to the "spatial turn",[7] a realisation that "[g]eographies […] are consequential, not merely the back-

2 Soja (2010).
3 Soja (2010) 2.
4 Ibid.
5 Soja (2010) 103.
6 Soja (2010) 4.
7 Soja (2010) 3.

ground onto which our social life is projected or reflected".[8] We are spatial as well as temporal beings, and "[w]e make our geographies, for good or bad, just or unjust, in much the same way it can be said that we make our histories".[9] Therefore, incorporating spatial thinking in our analysis of phenomena "cannot only enrich our understanding of almost any subject but has the added potential to extend our practical knowledge into more effective actions aimed at changing the world for the better."[10]

Steps have to be taken to incorporate the spatial perspective. For Soja, the following three principles underpin critical spatial thinking:

a) the ontological spatiality of being (we are all spatial as well as social and temporal beings),
b) the social production of spatiality (space is socially produced and can therefore be socially changed),
c) the socio-spatial dialectic (the spatial shapes the social as much as the social shapes the spatial).[11]

The first principle implies that as human beings, we exist within time and space; we have a historical as well as a geographical presence. The second principle notes that our geographies are made. Geographies have inbuilt justice and injustice arising from their initial state. While this is the case, human activities either add or reduce the inbuilt justice and injustice, hence the social production of space. The third principle alludes to the fact that the initial state of geography influences human activity and in return, human activity shapes geography. This relationship moves back and forth, hence the socio-spatial dialectic. From these principles, we realise that we make our geographies as well as our histories, and that the geographies or spaces we make have both positive and negative impacts as is the case with our histories.[12]

An essential thing to note in the social production of space is the place of notions of land. As noted above, human activities shape geography. However, not all activities shape every part of geography, and in the same manner. The determination as to what activity takes place, in what space and in what manner is crucial and is the place where ideas and power manifest.[13]

8 Soja (2010) 103.
9 Ibid.
10 Soja (2010) 2.
11 Soja (2009) 2.
12 Soja (2010) 104.
13 Said (1993) 7.

Through various activities, people look for space. This creates an avenue where various notions of land compete for the available space. The notions are represented in policy and law, which are formulated to achieve certain objectives in practice. In some instances, differing notions can be accommodated in policy and law, while in other instances some notions prevail over others. The dominance of some notions to the disadvantage of others represents power and influence over land resources by one group over others. Notions of land are therefore instruments of social construction of space and geography.

3. Settler colonial framework

The place of various notions of land and their impact in Kenya is further explained by the settler colonial framework. The framework is a tool for understanding landscape, hegemony and the construction of settler colonialism. Its aim is to examine how a "body of ideas could, by way of its apparent objectivity, or by way of its historically and geographically specific capacity to appear neutral, undergird the construction of settler colonial landscapes".[14] It accomplishes this objective by deconstructing arguments and revealing the assumptions which facilitate the construction of settler colonial landscapes, and situates the discourse in its geographical and historical context in relation to positions taken in the contest for land resources.[15]

The shaping of land resources through various uses reflects ideology and hegemony. Public discourse on land shapes the land by providing ideas that go into land issue discussions, policy, law and practice: "as a material component of a particular discourse or set of intersecting discourses, 'the cultural landscape' at once captures the intent and ideology of the discourse as a whole and is a constitutive part of its ongoing development and reinforcement".[16] Settler colonialism, for example, is "founded on the dual logics of Indigenous elimination and territorial appropriation".[17] This is why settler colonial landscapes are constructed by portraying settler notions of land as being universal, inevitable or "natural".[18] This is in addition to "narratives

14 Proulx/Crane (2020) 56.
15 Proulx/Crane (2020) 50.
16 Schein (1997) 663.
17 Dang (2021) 1004.
18 Proulx/Crane (2020) 48.

that render Indigenous ways of representing and valuing places invisible".[19] The aim is to acquire land, whose control is considered the most "specific, irreducible element" of settler colonial contexts.[20]

In looking at the ensuing struggles for access to and control of resources between the communities and the state and corporations, the settler colonial framework uses the Gramscian conception of hegemony. This conception interprets discourses around contestation for resources as "articulations of ideological constructs by individuals who are entangled in ongoing struggles over power".[21] When the various articulations are fronted, "the hegemony of a particular social sector depends for its success on presenting its own aims as those realizing the universal claims of the community".[22] To accomplish this, the Gramscian language of hegemonic struggle notes that the corporation or project proponent takes on "a function of universal representation" but at the same time retains its particularity.[23] For example, the proponents present the project as one that serves national interests, while in fact the project continues to serve their own goals:

> Discourses promoting these projects as universally beneficial rely upon reference to supposedly value-neutral or objectively good outcomes in order to silence or make invisible Indigenous claims both about the land from which they are or could be displaced and about the consequences of national development projects for their lives and identities.[24]

The claims to universality in the discourse on construction of settler colonial landscapes are pegged on subjects including national interest, economic growth, law and order, sovereignty and private property. They are premised on "assumptions that private property, environmental efficiency and economic growth benefit the whole community".[25] These outcomes are deemed "value-neutral" as they are said to serve the needs of the whole nation, including those communities who are protesting. In representing, for example, that a project is important for the national interest since it is a source of

19 Proulx/Crane (2020) 49.
20 Wolfe (2006) 388.
21 Proulx/Crane (2020) 49.
22 Laclau (2000) 50.
23 Laclau (2000) 56.
24 Proulx/Crane (2020) 52.
25 Proulx/Crane (2020) 56.

tax revenue,[26] the project, while maintaining its individual and partisan identity, takes on a national identity in order to facilitate its completion and portray opposing views as being against the national interest. Communities opposed to the project are therefore seen as being opposed to the increase in generation of tax revenue for the nation, hence opposed to the national interest.

Appeal to the sovereignty of the state in the construction of settler colonialism is meant to accomplish a "rhetorical transformation of the physical properties of ancestral land into natural resources" to be used by the state and those in control to arrive at industrial ends.[27] The communities are told that the resources will be used to benefit everyone. Private property and the accompanying notions of land are then naturalized "as objective and neutral to the exclusion of other place-based norms of access and value of the land".[28] Communities which oppose the projects are portrayed as being against processes which are "legal and proper", and engaged in violation of private property. Owing to this, they are characterised as disturbing the peace hence the need for the state to intervene, through the police,[29] to enforce law and order and protect private property.

4. Notions of land in precolonial Kenya

Land resources (referred to as the commons) in the local communities were administered using customary tenure.[30] They were managed by families, clans and communities as corporate entities. The management had structural and normative parameters.[31] Structurally, the social hierarchy for managing the commons took the form of an inverted pyramid with the family at the tip, the clan and lineage at the middle and the community at the bottom.[32] Decisions on allocation, use and management would be made at the family, clan, lineage and community level, and even when not done collectively, the decisions would adhere to shared values. The shared values "ensured that a

26 Proulx/Crane (2020) 55.
27 Proulx/Crane (2020) 51.
28 Proulx/Crane (2020) 59.
29 Proulx/Crane (2020) 53.
30 Kariuki/Ouma/Ng'etich (2016) 49.
31 Okoth-Ogendo (2000) 2.
32 Ibid.

reasonable balance was achieved between resource availability, technology of use and the rate of consumptive utilisation".[33] The decisions made by the community related to the interests of the group as a whole and assigning of areas for use by clans, which would in turn set out specific areas for families, and similarly, the families to individuals.[34] The normative aspect related to the determination of membership and access to the resources through social obligations. Resources were allocated based on the category of the collective (clan, lineage or family) or individual, and the use to which the resources would be put for example, cultivation or grazing.[35]

The management of the commons reflected the social ordering in the community and was geared towards ensuring that the interests of the individuals were safeguarded but not at the peril of the wider community.[36] Individuals would have responsibilities to perform in return for access to the commons.[37]Additionally, the community, through shared values, ensured that its members took care of those who were disadvantaged. This greatly reduced instances of landlessness.[38]

Land was understood to be more than the soil; it represented the source of life and a place to practise cultural, economic and political activities. This explains the treatment of land as having a special place – not just one more commodity for exchange:

> It is impossible, for most people, to abstract land from the social and cultural meanings associated with it. Besides being the main source of livelihood for the majority of families, land also supports a wide network of kin relationships, and functions as a status symbol. To sell land – particularly ancestral land – is a monumental decision.[39]

Through land, individuals, families, clans and lineages would show their care for vulnerable members by providing food, a place to stay and cultivate. This provided a safety net for people who were experiencing difficulties.[40] Additionally, the inclusive approach helped to mitigate some of the unfair-

33 Okoth-Ogendo (2000) 3.
34 Okoth-Ogendo (2000) 2.
35 Okoth-Ogendo (2000) 3.
36 Kariuki / Ouma / Ng'etich (2016) 90.
37 Okoth-Ogendo (2000) 3.
38 Mafumbate (2019) 8.
39 Nyamu-Musembi (2006) 18.
40 Mafumbate (2019) 8.

ness that people were experiencing due to the geographical aspects of the land. The land resources were the main basis for bringing and binding people together. Racheal Mafumbate notes in this regard that:

> Living together' and the sense of 'community of brothers and sisters' are the basis of, and the expression of, the extended family system in Africa. This arrangement guaranteed social security for the poor, old, widowed, and orphaned which is one of the most admired values in the traditional African socio-economic arrangement.[41]

Additionally, Macaulay Kanu explains that members of the community would allow others to live on their land:

> Africans easily incorporate strangers and give them lands to settle hoping that they would go one day, and the land would be reverted to the owner. This is usually done with the belief that one will never opt out of his own community.[42]

As this section shows, the prevailing notions of land in the precolonial period conceptualised land resources as places for practicing social, economic and political activities of the communities. The section further notes that the use of the resources was viewed from an angle of responsibility; all the members of the community had reciprocal duties to discharge while accessing the resources. Additionally, the responsibility over the resources extended to using the resources to take care of the less privileged in the society. These aspects were achieved, as the discussion points out, through the making of decisions using shared values aimed at achieving sustainability.

5. Notions of land in colonial Kenya

It is important to examine the colonial period and its impact while looking at land governance in Kenya or any colonised place:

> To study modern laws of private property ownership without accounting for the significance of the colonial scene to their development is to disaffiliate the development of modern law from its deep engagements with colonial sites in ways that parallel the literary disavowals of colonialism […]. [M]odern property laws emerged along with and through colonial modes of appropriation.[43]

41 Mafumbate (2019) 8.
42 Kanu (2010) 155.
43 Bhandar (2018) 3.

In Kenya, colonialism implied spatial reordering; the colonial enterprise was based on laying claims to land already within the hands of indigenous/traditional communities.[44] An essential aspect to this objective was, therefore, denial of the fact that the lands were already owned by the communities.[45] This was achieved, as is shown below, through steps including formulation of policies, enactment of laws and creating and spreading the narrative that the lifestyle, forms of tenure and land holding practised by the traditional communities would inevitably come to an end as the communities would eventually transition from pre-capitalist to capitalist societies. As new notions of land were introduced on the basis of private ownership of land, the ground was set for competition between the new and existing notions for the available land. While the existing notions were already rooted in the lives and practices of the local communities, the new notions started to penetrate the land practices since they had the legal backing of the colonial administration.[46]

While these notions competed, the crucial aspects in the land governance system were based on the framing of answers to the key questions such as where did the radical/ultimate title (original ownership) of the land vest, and what constituted use/occupation of land. The approach of the notions of land among the local communities was that the radical title vested in the community as a whole, and was held in trust by the leadership of the community.[47] On the question of land use, the communities practised different social and economic activities[48] such as farming and pastoralism, and the use of land took different forms including leaving the land vacant in order for pasture to grow back or for the land to regain its fertility in the case of farming.

The new notions of land had different answers to the above questions. As to the question of radical title, the new notions answered that it should vest in the Crown.[49] And in regard to land use, the new notions deemed places not physically possessed as "waste and unoccupied land" available for the

44 Coulthard (2014) 125.
45 Okoth-Ogendo (2000) 7.
46 Kariuki/Ouma/Ng'etich (2016) 165.
47 Kariuki/Ouma/Ng'etich (2016) 202; and Bentsi-Enchill (1965) 132.
48 Okoth-Ogendo (1989) 10.
49 *Crown Lands Ordinance 1915*, *Kenya (Annexation) Order-in-Council 1920* and *Kenya Colony Order-in-Council 1921*.

Crown to grant as it pleased.[50] Section 30 of the 1902 Crown Lands Ordinance set out the rights of the native communities on the basis of occupancy only. Consequently, under Section 31 of the same Ordinance, land not occupied by the communities was deemed "waste or unoccupied land" and could be leased or sold. The determination of these two key aspects – radical title and land use – resulted in a major shift in power in land governance; the power of spatial (re)ordering was moved from the communities to the colonial state. As a consequence, the state was empowered to displace communities and individuals. Additionally, the state exercised political influence over land governance. Pursuant to this, new legal provisions were put in place to take away the land from the communities and avail it for the use of the colonial administration and settlers. Such practices were also undertaken in Ireland and African countries which the British colonised.[51]

In order to arrive at the conclusion that land did not belong to the communities, the colonial administrators came up with their own interpretation of the customs of the local communities. John Ainsworth, for example, observed that the Kikuyu land custom would be interpreted

> as we think best for the country […]. Of course we can stretch such customs to almost any meaning within their reasoning: if we say it means a freehold then it becomes a freehold, but in our interpretation of the laws and customs I think it wiser not to recognise any system of freeholds; we want some control over non-native holders of land.[52]

In doing this, the colonial administrators denied ownership of land by local communities, hence conferring on the Crown the original title in the land.[53] This enabled the colonial administrators to take control of the land so that they could give it to the settlers on condition. The administration encouraged Europeans to settle in Kenya with one of the aims being to generate economic activity to sustain the East African railway project, which would help the British keep hold of India through the Indian Ocean and the Suez Canal. The "White Highlands", one of the highly productive areas in Kenya, would in return be reserved for the settlers.[54]

50 Kariuki/Ouma/Ng'etich (2016) 211.
51 McAuslan (2015) 341 and 344.
52 Ainsworth to Crauford, 19 July 1899, enclosure 1 in Crauford to Salisbury, 24 August 1899, as quoted in Sorrenson (1968) 179.
53 Sorrenson (1968) 45.
54 Harbeson (1971) 232. See also Robinson/Gallagher/Denny (1961).

To ensure the new notions of land were reflected in practice, the administration deployed strategies including using coercion and fraud to procure "agreements / treaties"[55] (for example, the 1904 Anglo-Maasai Treaty procured under coercion and the 1911 Anglo-Maasai Treaty procured under fraud)[56] with communities to cede some of their land to the Crown and moving communities to reserves. It also depicted native land use as backward and retrogressive, subjugated customary law to statute and common law[57] and gave incentives to facilitate the private ownership of land. The incentives included the ability to apply for financial credit by offering the private title as security[58] and the opportunity to participate in the new economic set up, for example through buying and selling of land.[59] When the Maasai challenged the legality of the treaties in *Ole Njogo and Others v The Attorney General*,[60] contesting the authority of the chiefs who signed the 1911 Treaty, the Eastern African Court of Appeal dismissed the case on the basis that the treaties were concluded between sovereign states – the Maasai were deemed to be a sovereign state under the protection of the British. This decision gave the administration "the best of both worlds".[61] The justification for the extension of jurisdiction over the East Africa Protectorate in 1815 was on the basis that traditional chiefs and elders were "practically savages in whom sovereignty could not possibly reside".[62] However, the chiefs and elders would later conveniently, and perhaps magically, become sovereign when the administration needed a treaty to be concluded, for example in the case of the 1904 and 1911 Anglo-Maasi Argreements, as discussed above. The Crown had its cake and ate it, and the judicial system cheered on.

At the protectorate stage, as the British were deciding on a form of government over the territory, various initiatives were undertaken in coming up with a policy on how to deal with the natives. Sir Percy Girouard, the Governor of the East Africa Protectorate, opted to introduce the Lugard

55 *Anglo-Maasai Agreements 1904* and *Anglo-Maasai Agreements 1911*.
56 Ole Simel (2003) 3. See also Ruto (2005) 30.
57 Kariuki / Ouma / Ng'etich (2016) 72.
58 Colony and Protectorate of Kenya (1954).
59 Government of the United Kingdom (1955) 323.
60 Civil Case No. 91 of 1912 (E. A. P. 1914), 5 E. A. L. R. 70.
61 Seidman (1970) 180.
62 Okoth-Ogendo (1991) 11.

indirect rule policy – "rule mediated through one's own"[63] – local chiefs were appointed to govern specific areas using a mixture of local customs and statute law, and answerable through a chain of command leading to the district officer, provincial officer, and the governor at the top. In doing so, he noted that South Africa would offer more insight than West Africa since the presence of the white settlers and racial issues in the Protectorate resembled those of South Africa. As a result, in his report to the Colonial Office in 1910, he followed the recommendations in the South African Native Affairs Commission Report of 1905 which "envisaged four stages of African evolution towards civilisation: at first Africans lived in a tribal society in reserves; then they laboured for European farmers; next they obtained urban employment; and finally, they moved into professional occupations".[64] At this point, "East Africa was in the first stage, though the second and third were rapidly approaching".[65] The "progress" in civilisation would be undertaken through measures including "gradual modification" of tribal institutions, encouraging individualization of tenure and European education.[66] The aim was to ensure that "[i]n the long run, through education, the African areas would become 'civilised Black states under White control'. With help from European supervision 'the Black may have the chance of working out his race salvation'."[67]

The above thinking was continued in the colonial period. Colonial administrators John Ainsworth and C. W. Hobley, for example, observed that

> [i]n dealing with African savage tribes we are dealing with a people who are practically at the genesis of things […] and we cannot expect to lift them in a few years from this present state to that of a highly civilised European people […]. The evolution of races must necessarily take centuries to accomplish satisfactorily.[68]

Additionally, many of the district officers – "Little Tin Gods" –

> felt it their duty to change the lives of the Africans they ruled, and against great odds they did. Sent out by their superiors in London and Nairobi as policemen and tax collectors, they saw themselves as secular missionaries for a superior culture. Work-

63 Mamdani (1999) 870.
64 Sorrenson (1968) 249.
65 Ibid.
66 Sorrenson (1968) 254.
67 Ibid.
68 C. O. 533/63, memo. on native policy, 2 October 1909, in Girouard to Crewe, 13 November 1909, as quoted in Sorrenson (1968) 227.

> ing in the decade before the catastrophic first world war, they were the last generation of Europeans who easily believed their own superiority.[69]

Individuals and local communities were incentivised to embrace the new ways by being given access to the new social, economic and political space.

Strategies were designed to provide productive lands to the settlers. This would be the beginning of a campaign of sustained enactment[70] targeting land occupied by traditional communities and the communal tenures they practised. However, "an intractable legal problem" stood in the way in the period when Kenya was a protectorate. This was because

> [a]ccording to British law the Crown was the source of all title in land. Thus, unless the Crown established an original title to the land, normally a consequence of sovereignty, it was legally impossible to make grants in fee simple or under any other form of tenure recognized in British law. As protectorates were technically foreign territories it was difficult for lawyers to see how the Crown could assert a title to land or grant titles to British subjects. It was possible to obtain rights to deal with land by treaties with the existing sovereign authority of a protectorate; but then, the Crown acted by delegation of authority, according to the terms of the treaty.[71]

Solving the above legal problem started through the extension of the 1890 Foreign Jurisdiction Act to permit control over foreign lands. It was enacted to consolidate statutes relating to the exercise by the Queen of jurisdiction outside of her domains – that is in relation to jurisdictions obtained by "treaty, capitulation, grant, usage, sufferance or any other lawful means".[72] The Foreign and Colonial Offices initially doubted the ability of the Act to grant control to the Crown over the land in Kenya. They advised that the Crown could only give certificates of occupation but not leases since the Crown did not own the land.[73] Arthur Hardinge, Commissioner of the East Africa Protectorate, urged the Foreign Office that the government should abandon the "juridical fiction" and assert title over the area by virtue of its protection.[74] He noted that "since Africans owned land only in terms of occupational rights", the unoccupied/waste land ought to revert to the Crown as the territorial sovereign.[75] He saw, "small chiefs and elders as

69 Thomason (1975) 145.
70 Manji (2020) 9. See also Blomley (2003) 114.
71 Sorrenson (1968) 45.
72 *Foreign Jurisdiction Act 1890* [53 & 54 VICT. CH. 37].
73 Sorrenson (1968) 50.
74 Okoth-Ogendo (1991) 11.
75 Ibid.

practically savages in whom sovereignty could not possibly reside; the only reasonable alternative was Her Majesty's Government".[76] The Foreign Office was warned that "if not put on legal lines", land administration "may give rise to much future trouble".[77]

Accordingly, the Foreign Office asked for advice from the Crown's legal officers. The situation had developed to the extent that "The Law Officers were left in no doubt that the Foreign Office required a favourable verdict".[78] The advice was given on 13th December 1899, and was to the effect that the Foreign Jurisdiction Act empowered the Crown to control and dispose

> waste and unoccupied land in protectorates where there was no settled form of government and where land had not been appropriated either to the local sovereign or to individuals. Her Majesty might, if she pleased, declare them to be Crown Lands, or make grants of them to individuals in fee or for any term.[79]

This position was reflected in the 1901 East African (Lands) Order-in-Council and later in the 1902 Crown Lands Ordinance. These two legal instruments

> had the effect of conferring upon protectorate administrators enormous discretion with respect to what land they could lawfully dispose of within the Protectorate. The vagueness associated with public lands left them power to determine more or less on an ad hoc basis what waste and unoccupied lands were.[80]

Consequently, a spatial reordering was set in motion. The provisions of the 1915 Crown Lands Ordinance, the 1920 Kenya (Annexation) Order-in-Council and the 1921 Kenya Colony Order-in-Council extinguished all native rights to the land occupied by natives, and vested the land in the Crown.[81] The local communities were therefore rendered "tenants at the will of the Crown".[82] The colonial state was vested with powers to fundamentally alter the spatial relations of local communities by unilaterally declaring some parcels of land as "Crown land".[83]

76 Ibid.
77 F. O. C. P. 7401, No. 143, Gray to F. O., 21 June 1899.
78 Sorrenson (1968) 51.
79 See F. O. C. P. 7403, No. 101.
80 Okoth-Ogendo (1991) 14.
81 *Isaka Wainaina Wa Githomo and Kamau Wa Githomo v Murito Wa Indangara (2) Nanga Wa Murito (3) Attorney-General* (1922–1923) 9 KLR 102.
82 Ibid.
83 Kariuki / Ouma / Ng'etich (2016) 164. See also *East African Order-in-Council 1901*.

Furthermore, pursuant to the 1920 Kenya (Annexation) Order in Council by which Kenya was made a British Colony, there was also the application of English common law to adjudicate civil and criminal matters in the colony, hence subjugating the customary laws of the communities. The customs are integral to the management of the commons. The effect of all these legal changes was to deem African commons as *terra nullius* resources. Additionally, the new legal system "paid little regard to the established community principles or mechanisms".[84] This impacted the continued application of inclusive notions of land. Social systems were disrupted, and communities moved to the less productive and challenging terrains in the "reserves".[85]

Once the communities were pushed to the "reserves", it became necessary to address the questions on land tenure in those areas since the places soon became crowded as more land was acquired for the settlers, for example, though the continued displacement of the Maasai pursuant to "treaties" with the British. As the "reserves" became crowded, the communities started to agitate for the land occupied by the settlers.[86] This started to build up sentiments of resistance to colonial rule and calls for independence. To address this, the colonial government set out to engage in land law reform within the reserves. The objective was to gaslight the communities in the reserves by "enlightening" them that the problems they were facing arose not from the fact that they had been confined to the reserves to create space for settlers but that the customary tenure was derailing development:[87]

> So as not to disturb the existing pattern of land distribution, it was tenure rather than land reform that was required. Tenure reform would freeze that pattern while at the same time justify it to the African peasantry on what were considered as sound economic grounds. As such, the reform was simply a means to an objective which was not necessarily consistent with those grounds.[88]

The stage was thus set for the further undermining of the commons, communal tenure and attendant practices. Two main things needed to be accomplished – denying the proprietary nature of the commons and the juridical character of customary law. These were sentiments already present at the

84 Okoth-Ogendo (2000) 6.
85 Ibid.
86 Sorrenson (1968) 292.
87 Kariuki / Ouma / Ng'etich (2016) 166–167.
88 Okoth-Ogendo (1991) 71.

heart of the colonial enterprise. Sir Frederick Lugard, one of the chief architects of British colonial rule observed that:

> Speaking generally, it may, I think, be said that conceptions as to the tenure of land are subject to a steady evolution, side by side with the evolution of social progress, from the most primitive stages to the organization of the modern state […]. These processes of natural evolution, leading up to individual ownership, may, I believe, be traced in every civilization known to history.[89]

From the discussion above, dispensing with customary law was therefore another key component of the colonial project. Customary law is "the domain which defines the structural and normative parameters of the commons".[90] The denial of the proprietary nature of the commons would be incomplete without the "legal and administrative contempt of customary law".[91] The sentiments were harboured throughout the administrative framework. Okoth-Ogendo notes that there was

> the strong view held by colonial anthropologists and administrators that 'native law and custom' was merely a stage in the evolution of African societies. It was expected, therefore, that relations defined by customary law, including common property systems, would wither away as Western civilisation became progressively dominant in African social relations. There was, therefore, no need to acknowledge, let alone develop, customary law as a viable legal system and customary land tenure as a system of rights and duties.[92]

It appears that the attempts to get rid of the commons and customary law were treated as moving the African communities along the "civilisation" trajectory.

To accomplish these objectives, the campaign of legislative enactments which started with the extension of the 1890 Foreign Jurisdiction Act was sustained through colonial government reports, policies, laws and regulations seeking to move land holding from customary tenure to individualisation/privatisation. For example, section 3 of the Native Tribunals Ordinance[93] empowered provisional commissioners to establish native tribunals. This merging of the administrative function with the judicial function "enabled administrators to align the development of customary law not only to their own values, but also to the political imperatives of the colonial

89 Lugard (1922) 280.
90 Okoth-Ogendo (2000) 7.
91 Ibid.
92 Okoth-Ogendo (2000) 8.
93 No. 39 of 1930.

state".[94] The practice was later implemented through District Law Panels "which were given the responsibility *inter alia* for guiding the development of customary laws and making recommendations for changes therein".[95] It is observed of the panel in the region of Murang'a that it "played a key role in transforming customary law in a fundamental (manner), filling a vital gap in political machinery left by the removal of what traditional organs of legislative action had once existed".[96]

A key policy document in the legislative campaign was *A Plan to Intensify the Development of African Agriculture in Kenya* (popularly known as the Swynnerton Plan due to the work of Roger Swynnerton – who was then the Assistant Director of Agriculture in Kenya – in developing the plan).[97] The Plan recommended changes in the agricultural sector and was meant to address the unrest among Africans in relation to land. By design, the Plan did not investigate the root causes; it instead "contemplated economic answers to what were in large measure political and social problems".[98] It noted that:

> Sound agricultural development is dependent upon a system of land tenure which will make available to the African farmer a unit of land and a system of farming whose production will support his family […]. He must be provided with such security of tenure through an indefeasible title as this will encourage him to invest his labour and profits into the development of his farm and will enable him to offer it as security against such financial credits as he may wish to secure […].[99]

This required the communities to forget about the land taken from them and adapt to the new ways of land holding and farming.[100]

Another consequential document in the legislative campaign was the 1955 Report of the East African Royal Commission, whose objective was to identify ways of improving the welfare of African peasants. The report noted that:

> individual tenure has great advantages in giving to the individual a sense of security in possession and in enabling by purchase and sale of land, an adjustment to be made by the community from the present unsatisfactory fragmented usage to units

94 Okoth-Ogendo (1991) 64.
95 Okoth-Ogendo (1991) 65.
96 Morris/Read (1972) 205.
97 Colony and Protectorate of Kenya (1954).
98 Harbeson (1971) 236.
99 Colony and Protectorate of Kenya (1954) 9.
100 Harbeson (1971) 236.

> of economic size. The ability of individuals to buy and sell land by a process of custom, opens the door to that mobility and private initiative on which a great sector of economic progress tends to depend […]. The specialist farmer is relieved of the liability of providing a place for the subsistence of his clan relations.[101]

What is notable from both the Swynnerton Plan and the Report of the East African Royal Commission is the deliberate framing of "the land question in specific ways so as to avoid pointing to colonial expropriation of land as the root of the ongoing land problems".[102] African land tenure systems are portrayed as the problem,[103] hence the justification for "reform" through individual/private tenure. The call for individual tenure was being translated into colonial government policy. In noting that "[t]he specialist farmer is relieved of the liability of providing a place for the subsistence of his clan relations", the report depicts the care among the members of the community as a "liability". This was aimed at breaking down the inclusive nature of social and land relations in the communities. As these measures took effect, the safety net in the community that would help the vulnerable disappeared; the spatial relationship between the communities and the land was changed.

To give effect to the above proposals, the Native Tenure Rules[104] were enacted to apply to "Emergency Districts" – Kiambu, Nyeri, Fort Hall (Murang'a) and Meru. These enabled the Minister to put in place measures for adjudication and consolidation in native areas "within which the Minister considers that a private right-holding exists".[105] To ensure the process proceeded without obstacles, the African Courts (Suspension of Land Suits) Ordinance[106] was passed "to bar all land litigation in all areas to which the Rules applied".[107] Additionally, the Indemnity Ordinance[108] was passed "to absolve any person in government service from liability arising from 'any act, matter or thing done within the Kikuyu Native Land Unit during the emergency […]'."[109] In February 1957, the Working Party on African Land Tenure was appointed to look into

101 Government of the United Kingdom (1955) 323.
102 Manji (2020) 39. See also Ngugi (2001) 337.
103 Manji (2020) 39.
104 Legal Notice No. 52 of 1956.
105 Rule 2(1).
106 No. 1 of 1957.
107 Okoth-Ogendo (1991) 72.
108 No. 36 of 1956.
109 Okoth-Ogendo (1991) 72.

> measures necessary to introduce a system of land tenure capable of application to all areas of native lands with particular reference to: (a) status of land in respect of which title is issued; (b) the nature and form of title to be granted; (c) the substantive legislation for the determination of rights, consolidation, enclosure and demarcation; the issue and registration of title […].[110]

It submitted its recommendations in 1958 which included that registration should lead to an absolute title except in cases of succession.[111] The recommendations were captured in the Native Lands Registration Ordinance[112] to introduce a system of registration, and the Land Control (Native Lands) Ordinance[113] to control land transactions in native areas – "to protect uninitiated peasants from improvident use of their rights under the new tenure system".[114]

There were also other ways in which the narrative was strengthened and spread. These included the social, economic and political incentives given to those who would shun the "backward" ways and embrace the "civilised" ways of life. The agricultural reform envisaged by the Swynnerton Plan, for example, was purposely designed to direct credit, planning and extension services to "a select group of educated progressive farmers already engaged in the production of settler crops".[115] The Plan was selectively implemented. A 1960 report by the International Bank for Reconstruction and Development on development of African agriculture in Kenya sets out the details of a loan application to the Bank by the governments of Kenya (borrower) and the United Kingdom (guarantor). The governments applied "for a loan in an amount equivalent to US-$5.6 million to help finance the completion of the so-called Swynnerton Plan of the Kenya Government for the development of African agriculture in 'high potential areas' of the territory".[116] The Plan would be primarily implemented in select provinces:

> The Swynnerton Plan operations are mainly conducted in four of the six provinces of Kenya: Central Province, Nyanza, Rift Valley, and Southern Province. The bulk of the action is concentrated on 'areas of high potential' and most of these areas are

110 Okoth-Ogendo (1991) 73.
111 Ibid.
112 No. 27 of 1959.
113 No. 28 of 1959.
114 Okoth-Ogendo (1991) 74.
115 Okoth-Ogendo (1991) 71.
116 International Bank for Reconstruction and Development (1960) i.

> located in Central Province and Nyanza. Activity under the plan in Coast Province and Northern Province is minor.[117]

Despite the implementation of the various measures, agitation for land restitution and independence grew louder. As this happened, some settlers started engaging with African farmers on ownership of the "White Highlands":

> Multi-racialism was a political and economic philosophy meant to take the steam out of the nationalist kettle […]. Arguments for the extension of the franchise ['White Highlands'] to Africans were limited to those of a certain age and qualified either by property ownership or by their military record; this was to ensure the election of non-nationalist Africans capable of appreciating the European economic contribution.[118]

The multi-racial initiatives were primarily designed to again divert attention and delay questions being raised as to the distribution and occupation of the lands. One way of diverting attention was to create division among the Africans in the fight for land restitution and independence. Those who were rewarded with land would form an opposition to the nationalists hence shifting attention from the "White Highlands" occupied by the settlers, and the accompanying geographical injustices.

Another key aspect used in promoting the new notions of land at the expense of the local ones was the use of language. Under the settler colonial framework, discussions on the construction of colonial landscapes are viewed as "articulations of ideological constructs by individuals who are entangled in ongoing struggles over power".[119] The portrayal and treatment of the Mau Mau fighters offers a good example. The Mau Mau fought the colonial state and its collaborators to get back land taken away from the communities and to attain independence.[120] Primarily made up of squatters, former squatters, farm workers and landless Kikuyu, the Mau Mau wanted to put an end to the settler domination of the highlands – which were the most productive but least utilised land – and called for the removal of limits on economic and political rights in native reserves.[121] While the local communities saw them as advocating for their rights, the colonial state and the

117 International Bank for Reconstruction and Development (1960) 4.
118 Harbeson (1971) 237.
119 Proulx/Crane (2020) 52.
120 See Clough (1998) 34.
121 Boone (2014) 141.

settlers painted them as criminal, rebel and violent groups. Sir Michael Blundell, a settler and member of the Legislative Council, notes as follows in regard to the Mau Mau in his memoir,[122] in a chapter titled "The Kikuyu and the Misery of Mau Mau":

> The second aspect of policy which I stressed was the increasing lawlessness and contempt for government which was being manifested, mainly by the Kikuyu. Already one or two of my constituents, as early as 1950, had told me of a secret society called 'Mau Mau' which was terrorizing the men and women working on their farms with oaths and all the mumbo jumbo of tribal witchcraft. Violent assaults, even serious physical harm, and death were the concomitants of robbery and a general disregard for the law. Whole locations would stage mass disobedience to simple agricultural and soil conservation methods in defiance of authority […]. I therefore put the need for a firm hand in restoring the situation in the forefront of my views.[123]

The above view portrayed the Mau Mau as a group which had a "disregard for law and order".[124] The settlers used this depiction to pressure the government to crack down on the members of this group. In one of his speeches to the Legislative Council, Blundell claimed that the Mau Mau were "a subversive organization which was like a disease spreading through the Colony and the leaders have a target and the target is the overthrowing of the Government […]".[125] This and other views by the settlers and colonial administrators served to undermine the land and independence grievances of the Mau Mau in the ongoing struggle for the control of land and governance in colonial Kenya. These views informed the declaration of the state of emergency in the Colony from 1952 to 1960 in order to deal with the Mau Mau and other rebel groups. The "maintenance of law and order" was presented as important for the interests of all the people in the Colony but in fact served to ensure that the fertile highlands remained within the hands of the settlers, and the colonial state continued its rule over the people.

Additionally, the colonial government embarked on resettlement of natives under private land systems as a political and economic strategy to demobilise the Mau Mau and other groups.[126] The aim was to cause doubt

122 Blundell (1964).
123 Blundell (1964) 88–89.
124 Blundell (1964) 91.
125 Ibid.
126 Kariuki/Ouma/Ng'etich (2016) 422.

in the minds of the Mau Mau members as to whether to continue the fight for liberation or abandon the fight so as not to miss out on the land allocations. Land served as a weapon as well as a prize in the war. For example, the tenure and agricultural reforms proposed under the Swynnerton Plan such as the offering of credit, planning and extension services were initially targeted at the "Mau Mau Districts" in Central Province. And within those districts, "the concern did not by any means include every peasant. It was to a select group of educated progressive farmers already engaged in the production of settler crops".[127] This was meant to cast doubt in the minds of the Mau Mau fighters and the people in the area by presenting a narrative of a new crop of successful people working in tandem with the government.

From a spatial justice lens, the above discussion of some of the key highlights of the colonial land governance in Kenya indicate that the new notions of land – based on the English property law system – were used to enable the colonial administration to engage in spatial (re)ordering. As the discussion notes, for example, the vesting of the radical/original title on the Crown was intended to take away land from the communities for use by the colonial administration and settlers. The initiatives undertaken in the pursuit of this objective are demonstrative of the manner in which settler colonial landscapes are constructed. The colonial administration falsely and intentionally misinterpreted the customs of the communities to the effect that the communities did not own the land but were merely using or occupying it. Additionally, the colonial administration viewed the communities as being in a lower level of civilisation. The traditional chiefs and elders were regarded as savages who could not possibly have sovereignty. It was the duty, therefore, of the colonial administrators to change the communities and move them towards a higher level of civilisation. When the Mau Mau fought back to get the land, the administration and settlers depicted them as agents of lawlessness and branded them terrorists. And when independence was inevitable, strategies including fake attempts at multi-racism were used to divert attention away from land grievances. All these strategies fit within the settler colonial framework; where in the fight for control over resources, discourses are constructed by portraying some views as universal, inevitable and natural while depicting others as backward, lawless and irrational.

127 Okoth-Ogendo (1991) 71.

Appeals to law and order are used to foreclose any questions on the legitimacy of resource acquisition and distribution.

6. Notions of land in present-day Kenya and their impact on land governance

Colonialism "produced a racial regime of ownership that persists into the present, creating a conceptual apparatus in which justifications for private property ownership remain bound to a concept of the human that is thoroughly racial in its makeup".[128] This is seen in Kenya where "Kenyanisation" at independence did not change the fundamental aspects of land relations;[129] the racial discrimination in the colonial state transitioned to class and ethnic domination in the post-colonial state.[130] As the situation in the colony indicated that the time for independence was drawing close, the process was carefully midwifed by the colonial government and settlers to ensure that the colonial economic, social and political interests were protected in the post-colonial state:

> By the time that revolutionary forces from below and the pressures from Whitehall from above had made independence inevitable, the Department of Lands and Settlement had crafted plans for the transfer of lands from European to African ownership in such detail that they could be circulated in international capital markets, appraised, and funded – all within a few months' time.[131]

The colonial and settler interests were secured through guarantees that none of the land would be taken back without compensation. Through the Yeoman and Peasant scheme, administered by the Land Development and Settlement Board, Kenya would obtain funds from the World Bank and the Colonial Development Corporation and purchase land from settlers on a "willing buyer willing seller" basis, and sell it, by way of loans, to the locals.[132]

Eager to ascend to power, the new Kenyan political elite, who had embraced the British colonial lifestyle, agreed to the guarantees. Jomo Kenyatta, who was the Prime Minister then, underwent a "radical" transforma-

128 Bhandar (2018) 4.
129 Manji (2020) 10.
130 Manji (2020) 9.
131 Bates (1989) 58.
132 Leo (1981) 209–210, 216.

tion from having advocated for the return of land by settlers to envisioning an independent Kenya with settlers in it. In his speech to the settlers in Nakuru in August 1963, Jomo Kenyatta stated that

> [t]here is no society of angels whether it is white, brown or black. We are human beings and as such we are bound to make mistakes […] If we start thinking about the past, what time have we to think of the future?[133]

He forged ahead with a message of a "united" Kenya where the past and the "vicious activities" of the colonial government, settlers and their collaborators were "to be forgotten/suppressed".[134] The Mau Mau and their fight for land were given a clear message that such was not needed in the "new" Kenya:

> Over the years, then, those who have sought, in Gikuyu society, to raise issues pertaining to the Mau Mau fighters' arguments have had the regular reminder that they are seeking to destabilize society by 'opening old wounds'. Their very motives have been questioned: they are *andu a muthotho* (gossips) […]. It has been the corporate endeavour of the state and the Gikuyu community to suppress this past, a significant slice of the total Mau Mau experience.[135]

The colonial government ban on the Mau Mau was retained by the post-colonial state until August 2003.[136] The ban was retained to "suppress the narratives of the radical Mau Mau as an embodiment of the struggle for Kenyan nationhood".[137] It ensured that the only politically recognised Mau Mau were those in support of the government.[138] This rendered the contributions of the Mau Mau towards the fight for independence invisible, and depicted those in government as the "fathers of the nation".

The new political elite behaved like the colonial masters (the Crown); they retained the colonial land policies and laws and continued the spatial re-ordering: "Independence led, not to a re-examination of the status and content of the commons, but rather to its more intensified expropriation and neglect".[139] Through the land resettlement schemes, some of the areas previously forcefully taken from communities and designated as the "white highlands" were put up for sale. The manner of allocation by the new leader-

133 Knauss (1971) 134.
134 Atieno-Odhiambo (1991) 303.
135 Ibid.
136 Branch (2010) 314.
137 Mwangi (2010) 92.
138 Ibid.
139 Okoth-Ogendo (2000) 9.

ship followed "a patronage politics logic of transferring land to government-selected beneficiaries".[140] Just as the colonial government had rewarded settlers and loyalists with land and excluded the Mau Mau, President Jomo Kenyatta "used the former settler land as patronage to solidify his support and build alliances, and many former loyalists became prominent in the new KANU government".[141] His successor, Daniel Moi, presided over a period characterised by "irregular allocations of public land to well-connected individuals and land-buying companies" in different parts of the country including forest lands.[142] It was the colonial administration disguised in post-colonial attire.[143]

For example, through the World Bank, Britain and donor funded settlement schemes, "those charged with implementing the scheme settled some landless – and settled themselves too!"[144] At the instantiation of Jomo Kenyatta, a secret settlement scheme known as the Z-Plot scheme was created in 1964. The subject of the scheme was the former European settler farm houses with 100-acre plots around them. However, unlike the other settlement schemes, the "Z-Plot scheme was not for the hoi polloi":[145] "[t]he plots were intended for potential community leaders – a sort of created squirearchy – drawn from political leaders, high-level civil servants and military officers".[146] The Cabinet had not approved any plans for disposal of the plots – all that the individuals fitting in this category were required to do "was to identify a farmhouse and the land and apply to the minister of Lands and Settlement for allocation".[147] Jomo Kenyatta got one in Nyandarua while his successor, Daniel Moi, got one in Eldama Ravine, and so did many other top politicians, ministers and civil servants, with some applying for several of the plots.[148]

The secret scheme came to light in 1965 when it was realised some of the individuals were defaulting on the plots – the repayment from the scheme

140 Boone/Lukalo/Joireman (2021) 6.
141 Klopp (2000) 16. See also Berry (1993) 125.
142 Klopp (2000) 8.
143 Funder/Marani (2015) 90.
144 Kamau (2016).
145 Ibid.
146 Van Arkadie (2016) 65.
147 Kamau (2016).
148 Ibid.

was worse than any other. The British appointed a commission in 1966, led by Brian Van Arkadie. Van Arkadie was given a list which "a cursory glance over the names shows that many of the new plots are owned by ministers, members of parliament, ambassadors, permanent secretaries, provincial commissioners, civil servants and prominent national personalities".[149] The Kenyan government objected to this involvement by the British government. The scheme continued and the Treasury was directed to guarantee the funds needed: "[t]his meant taxpayer money would be used to fund the take-over of land by a select few. When that was done, nobody questioned the Z-Plots again".[150]

Another key aspect at independence was the renaming of "Crown land" to "government land"[151] and vesting the President with powers, through the now repealed Government Land Act, "to make grants and dispositions of estates, interests or rights in or over unalienated government land".[152] The Act did not provide clear procedures on the making of the grants. What ensued was abuse of the power of allocation through corruption.[153] Parcels of land, in both rural and urban areas, would be allocated leading to loss of public land.[154] The presidents and the government treated the land as "belonging" to them rather than being held in trust for the people of Kenya.[155] And even though the Act has been repealed and measures provided in the 2010 Constitution for the holding of the land in trust for the people, the consequences of the "Crown" and "government" land are still felt today. Public projects such as construction of schools, hospitals, roads and railways necessitate massive displacement and eviction of communities. This impact would have been reduced if the land taken from communities and classified as "Crown" and "government" land had not been irregularly allocated to politically connected individuals.

The pattern of development in the country also largely mirrors the colonial designation of areas as "white highlands" and "reserves". Most of

149 Ibid.
150 Ibid.
151 Kariuki/Ouma/Ng'etich (2016) 212.
152 Section 3(a), *Government Lands Act* (Chapter 280, Laws of Kenya) (Repealed), and Kariuki/Ouma/Ng'etich (2016) 212.
153 Republic of Kenya (2004) 12.
154 Republic of Kenya (2013) 254.
155 Akech (2010) 25 and 27.

the resources have been channelled to the "white highlands" as the productive parts, while most of the "reserves" remain marginalised. For example, arid and semi-arid lands (ASALs), which make up 89% of the country,

> have been marginalized in terms of resource allocation, infrastructure development, social-service delivery and economic investment. The population in the ASALs have had little or no participation in political leadership and hence no opportunity to influence policy decisions and actions in their favour.[156]

This marginalization "is partly the result of conscious public policy choices",[157] and brings to mind the selective manner of implementation of the Swynnerton Plan as discussed in the section on the colonial period. Sessional Paper No. 10 of 1965 on *African Socialism and its Application to Planning in Kenya*, Kenya's economic development blueprint at the dawn of independence, stated as follows under heading "Provincial Balance and Social Inertia":

> One of our problems is to decide how much priority we should give in investing in less developed provinces. To make the economy as a whole grow as fast as possible, development money should be invested where it will yield the largest increase in net output. This approach will clearly favour the development of areas having abundant natural resources, good land and rainfall, transport and power facilities, and people receptive to and active in development. A million pounds invested in one area may raise net output by £20,000 while its use in another may yield an increase of £100,000. This is a clear case in which investment in the second area is the wise decision because the country is £80,000 per annum better off by so doing and is therefore in a position to aid the first area by making grants or subsidized loans.[158]

As a result of the policy choice, development in the post-colonial state is still primarily concentrated on the areas which had been designated as the "white highlands", while ASALs are "characterized by the poorest indicators in all spheres of social and economic development – lacking in physical and social infrastructure and poorly integrated into the national economy, with their residents isolated and alienated from the rest of the country".[159] This is despite the introduction of a devolved system under the 2010 Constitution, where participation in governance is intended to be brought closer to the people. Many factors curtail the achievement of this objective, including

156 Odhiambo (2013) 159.
157 Republic of Kenya (2012) 1.
158 Republic of Kenya (1965) para 133.
159 Odhiambo (2013) 159.

control of funds by the national government, lack of capacity in the counties and "devolution" of corruption to the counties.

The narrative on the need for private ownership seemed to die down a bit only to pick up more speed in the period around 1970–2000. This is owing to the fact that "in this period neo-liberal ideas, values and constructions come to dominate such that they become 'common sense' in economic and social thought".[160] This continued to occasion many injustices. In many families, for example, the land was in most cases registered in the name of the eldest male member of the family, leading to the rest of the family being evicted when the registered person invoked the new property rights:[161] "[e]ntitlements based on customary rights to land have been rendered vulnerable when title holders assert their absolute rights of ownership against unregistered family members".[162] Additionally, commons were not left behind in the spatial reordering:

> Community rangelands, forests and wetlands were reallocated to local farmers with means to clear these, or co-opted by government for disposal to private interests, or turned into local authority wildlife and forest reserves, controlled by the new county councils. Many were in turn depleted and / or sold off, on the instruction of, or with the endorsement of, the Land Commissioner.[163]

The onslaught on the commons continued as private property systems were introduced even in pastoral and arid and semi-arid areas.[164] This is despite the fact that such land ownership system would not fit well with the community practices of using grazing areas in common and constantly moving according to weather patterns.

This depiction of the commons as not constituting property in the legal sense during this period is traceable to the explanation of Garrett Hardin in his paper *The Tragedy of the Commons*,[165] and Hernando de Soto in his book *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*.[166] According to Hardin, the "tragedy" unfolds as each individual

160 Manji (2020) 10.
161 Wily (2018b) 7. See also Haugerud (1989) 62.
162 Nyamu-Musembi (2006) 20.
163 Wily (2018b) 7. See also Kamuaro (1998).
164 Okoth-Ogendo (2000) 9.
165 Hardin (1968).
166 De Soto (2000) 27.

makes the rational decision to increase their use of the commons while the negative impact of the overuse of the resource increases:[167]

> Each man is locked into a system that compels him to increase his herd without limit-in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.[168]

He posited that the "tragedy" would be "averted by private property, or somethings formally like it".[169] The theory had a significant influence; "[t]he Hardin metaphor was thus translated into legislative policy which advocated the conversion of common property regimes into individualised private property".[170]

The call for private property systems in the commons was later revived by Hernando de Soto in his book *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*.[171] In calling for the adoption of formalised private property rights in the developing world, de Soto observed that

> [t]he only real choice for the governments of these nations is whether they are going to integrate those resources into an orderly and coherent legal framework or continue to live in anarchy.[172]

This call was taken over by many governments in the developing world, with the backing of development agencies such as USAID, the World Bank, High Level Commission for the Legal Empowerment of the Poor, the United Nations Economic Commission for Europe and the United Nations Development Programme.[173] The World Bank noted that "[a]ccordingly, farmers must be given incentives to change their ways […]. Secure land rights also help rural credit markets to develop, because land is good collateral".[174]

The theory by Hardin has been debunked in relation to the African commons. His explanation referred to "a society that believes in the freedom

167 Hardin (1968) 1244.
168 Ibid.
169 Hardin (1968) 1245.
170 Okoth-Ogendo (2000) 8.
171 De Soto (2000) 27.
172 Ibid.
173 Nyamu-Musembi (2006) 7.
174 World Bank (1989) 104.

of the commons".[175] This implies that the resources he had in mind were open access. The case of the African commons is different. As noted in the section above on the precolonial period, the holding and management of the commons has structural and normative frameworks; the customary norms and decisions making bodies outline the basis for access and use of resources and the quantum of the resources. Therefore, the real tragedy of the African commons occurs not because of their intrinsic characteristics but due to expropriation.[176] Celestine Nyamu-Musembi notes that equating formal title with legality is a narrow view of legality and the absence of formal title does not imply anarchy. Property relations across the world are characterised by informal legality. This is because "the legitimacy of property rights ultimately rests on social recognition and acceptance".[177]

Additionally, empirical evidence shows that formal title does not imply access to credit: "the attitudes and lending practices of commercial banks tend to shun small scale (particularly rural or agriculture-dependent) landholders. Title does little to change these institutionalised biases".[178] This brings to mind the Swynnerton Plan measures that farmers would access credit once they acquired title. This was not the case for many small-scale farmers since banks in the colonial period viewed them as being financially risky and that the land parcels would not be adequate in the event of default. There are also thriving informal micro-lending networks.[179] The informal networks also make up an informal market for land transactions.[180] Titling also brings security and insecurity since it means a gain for some but a loss for others. For example, when titles are issued in urban slums security of title comes with the safeguarding of everyone's rights. However, this means when the value of the land rises, the poor beneficiaries "come under pressure to sell off their holdings to developers and slum-lords, forcing them into further marginality and widening inequality".[181] Taken together, the claims of the

175 Hardin (1968) 1244.
176 Okoth-Ogendo (2000) 1.
177 Nyamu-Musembi (2006) 10.
178 Nyamu-Musembi (2006) 16.
179 Ibid.
180 Nyamu-Musembi (2006) 18.
181 Nyamu-Musembi (2006) 20.

inevitability of formal titling and private property rights contain a social evolutionist bias which was used to justify practices such as colonialism.[182]

The above explanations bring out the fact that certain views are held out as being true or universal while in fact such is not the case. It is a reminder of how Hardin's "tragedy of the commons" was coined and the manner in which certain narratives have been carefully woven to facilitate the construction of settler colonial landscapes. De Soto equates common property systems with anarchy in the attempt to depict those systems as bad and needing replacement. However, despite the deliberate attempt to eradicate them, the commons systems of property continue to exist.[183] The approaches fail in part due to the refusal or failure to understand the complexity of the web of relationships in the management of the commons.[184]

Closely tied with the initiatives to eradicate the commons was the subjugation of customary law to common law and statute. This also continued since most of the post-independence laws were modelled on colonial laws.[185] For example, the "[n]ative councils in the 1950s, and then locally elected county councils after independence in 1963 continued to be the trustees of native lands".[186] These councils were empowered to "set aside" some of the lands for use by the government or mining activities, "a process which extinguished tribal, group, family or individual customary rights".[187]

The promulgation of the Constitution of Kenya, 2010, and the enactment of the Community Land Act have improved the treatment of the commons in law. As noted above in the introduction, the Constitution lists communal ownership of land as one of the ways in which people in Kenyan can hold land. Under Article 61(1), the Constitution also notes that radical title rests with the people and not the government, as was the case between the colonial period and the coming into force of the 2010 Constitution. The article states that "[a]ll land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals". This means that in

182 Nyamu-Musembi (2006) 12.
183 Wily (2018b) 5.
184 Wily (2018a) 662.
185 Wily (2018b) 3.
186 Wily (2018b) 7. See also Leo (1984).
187 Wily (2018b) 7.

the case of community land, the radical title rests with the community. This restores the radical title to the position it was before the colonial period.

Further provisions on community land are contained in the Community Land Act which provides for the registration of titles to be held by communities. And while the Act recognises communities as having the ability to hold land, it introduces a new institutional framework of committees to be formed by communities.[188] This fails to recognise the existing structures within the communities. The new structures are state-designed, hence reducing the ability of the communities to fully utilize them. The creation of space carries power through the act of creating it and controlling or influencing the issues under discussion and/or the manner of participation.[189] Additionally, there is bound to be confusion in the process of administering community land since the traditional structures are still functional. There is therefore the possibility of a power tussle between the introduced and the existing structures. While this takes place, it is the community that is going to be at a loss – the back and forth between the two structures only serves to distract from the main issues and provide an opportunity for practices such as land grabbing.

Another aspect of the new legislative framework is the investigation of historical land injustices. Article 67(2)(e) of the Constitution outlines that one of the functions of the National Land Commission is "to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress". This provision holds an emancipatory potential for communities and individuals to make claims in relation to historical land injustices such as the colonial dispossessions. However, this potential is limited through the manner in which Parliament has enacted the National Land Commission Act. The Act, passed in 2012, initially provided that the Commission recommends to Parliament the appropriate legislation for addressing historical injustices. This was never accomplished. In 2016, the Act was amended to empower the Commission itself to address historical injustices directly. Section 15(3)(e) of Act set 21 September 2021 as the deadline for the launching of historical land injustice claims.

188 For example, section 15 of the Act provides for the formation of a community assembly and a community land management committee.

189 Nolte / Voget-Kleschin (2014) 654.

Additionally, section 15(11) gives the Commission a period of ten years as from 2016, to complete the processing of the claims. This is "a ludicrously short time for such a massive problem".[190] The manner of implementation shows that "the amount of vested interest on the part of very important or well-connected people in leaving things as they are has no doubt been a major factor".[191] This brings to mind Jomo Kenyatta's call to the new nation in 1963 to forget the past and think about the future.

Even though the new laws make some good provisions, there is a lack of political will to implement them.[192] Ceding power to the communities from central and elite control is difficult. This is why, for example, despite the provisions on community titling in the new laws, "community titles as only a stepping stone to subdivision is evident in official thinking"[193] with observations that

> there is no evidence that politicians or leading civil servants have grasped the viability of collective tenure as an appropriate basis for economic growth where communities own resources in common and wish to sustain and develop these lands and resources in common.[194]

This is notable in political party manifestos and national development blueprints which seek to move the country in a "forward thrust" as a market economy where private rights are at the centre of economic development.[195] Additionally, "the state's conception of the citizen is first and foremost of a property-owning subject".[196] This is because property law is not only "the primary means of appropriating land and resources",[197] but property ownership is "central to the formation of the proper legal subject in the political sphere".[198] This implies the readiness by the State to ensure that it facilitates the acquisition of property rights to be traded in the market economy, which is taken in most cases to mean private property rights. The commons easily

190 Ghai (2023).
191 Ibid.
192 Wily (2018a) 662.
193 Wily (2018b) 14.
194 Resource Conflict Institute, Kenya Land Alliance, Haki Jamii, Enderois Welfare Council, and Sustainable Community Environmental Programme (2017) 1, as quoted in Wily (2018b) 15.
195 Manji (2020) 8.
196 Manji (2020) 7.
197 Bhandar (2018) 4.
198 Ibid.

become targets for land acquisition due to development of resource corridors and exploitation of minerals and other natural resources, leading to displacements and further geographical injustices.

Another protection for private land ownership and its continuation is in the reliance of a language of "law and order" to discredit those who argue for land reform and redistribution in land governance today. For example, during discussions concerning the 2009 National Land Policy, an

> elite with longstanding stakes in a stable property regime sought to dampen or at least control the extent of reform. It sought to hold onto both concentrated power in the President and the access this arrangement provided to valuable patronage resources in the form of land. As they perceived the dangers to private property rights that might be posed by reform, the private sector sought to play a more prominent role.[199]

The elite saw the Policy as undermining security of tenure through measures including promoting community land ownership and focusing on historical injustices.[200] This "law and order" narrative serves to ensure that no questions are raised in the land discourse even where some have acquired land under questionable means. The "law and order" card categorises any discussions on land redistribution as illegal, just as was the case with the settlers and the colonial state depicting the land grievances by the Mau Mau as subverting the law. The "law and order" narrative preserves the vested interests of the elite, and this is partly why instead of engaging in land reform, the country always resorts to land law reform, which does not touch on the fundamental distributive question. Any calls against the overemphasis of private property systems and commodification are seen as going "against the grain of Kenya's forward thrust as a market economy".[201]

Viewing the above discussion from a spatial justice perspective reveals that the notions of land originating in the colonial period still hold a great sway in the manner in which land governance is conducted. The political elite at independence joined hands with the colonial administration and settlers to preserve the state of affairs. The leadership of the new state told the people to forget the past and think about the future because to think about the past is to destabilize society by opening old wounds. The colonial

199 Manji (2020) 74.
200 The East African (2009).
201 Manji (2020) 7.

ban on Mau Mau was retained until forty years after independence, and those talking about the past and Mau Mau were seen as gossips. The land taken from the communities was not fully given back. The development priorities of the country were also deliberately directed to the productive areas, and an economic rationalization given in the 1965 Sessional Paper. Individualisation and formalisation of rights especially in areas occupied by communities is still prioritised. The 2010 Constitution was seen by many as a sign of hope, but this is not being realized in the implementation. Communities are still required to hold community land using institutions designed by the state and the address of historical land injustices is limited. The state and those in control of it have no time for the past as they are busy marshalling the view of the ideal citizen as the private property owning subject ready for "Kenya's forward thrust as a market economy".[202] As the discussion notes in the section on the colonial period, these strategies mirror those used in the construction of the settler colonial landscape in the protectorate and colonial periods.

7. Conclusion

The discussion above shows how the colonial land policy initiated measures whose consequences continue to be witnessed in the postcolonial state. There was a shift in the power of spatial (re)ordering from the communities to the state through measures including the (re)location of the radical title and the (re)definition of land occupation and use. The colonial state took over key aspects of social production of space; the land was shaped according to the ideas underpinning the colonial enterprise beginning with the definitions of terms such as use and occupation. The postcolonial state has continued these policies with the assistance of the elite who are keen to preserve their interests in land and supress questions from communities.

The land governance framework needs to embrace inclusive notions of land. This would promote the appropriate management and use of existing commons. As long as the system is geared toward a development framework centred on the individual and private property rights, communal notions of land and associated practices will continue to dwindle. Communities need recognition in land governance practice as the as owners/custodians of

202 Ibid.

resources such as water and forest resources. This becomes an important step in including communities in the decisions around the resources in their environment. The administrative mindset of community land and community titles as a stepping stone to private titles needs to change; communities have the right to manage the resources without being directed towards a specific end without their consent. Additionally, the Community Land Act and other legislation on the area need to recognise use of existing community frameworks instead of seeking to create new ones which skew the politics of space creation and power in favour of the state and the elites. In adopting community frameworks, concerns on equality and fairness can be addressed, as already set out under the provisions of the Constitution, including article 27 on equality. These measures will enhance the impact of the place-based notions of land among the local communities.

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Sinéad Mercier

A Haunting Absence: Tracing the Origins of International Energy Law from the Laboratory of Ireland*

> We may imagine ourselves at an angle in the Anglosphere, basking in our guilt-free posturing as both recovering colony and third richest country in Europe, but we have little countervailing sense of what exactly the absence that haunts our modernity might be.
>
> Michael Cronin[1]

1. Introduction

Energy law is primarily concerned with the management of the extraction of natural resources,[2] and their use in infrastructures to create heat, power and light. These management techniques have caused such a level of devastation that the planet has entered a new geological epoch – the Anthropocene.[3] What happens to the law's claim to universalism, timelessness, objectivity and reason, if the law has created a new epoch which is likely to end in our extinction as a species?

Scholars within the discipline have roundly criticised energy law from within,[4] in particular highlighting the irreconcilable aims of climate action

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1 Cronin (2019) 11.

2 Heffron (2015) 3.

3 Crutzen (2002) 23.

4 Talus (2013).

(or more precisely, decarbonisation)[5] and the goals of the internal energy market, as well as the lack of an energy justice and 'just transition' approach.[6] A wave of activist litigation is occurring, seeking to hold fossil fuel companies and their facilitative states to account for climate change and biodiversity loss.[7] In response, many states have passed new climate legislation, accompanied by much furore, though with little impact on emissions. Yet, energy contracts that increase fossil fuel production continue, proliferating in parallel with new climate legislation.[8] This article seeks to uncover whether there are lessons to be learnt for our current point of stasis from the historical development of energy law, and its origins in the colonial-capitalist treatment of land and natural resources.[9] In doing so, we find value in understanding the Anthropocene from the perspective of critiques of the Capitalistocene or Plantationocene, terms which will be discussed further below.

Today, energy is placeless in the law. Despite the sources of the world's energy being from a concentrated number of places, the focus is on ensuring that energy – once released from the land – becomes as fluid as possible. The concept of 'energy' is analogous to the contemporary treatment of money, to a regime of stocks and shares that can be bounced around from space to space, subject to 'light-touch regulation' as a commercial product in a free market.[10] This concept is historically and temporally distinct. In her book *The Birth of Energy*, Cara New Daggett traces "genealogy of energy" as a *natureculture* – a "hybrid assemblage" of cultural and natural factors, influences and entanglements.[11] Daggett shows that the concept of thermodynamic energy – which is foundational to energy production and consumption today – was developed at the height of the Industrial Revolution by a "group of mostly northern British engineers and scientists".[12] These "midwives of energy" sought to align the technological and capital achievements

5 Marhold (2021); Barrett (2016) 1.
6 Muinzer et al. (2022); Muinzer/Ellis (2017); Heffron (2022) 168.
7 Setzer/Higham (2023); Kaminski (2023).
8 Azaria (2015) 1.
9 Misiedjan (2022).
10 McCabe (2017).
11 Daggett (2019) 5 referring to Donna Haraway (and others).
12 Daggett (2019) 3.

of the Victorian era enabled by fossil energy to a "political rationality" that justified unequal labour relations, colonial extractivism and imperialism.[13]

Processes of contest and struggle have continued to shape the historical progress of the concept of energy, its legal treatment and its attendant infrastructures of consumption and production.[14] As Daggett rhetorically asks "[w]hy does energy politics refer to the acquisition and security of fuel, rather than to the politics of ensuring public vitality?"[15] The waves of climate litigation that are now taking place across the globe are merely the most recent example of centuries' of struggle over centuries to return energy to the meaning of ensuring vitality, of the Irish *fuinneamh*, as opposed to something to acquire and secure for private gain. This research incorporates a law and geography approach to the development of Irish energy law through the prism of Nicole Graham's 'Lawscape', which highlights how law follows the Cartesian eye to rewrite the land in the language of a private property regime. By writing the biography of particular places and localities[16] we can examine the spatial impacts of Ireland's natural resource regimes. In examining these national conflicts over land values, use and appropriation, 'energy' can be placed in historical and political context. From these contextual, emplaced narratives, we can build an energy epistemology that is 'landscape', not 'Lawscaped' and so gives due credence to 'othered' ways of seeing the world as an enmeshed *comhshaol*.[17]

2. The contribution of legal geography to energy law: Between Lawscape and Landscape

a) Understanding the Lawscape of energy law

How do we disentangle the concepts of energy over which regimes clash, resulting in spatial justice or injustice? One means of doing so is by taking a law and geography approach. Legal geography approaches seek to interrog-

13 Ibid.
14 Moore (2015); Lohmann (2021).
15 Daggett (2019) 3.
16 Godden (2014) 3.
17 *Comhshaol* is an Irish language term for the "environment". It expresses the environment not as an extractable entity which 'environs-us', but as the "collective / shared-life / world", discussed further below.

ate the co-constitutive nature of law and spatiality.[18] For Irus Braverman, Nicholas Blomley, David Delaney and Alexandre (Sandy) Kedar, "[l]egal geographers note that nearly every aspect of law is located, takes place, is in motion, or has some spatial frame of reference. In other words, law is always 'worlded' in some way."[19] The world we live in, from bathrooms to pathways to electricity sockets is ordered by law and the meaning it assigns. Such understandings of law are key to understanding the 'place' of seemingly placeless and abstract legal entities such as energy.

Lawscape is a concept developed by Nicole Graham that highlights how law follows the Cartesian eye to rewrite the land in the language of a private property regime. "Land law" deals not with land, but with "placeless property", othered, abstracted and disembodied from the physical or metaphysical being of the land itself.[20] Law refuses "to venture beyond the limited Cartesian spatiality of quantifiable, fixed on a map, empirical, absolute space".[21] Law charts territory and renders it visible only on the terms of a mythology where lawyers are "translators" and "creators of the language into which they translate".[22] The land becomes dephysicalised; a Lawscape.[23] The material characteristics of a place, its history, limits and inhabitants, have no bearing on how an owner may use them under the dominant legal and economic system. Property law forms the basis of our concept of the land to this day; it "fostered the development of the growth economy and thereby encouraged, supported and even rewarded environmental degradation".[24]

As my colleagues show in this volume, scholars have deconstructed the supposedly apolitical and scientific foundations of environmental and property law, exposing certain conceptions of the world were connected to capitalist imperial expansion – often employing racialised hierarchies of knowledge to dispossess and dismiss alternative ways of managing land.[25] This research seeks to add to these developments by applying a legal geographical

18 Braverman (2010) 7.
19 Braverman et al. (2014) 1.
20 Graham (2011).
21 Kotsaikis (2011) 193.
22 Cain (1994) 415.
23 Graham (2011) 37.
24 Graham (2014) 402.
25 Guha (1999).

lens to the large body of work by energy lawyers, historians,[26] anthropologists[27] and theorists of energy.[28]

Energy is placeless in the law. It has a "distinctively legal" form and meaning, with no responsibility to the places from which it is produced, or the people that produce it. Concepts of 'energy' as a distinct, "unit of equivalence through which we can compare human civilisations"[29] comes from the concept of intangible, autonomous and placeless property. A concept developed through legal techniques which transformed emplaced land into product during the twin 1600s developments of colonial settlement in Ireland and the enclosure of the commons in England. In the *Lawscape* of the global property regime, energy is private fungible property, that at most results from 'natural resources'.

b) Energy in the Irish Landscape: Rooting 'resources' in place

The legal interpretations of land and its 'resources' are resisted and contested, even by the physicality of land itself – as is evident from advancing biodiversity loss and climate change.[30] These contestations allow us to see ways in which the meaning of 'energy' in law can be reinterpreted and reformed. The concept of 'landscape' helps to give expression to the many ways in which humans build co-constitutive, respectful relationships with the world around them. These relationships can provide counterpoints to the Lawscape's reduction of the meaning of land and elements to the mere commodity form.

Landscape is a term whose complexity "is matched only by the clamour of competing theoretical and methodological positions which have sought to understand it".[31] Landscape scholars have come from backgrounds as diverse as literature, art history, and the social sciences (particularly Human Geography). The tradition also has had a major impact in Ireland, particularly planning, cultural heritage and Irish Studies.[32] Landscape is "not simply as

26 Yergin (1991).
27 Loloum et al. (eds.) (2021).
28 Mitchell, T. (2013); Pirani (2018).
29 Daggett (2019) 2.
30 Mary Laheen speaks of the land itself as a primary source for analysis: Laheen (2010).
31 Dubow (2009).
32 Collins et al. (2016) 9; Strecker (2019).

an object to be seen or a text to be read, but a process by which social and subjective identities are formed".[33] Landscape lawyers have brought new understandings of how "[t]he environment is not just the backdrop to law or society, where the non-human can be separated ontologically from what is human, but a mesh of entangled bodies co-producing each other in, as well as with, the landscape".[34] Continuing developments in progressive deconstructions of property have enabled new understandings of how land can be managed to avoid splitting the human from the nonhuman, and people from the land. The area in which this has advanced most is in landscape studies. Landscape is peopled place. Landscape law enables people to have control over where they live and what is situated there, in a dynamic, enfolded concept that does not require it to be frozen in time, or treating land as museum or extractive wasteland. Even degraded landscapes can be powerful evocative places that can be ecologically rebuilt through relationships between humans and nonhumans. Kenneth Olwig describes landscape as not just being an aesthetic object, pleasing to the eye, but rather "a nexus of community, justice, nature and environmental equity, a contested territory".[35] It is land that is shaped by its customs and culture, not by its physical characteristics alone.

Ireland is an interesting site for the exploration of the conflict between Lawscape and Landscape in energy law and policy. Elizabeth Chatterjee, Ankit Kumar and others have shown that there is a dire need to displace Euro-American concepts of energy in Anthropocene narratives.[36] While a seeming paradox, I respond that Ireland has unique and important lessons for interrogations of empire, its legal treatment of land and its elements. The legal frameworks of empire have shaped the boundaries of "Other(ed) energy histories–those not embedded in the Euro-American contexts",[37] primarily because international energy law has been developed in the US and Europe and is dependent on legal techniques developed in the colonial era to instrumentalise land and resources. Ireland has been described as a "laboratory for empire" for these techniques, primarily in the use of new property

33 Mitchell, W.J.T. (2002) 1.
34 Stenseke Arup (2021) 24–25.
35 Olwig (1996) 632.
36 Kumar (2022).
37 Ibid.

regimes and techniques to dispossess, mollify and fundamentally alter people-place relations through imperial laws.[38] However, due to its position as a hub for international financial law and accountancy, Ireland benefits from the continued use of these techniques. As noted by historian Jane H. Ohlmeyer, "Ireland was England's first colony. Yet if Ireland was colonial, it was also imperial. The Irish were victims of imperialism as well as aggressive perpetrators of it".[39] While being "unique" in Europe in being colonised and not coloniser, Irish people "participated in, and benefited from, the expansion of the British empire, and indeed other imperial worlds".[40] Ireland is also instructive in terms of how it opposed imperial understandings of energy and resources. In the 1920s, the Irish Free State initiated a series of nationalisations of existing energy infrastructure under the newly established Electricity Supply Board, leading Ireland to not only have one of the first publicly owned energy systems in the world, but one of the first to be owned by a decolonising state.[41] In building this energy infrastructure from 1927, Ireland operated in a historical context framed by modernist experiments in the concept of science and technology (especially electricity) as a modernising, centralised public good; developed in Bolshevik Russia through the GOELRO rural electrification programme,[42] later influencing Roosevelt's Tennessee Valley Authority and 1935 Rural Electrification Administration, and 1940s India under Jawaharlal Nehru.[43] Energy became socially 'landscaped' in gas and electricity infrastructures, though on the terms of productivist developmentalism and a growth economy. Ireland has also been home to major resistances to energy infrastructure projects, from anti-nuclear campaigns in Carnsore Point, to the Corrib gas project. Numerous sociologists and geographers have pointed to these campaigns being unique in Northern Europe in that they conceive of the environment as an enfolded concept that does not separate the human and non-human.[44] This notion may have its

38 Ohlmeyer (2004).
39 Ohlmeyer (2015) 169.
40 Ohlmeyer (2021).
41 Though, the process of decolonisation is a continuing project, particularly in relation to partition and creation of Northern Ireland, see McVeigh / Rolston (2021), and the heavy influence of London over finance, see McCabe (2014).
42 Coopersmith (1992) 153, 175.
43 Chatterjee (2020) 12; Williams / Dubash (2004) 413.
44 Tovey (1993); Garavan (2007); Taylor (1998); Barry / Doran (2009).

roots in the Irish language, which is closely related to place-based understandings of the world[45] – evident in the phrase for environment – *an comhshaol* which translates as the collective or shared life / world.[46] Ireland has also been home to a remarkable series of 'firsts' in anti-fossil energy campaigning – being the first country to divest its state investment fund (the Irish Strategic Investment Fund) from fossil fuels, ban fracking, and ban (new) offshore oil and gas exploration.[47] Finally, from the 1990s to the present, Ireland was (and continues to be) a site for the application of new energy market techniques tested in other laboratories, including the Southern Cone particularly Chile and Argentina under dictatorship.[48] The legal techniques of Empire were renewed and re-applied in response to decolonising claims to sovereignty over natural resources in the inter- and post-war period, and the threat this caused to Western patterns of extraction from dependencies such as Mexico[49] and British protectorates in the Middle East.[50] These legal techniques formed the basis of international law, making it difficult for decolonising states and peoples to fully decolonise their treatment and conception of land and resources.[51] Can an analysis then of Ireland's history and context allow us an insight into what it might mean to 'decolonise' energy in a European context? To do this, I seek to tell an alternative history of energy law's origins, by engaging in a legal geographical analysis of energy law as it emerged from its first laboratory, Ireland.

3. Understanding the origins of placeless energy in the Lawscape in land abstraction

The following section will provide a chronological analysis of Irish energy law. In charting the changes in energy law in Ireland over time, I hope to provide insight into how wider social, political, cultural and environmental events have shaped the law. This allows us to draw a family tree; a genealogy

45 Magan (2020); Murphy (2009).
46 With thanks to Paul Mercier for this translation.
47 McKenzie / Carter (2021) 6–7.
48 The Southern Cone includes Chile, Argentina and Uruguay. See further Klein (2007); Dezalay / Garth (2002).
49 Maurer (2011).
50 Mitchell, T. (2013) 86, 209.
51 Coulthard (2014) 74.

of the concepts of energy in the Irish context and how these might be different from the concepts of energy that underpin international law, including private economic law.

The aim in outlining these legislative shifts is to show that the concept of energy in society has changed over time, as reflected in national legislation. In showing that particular ideas of energy in the law are particular to time and space, we can unsettle hegemonic notions of how energy should be produced, where it is produced and for whom. In unsettling and unseating hegemony, we can see conflicts over energy production in a clearer and "more objective light".[52]

a) The early modern era: Colonial capital in the Plantationocene through the *Adventurers Act 1642*

As noted above, energy law is concerned with "the efficient management of natural resources that produce fuel".[53] Therefore, our examination of Irish energy law must begin with an examination of the concept of 'natural resources', and where such a concept came into being. Our concept of 'energy' has its origins in land-as-commodity, imposed through early modern colonial-capitalist techniques of improvement and dispossession first practiced in the laboratory of Ireland. The Tudor experiment in (language) extinction and (territorial) extraction "made Ireland the ideal laboratory for a form of ecological dispossession that will be replayed endlessly in various corners of the Empire".[54] In one of the first major legal feats of financialisation, the conquest of Ireland was to be paid for by the land of Ireland. *The Adventurers Act 1642* mandated the transfer of the land of Ireland from the Irish to the private adventurers, merchants and soldiers that joined the English military campaign led by Oliver Cromwell (1649–1652). In the Downs Survey from 1656–1658, the surgeon-general of the English army, William Petty, developed a standardisation and quantification process to render Ireland a blank slate, what later became the basis for the *terra nullius* (no man's land) doctrine applied to other colonies.[55] The survey sought to measure all the land

52 Proulx/Crane (2020).
53 Heffron (2015) 3.
54 Cronin (2019) 11.
55 McVeigh/Rolston (2009).

to be forfeited, reduced to "an amalgam of economic units […] estimating the value of people's productive output, the cost of their labor, and the value of stock ('wealth') of the nation".[56]

This transfer was made possible through the development of what Brenna Bhandar terms "a racial regime of ownership" in the common law. Property law built on Lockean theories of 'improvement' which designated only those who engaged in specific conceptions of what produced economic worth – English cultivation methods through 'improvement' – as being entitled to the divine, natural right of ownership.[57] This divine right of property ownership was also formed through the knots required to marry the slave trade with the emerging rights of the liberal human subject in the law, a practice which white Irish subjects of empire later benefited from.[58]

Jane Ohlmeyer, Richard Ross and Phil Stern show that the Anglicisation of the law enabled this process.[59] A "conquest by law" ensued, with colonisation forcibly removing previous embedded understandings of land, to replace them with tenure and resource-ownership as we understand it today.[60] The dominance of English law was consolidated not only by the clearance of Irish landowners to resettle in Connaught but by the establishment of English legal systems as superior to Irish law.[61]

In opposition to the previous "woodland culture" which understood forests as part of an embedded cultural landscape,[62] trees became natural resources and were rampantly removed to produce heat for a colonial ironworks industry based in Ireland.[63] Iron smelting required high heat levels from charcoal, a process which in England involved coppicing of 25-year old oak, but in Ireland engendered the wholescale destruction of forests.[64] From an initial forest cover of around 80%, 12% remained in 1600.[65] This shift in perspective and land-use caused great distress to the local population as is

56 Bhandar (2018) 40–43.
57 Bhandar (2018) 40.
58 Park (2022); Hogan et al. (2016).
59 University of Illinois (2016). See also Ohlmeyer (2021).
60 Smyth (2007) 84.
61 Dennehy (2023).
62 Smyth (2007) 84. See also Guiry (2023).
63 McCracken (1971) 93.
64 McCracken (1971) 92.
65 Forest cover in Ireland remained below 2% until 1945. McCracken (1971) 93.

evident in the poetry and song of the time, incuding *Dirge of the Munster Forest* (1591)[66] and *Cad a dhéanfaimíd feasta gan adhmad?* (The Lament for Kilcash), which lamented the loss of "the last of the woods".[67] Rebellions occurred in places where the most extreme destruction of forests had occurred. "Nature herself" was believed to be delivering people from the invaders.[68]

By the late 1600s, due to over-extraction of resources, legislation was introduced to try to retain some level of 'sustainable development' of resources. However, the use of the woods by *woodkerns* to conduct guerrilla warfare against plantations necessitated the clearance of forest.[69] By 1800, only 2% of woods remained, primarily in the estates of the Anglo-Irish gentry. Other resources were turned to to produce energy, such as wind, water mills and coal. Ireland may therefore be an example of Colonial Capital, not Fossil Capital and shares similarities with descriptions of the Plantationocene.[70]

b) Under the "Victorian Eye": Early landscaping of energy infrastructures in the *Dublin Electric Lighting Order, 1892*

In the Victorian and high imperial era, a tentative idea began to emerge that energy *infrastructures* should be 'landscaped': that is managed and controlled to reflect social and cultural relationships with them. Energy produced from placeless natural resources began to be seen as something that should be put towards social ends, however the land itself and its elements was subject to further disembedding.

The Victorian era brought about a shift to steam-powered, machine energy from coal, replacing wind and water mills.[71] As the 'improvement'

66 McCracken (1971) 13.
67 Smyth (2007) 86–87.
68 Simms (2000) 27.
69 The rebelling Irish were named 'woodkern' due to their use of the prodigious woods to conduct guerrilla warfare against plantations. McCracken (1971) 27–29: "After 1646 the name woodkerne was generally replaced by tory, from the Irish tóir – search: a tory was one who was searched out […]. Wolves and woodkernes were commonly bracketed together, for they inhabited common ground and represented a common threat to settlers; and there were rewards for the destuction of wolves as well as of woodkernes." See also Sands (2022).
70 Haraway / Tsing (2019).
71 McCabe (1992); Malm (2016).

of land became a signifier of racial superiority in the early modern colonial period,[72] in the high imperial era the ability to wield machine-power become a universal "measure of men".[73] The public realm of the British city was a site of education and discipline[74] for the superior citizens of empire. The generation, transmission and distribution of energy was quickly brought under municipalisation through the *Electric Lighting Acts 1882 to 1909* in order to ensure efficiency and safety of an often dangerous technology, and to prevent 'oppressive monopolies' controlling a service now fundamental to new forms of interrelated modern life. One popular measure of municipalisation was through the grant of Charters to companies to set up infrastructures and run services for a limited time period, after which they would be brought under the ownership of the town corporation in return for compensation.[75]

In his in-depth history of Victorian light, Otter states that "[t]he distribution of electric light followed no simple pattern, determined as it was by innumerable local technological, economic, political, and topographical factors".[76] While contingencies of geography, resource and place did shape energy infrastructures in Ireland under British rule, we must heed Marks' warning against "false contingency".[77] The delivery of energy infrastructures was shaped also by colonial and capitalist exigencies, which has led to similar patterns of progress across empires. The peculiarly British solution of "an ecology of liberalism"[78] to manage the advent of gas and electricity was not applied across the British Empire. Laissez-faire approaches to energy, with its low-quality service, lack of access outside the colonial grid and excessive monopolies remained in most colonies. As noted by Hasenöhrl: "most colonial infrastructures remained piecemeal affairs, reaching only a fraction of the people, segregated along ethnic and class lines, as well as fraught with (often unintended) social and ecological consequences".[79]

72 Bhandar (2018) 45.
73 Arnold (2005) 92.
74 Otter (2008).
75 Manning/McDowell (1984) 5. The Electric Lighting Act 1882 allowed local authorities to take private company assets into municipal ownership after 21 years. This was extended to 42 years by the Electric Lighting Act 1888, with optional 10-year extensions.
76 Manning/McDowell (1984) 178.
77 Marks (2011).
78 Otter (2008) 262.
79 Hasenöhrl (2018) 11.

In Ireland, new energy technologies such as gas and electric light were confined largely to the homes, industry and public realm of the wealthy.[80] However, even provision to these upper-class groups was underpinned by a logic of extraction. Much of the coal used in Ireland was British coal, as Irish coal and peat were unable to gain prominence due to the greater technical difficult in extraction,[81] competition with cheaper coal from Britain, and a lack of scientific and landlord interest in investing in production.[82]

In these circumstances, the question of who should own and operate energy, and for what purpose, was a major topic of debate in 19th-century Ireland, as it was in the rest of Europe.[83] As municipalisation of gas and electricity spread across Britain and Europe, Irish municipalities were often blocked from doing the same by the Westminster Parliament under the Act of Union of 1801. Liberal nationalists of the era set up "Irish-owned" gas companies to compete with the mainly British owned industry, for example the short-lived Dublin Consumers Gas Company established in 1844 under the chairmanship of Daniel O'Connell (with shareholders only allowed from the Pale).[84] The purpose of the Dublin Consumers Gas Company was "almost certainly" to purchase all other companies to bring them under one united private, though Irish-owned, gas company.[85] The *Alliance and Dublin Consumers Gas Act* in 1866 did result in an Irish merger of the three main private gas companies under the Alliance Gas Company, but the issue of 'oppressive monopolies' remained.[86] Therefore, when the technology developed, Dublin Corporation leapt at the opportunity to switch public lighting to electricity. The first public electric lamp was lit outside the offices of the Freeman's Journal[87] on Princes Street, Dublin which had long

80 McCabe (1992).

81 In Ireland there were four worked coal deposits in the 18th and 19th centuries. Hogan (1944) 45–49.

82 Wheeler (1944) 17; Mokyr (1983).

83 McCabe (1992) 33.

84 The Pale included Dublin, Meath, Kildare, Wicklow and the Borough of Drogheda. McCabe (1992) 35.

85 Ibid.

86 This was to remain the basis for the Dublin Gas Company until the Gas Act of 1987 which nationalised gas infrastructures under Bord Gáis Éireann. McCabe (1992) 35.

87 Meehan (1943) 130–136. In relation to attempts to undermine Dublin Corporation's with the re-introduction of free competition, the Freeman's Journal responded: "Mr. Trevelyan is supposed to be a Radical, but in this instance he appears to have developed a hostility worthy

criticised the behaviour of London gas companies. This may point to electricity being tied to the burgeoning *fuinneamh* of egalitarian nationalist idealism. Indeed, Dublin Corporation's municipalisation of the generation, sale and supply of electricity under the *Dublin Electric Lighting Order, 1892* was viewed as a precursor to Home Rule and strenuously opposed by loyalists and unionists.[88] As an example, in 1900, loyalists and unionists introduced the *Dublin Electric Lighting Bill (by Order)* which sought to roll back Dublin Corporation's municipal control of electricity by re-opening it to private competition.[89]

These campaigns to take ownership of the infrastructures which produced energy were set within a wider context of the Irish Famine and mounting militant agrarian unrest against landlordism on the island of Ireland. The natural resources of the land used to produce electricity – particularly coal – remained within landlord ownership. Militant land agitation had resulted in the Land Acts and the Land Commission, beginning improvement of conditions through the *Landlord and Tenant (Ireland) Act 1870*. The *1903 Land Acts* had shorn landlords of their estates, but not their rights to existing natural resources, such as fishing rights and minerals.[90] The Land Acts also imposed a common law regime of land ownership, cleansing prior regimes of communal landscaped management – such as the rundale (or Roinn Dáil) and the *bailte fearainn.*[91] The organising skills developed through agrarian revolt in Ireland against landlordism brought lessons to worker organising around coal in the UK, Australia and the US, most famously through the Molly Maguires in Pennsylvania, USA and Peter Lalor's involvement in the Eureka Stockade in 1854 in Victoria, Australia.

of Sir Henry Fowler to the Liberal principle of the municipalisation of monopolies. It is not a good beginning to a Liberal career." Dublin Electric Lighting Bill (By Order), Volume 85, debated on Monday 2 July 1900 (House of Commons, Private Bill Business).

88 Dublin Electric Lighting Bill (By Order), Volume 85, debated on Monday 2 July 1900.

89 Dublin Electric Lighting Bill (By Order), Volume 85, Monday 2 July 1900. The proposers of the Bill sought to place Dublin Corporation in competition with a re-established Dublin Electric Light Company. The original private Dublin Electric Light Company had as its directors William Martin Murphy and John Findlater. It had gone into liquidation and was taken over by the Alliance Gas Company.

90 Mohr (2007).

91 Land was given out in straight strips, with some areas of poorer land given over to commonage. Rights to cut turf and take seaweed for fertilisation were also granted. Byer (2023a); Dunne (2018). See also McNeill (2021).

However, the Land Acts did strengthen the bargaining position of the peasant and working classes[92] whose demands and connections to international socialist movements may have later influenced the policy choice of energy nationalisation in the 1920s. Through the Wyndham *Irish Land Act 1903*, land was subdivided into small plots and bought by local coal workers. These plots were generally around 14 acres, not enough to subsist on the land but could "cushion the family against the uncertainties and risks of mining".[93] With gas and electricity confined to industrial centres and large cities, for the wider Irish population, hand harvested peat remained the main source of fuel for cooking, heating and light.[94]

c) Landscaping the brutal machine: Decolonising responses to the First World War in *(R) Moore v Attorney-General*

In *Networks of Power*, Thomas Hughes describes electricity systems as "evolving cultural artifacts" which shape and are shaped by political, geological and cultural features of a polity.[95] In the inter- and post-war period, imaginaries of new modernities took hold, formulated in a normative *schismogenesis* with the imperial West.[96] These modernities sought to take destructive energy technologies and morally repurpose them. As Timothy Mitchell recounts, the "destiny" of colonial regions and peoples was to "mimic, never quite successfully, the history already performed by the West".[97] For dominated peoples in the inter-war period, the resolve was found to re-articulate and re-imagine other uses for human creativity and skill involved in the creation of energy and machines.[98]

This resolve was founded in brutal circumstances. For its supporters, the technologies of the high imperial era displayed the mastery of Empire over nature and other peoples.[99] With 40 million dead in its wake, the Great War

92 Though the landless labourer without tenancy, the spailpín, was left to emigrate. Higgins (2016).
93 Boran (2021) 5.
94 The first industrial harvesting of turf began in 1825 in Mona bog, however it was not pursued in earnest.
95 Hughes (1983).
96 Graeber/Wengrow (2021).
97 Mitchell, T. (2000) 1.
98 Mitchell, T. (2000) 2.
99 Arnold (2005) 92.

was a reckoning with such racist romanticisms. In contrast to grand ideals of triumphalist progress,[100] the human inventiveness of the West was used to unleash "butchery and ecological devastation on a scale unknown in human history".[101] In *World making after Empire*, Adom Getachew charts how the hypocrisy of the imperial powers led to an outburst of revolutionary thought demanding anti-domination as a guiding principle of international law. The role and purpose of energy in modern society, and who should have control over the means of producing it, played a central conceptual role in these demands. For Vladimir Lenin, the Great War made explicit the "barbarous policy of bourgeois civilisation". In *The African Roots of War*, W. E. B. Du Bois traced the origins of WWI in "desperate flames" from colonial aggrandisement after the Berlin Conference; stating that "the ownership of materials and men in the darker world is the real prize that is setting the nations of Europe at each other's throats today".[102] These claims were repeated across the world by other anti-colonial revolutionaries demanding self-government, from Egypt and India to China and Korea.

In this era, a number of anti-colonial theories on technology emerged. With growing Third World nationalism and technological skepticism within and outside the West, rich 'indigenist'[103] and indigenous technologies were revived and re-explored.[104] An understanding grew that many of these systems of knowledge had been co-opted or suppressed by colonial-capitalist modernity.[105]

As Ireland neared independence, the pre-colonial texts of the Brehon Law were brought into contemporary legal practice, where they could form the basis for the decisions of the Republican or Dáil Courts run by the IRA during the War of Independence[106] and a number of common law cases.[107]

100 Ibid.
101 Getachew (2019) 22.
102 Quoted in Getachew (2019) 38.
103 Arnold (2005) 101 (fn. 8) uses this term to describe how "exponents of this approach did not need to be indigenous to the societies they described (they often were not) but to identify with its traditions and to see Europe as an external, intrusive and colonial force".
104 Arnold (2005) 87.
105 Bourke (1999) 60.
106 Many of these judgements are still today deemed more egalitarian than the common law of the time, particularly with regards to women and children. See Laird (2013).
107 Mohr (2007); Laird (2005).

Harking back to a 'Gaelic Utopia', Brehon law challenged the contemporary treatment of the land and natural resources.[108] Land was seen as farmed collectively, an interpretation popularised by Friedrich Engels who concluded from a reading of Brehon law texts that "the soil had been the collective property of the gens or the clans".[109] While the similarities of Gaelic Ireland to communist ideals have been hotly contested,[110] Thomas Mohr notes that "[i]n the early years of the independent Irish state such perceptions proved to be so strong that they decisively influenced the outcome of a number of important court cases".[111] In fisheries cases such as *(R) Moore v Attorney-General*, Irish Brehon law was used to establish community rights to fish in waterways owned largely by the landlord class, through title derived through landlord ownership.[112] Armed with original research into Brehon law texts, Irish Professors Eoin MacNeill and Daniel Binchy set about founding an argument for *nullius in bonis* based on the Brehon law formulation of the communal right to '*aé áite*', which was interpreted to mean "the salmon of every place".[113] The interpretations of the right, however, were indicative of the thinking of the time, with the salmon reduced to an exploitable resource (though for the people), rather than requiring guardianship and spatially just sustainable, relational management.[114] While

108 For the state also, Ireland's own independence had been beset by famine in 1920–1921. Cunningham (2020).

109 Friedrich Engels wrote often about Ireland, being connected through his wife Liz Burns to Irish working classes in Manchester and the Fenian movement. Quoted in Mohr (2007).

110 See Kelly (1988) 105: "The 1865–1901 edition of the Ancient Laws of Ireland almost always translates fine as "tribe" rather than "kin-group". This misled Engels and other modern political thinkers into believing that land was held in common by all members of the túath in early Ireland. In fact, early Irish society clearly attached great importance to the principle of private ownership of property, and even extended it to mines and fishing rights."

111 Mohr (2007).

112 Mohr (2002). Other cases after the Erne Case included the Moy, the Foyle and Bann Fisheries Cases. In the Erne case, the exclusive fishing rights on the Erne were owned by a private company, the Erne Fishery Company. The company's title was derived from landlord ownership and major members were of the landlord class, however many shareholders were far from wealthy. With thanks to Thomas Mohr for this point.

113 Ibid. Interestingly, the Brehon Laws also made their way to India where they influenced independence movements. Laird (2006).

114 Byer (2023b). See also McNeill (2022).

eschewing these more ecological management regimes, the 1919 Democratic Programme issued by the first Dáil and the 1922 Constitution sought to bring about more egalitarian ownership of land and resources, being influenced by the property clause of the USSR Constitution.[115] The early drafts of the 1937 Irish constitution also prioritised a concept of natural resources as "dedicated to the maintenance of the people of [Éire]".[116] However, the final 1937 constitution finally protected established understandings of property rights in an "individualist democracy" under the existing common law regime, eschewing the ethos of the original Constitution Committee's "commitment to a social and communitarian property ideology, framed in terms of the collective interest in social justice, rather than in terms of individual rights".[117] Social protections and economic, social and cultural rights were relegated to Article 45 Directive Principles of Social Policy, which provided non-justiciable guidance for the Oireachtas. Restrictions on women's rights[118] and labour[119] were also inserted.

While the purpose of the 1937 Constitution may have been to ensure that natural resources "should be exploited for the benefit of the people and not for the private profit of individuals", the State was to play this role in a context in which the State's private property rights to land supported private

115 Walsh/Fox O'Mahony (2018). The USSR Constitution provided that: "[i]n order to establish the socialisation of land, private ownership of land is abolished; all land is declared national property, and is handed over to the workers, without compensation, on the basis of an equitable division, carrying with it the right to use only". Quoted ibid.

116 Part IX "Constitutional Guarantees". Part X on economic life, Article 39.3 states: "The natural resources of E. (including the air and all forms of potential energy) are dedicated to the maintenance of the people of E. and are under the special control and supervision of the State. Rights of private property in any of the said natural resources shall be exercised and the use and exploitation thereof by private owners shall be conducted with a view to the conservation and development of the said resources for the benefit of the community." First Draft, undated late 1936 [Source ucda p150/2385] in Keogh/McCarthy (2007) 395. In terms of extractivist regimes, it is interesting to note that one draft of the 1937 Constitution (11 Jan.) sought to give control of resources under Article 10 to the Dept of Finance (11 Jan. 1937). See Coffey (2018) 80. With thanks to Donal Coffey for the point that control of natural resources was to be given to the Executive branch, rather than the Legislature as under the 1922 Constitution.

117 Walsh/Fox O'Mahony (2018).

118 Luddy (2005).

119 Keogh/McCarthy (2007) 120. De Valera and McQuaid were also "politically dismissive" of O'Rahilly's 1922 draft of the constitution in relation to property and competition and feared the strike as "the most potent form of social agitation".

profit.[120] In fundamentally seeing land as a fungible commodity to be turned towards private gain, the Constitution still maintained the existing colonial natural resource licensing regime that prioritised private commercial extraction under Article 10.[121]

The natural resources that form the source of 'energy' are held under a separate property regime to property title. A person may own their titled property, but the rights to exploit the natural resources below it belongs to the state under the same 'Crown' process as in British Commonwealth countries. Natural resources regimes such as oil and gas, forestry, mining – until recently peat – are de facto dealt with (if they are regulated at all) through licensing regimes outside of the ordinary planning processes covered by the Planning and Development Acts 2000–2022.[122] The removal of natural resource regimes from this process protects them from ordinary processes of scrutiny.[123] This process of instrumentalised nature is applied through international natural resources law,[124] and is used to undermine indigenous claims to land, who have rights in international law to practice and self-determine their own cultural framings of land and resources.[125] For example, in New Zealand, the state has recognised Māori title to land under the Treaty of Waitangi but not to natural resources in that land. As noted by Estair Van Wagner and Maria Bargh "it is Crown policy not to consider minerals-based remedies for Treaty settlements" or successful claims before the Waitangi Tribunal to "a proprietary right in petroleum resources, and a subsequent inquiry into the management of petroleum under the CMA [Crown Minerals Act 1991]".[126] Māori are permitted to manage the land they have title to in keeping with *te ao Māori* (the Māori worldview) which

120 Arthur V. Matheson's advice to Eamon de Valera in the drafting of the new Article 10. Coffey (2018) 81.

121 Article 10.3 states: "Provision may be made by law for the management of the property which belongs to the State by virtue of this Article and for the control of the alienation, whether temporary or permanent, of that property." See Slevin (2015) which interrogates this approach in the Constitution.

122 Jackson (2021); Accogli (2021).

123 A third party right of appeal is generally retained in these processes, but in a regime subject to less structural transparency/clarity as set out in legislation and case-law in the wider planning regime with respect to land and housing. See Sargent (2020).

124 Proulx/Crane (2020) 62.

125 UNDRIP (2007); UNDROP (2018); CBD (2004).

126 Van Wagner/Bargh (2021).

prioritises "the fundamental law of the maintenance of properly tended relationships" where "broader ecological systems [are] central to sustaining not only human life, but all parts of the natural and spiritual worlds and future generations". However, the kaitaki (guardianship) ethic[127] cannot be extended to natural resources regimes. Even in relation to resources within their territory, the role of the Māori is restricted to making submissions or working with companies to improve their process.[128] With these lessons from indigenous scholars such as Glen Sean Coultard,[129] the winning of land rights in Ireland on the basis of property rights as defined by Empire can be understood as a narrowing of the more revolutionary agrarian land ownership claims of the period. This continued use of colonial legal regimes and understandings of land and energy has contributed to Ireland's rapid rate of biodiversity loss and a high carbon emissions trajectory.[130] The potential offered by the Brehon law for a more emplaced and relational treatment is thoroughly undermined, even in fisheries.[131]

d) Vertically integrated communities: Building landscape approaches to energy infrastructures after World War II through the *Electricity (Supply) Act 1927*

A third approach can be described as 'postcolonial' and 'anti-domination' in vision, though not its circumstances, seeking to appropriated new technologies for public, nationalist and decolonial purpose. Rather than a site of profiteering by global financial flows that were seen as a contributor to the Great War, energy was to be de-commodified. Energy systems and infrastructures were to be directed towards a variety of aims including lifting populations out of poverty, education, industrialisation as a means of modernising backward societies and an employment guarantee. As Chatterjee

127 Dame Nganeko Minhinnick quoted in: ibid.
128 Ibid.
129 Coulthard (2014) 74.
130 It is worth noting that Native American peoples strenuously opposed the Land Commission process applied in Ireland being repeated on their collective lands through the US *Dawes Severalty Act 1887*. The legislation was seen as a means of assimilation into capitalist land ownership regimes. Merjian (2010) 609.
131 See the critique of the 'market environmentalist' approach to fisheries in Ireland and New Zealand in McCormack (2017).

says of decolonising India, "[e]lectrification was at least partly decommodified, instead reconceptualized as a national good and increasingly as an (imperfectly recognized) entitlement to be demanded from the state".[132] Energy was imbued with a sense of positive, anti-imperial, modernist purpose and its infrastructures became 'landscaped', not ecologically, but socially.[133] The first steps towards this were taken by Bolshevik Russia under Lenin's Five-Year Plans. Many young nations soon followed,[134] as did the United States under President Roosevelt's New Deal Rural Electrification Programme. The UK took tentative steps to centralise the industry in with the establishment of the Central Electricity Board under the *Electricity (Supply) Act 1926*, but did not nationalise until the *Electricity Act 1947*.[135]

In December 1922, the Irish Free State secured a modicum of independence after the Anglo-Irish treaty, though at the cost of partitioning the country. In a context of civil war and great poverty, the nascent government began to prioritise national independence through water-generated electricity.[136] Though often left out of histories of electrification and nationalisation, Ireland was "the first country in western Europe to opt for the establishment of a state-owned monopoly to meet the public electricity demand of an entire nation".[137] The Irish electricity industry at the time was expensive and erratic, concentrated in urban industrial areas and "fragmented among numerous municipal and private undertakings, some authorized by statute, but most non-authorized".[138]

One of the first pieces of legislation passed by the Oireachtas [Irish Parliament] was the *Electricity (Supply) Act, 1927*. This legislation established the first Irish state company, the Electricity Supply Board (ESB), nationalising all existing undertakings.[139] The new semi-state company would be a vertically

132 Chatterjee (2020) 4.

133 The possibility to see how this purpose could have been taken to more ecologically landscaped directions was not given the chance to emerge.

134 Hasenöhrl (2018) 18.

135 Hannah (1979). The Electricity Act 1989 privatised the British electricity industry.

136 Manning / McDowell (1984) 28.

137 Cross (1996) 70.

138 Cross (1993) 34.

139 Manning / McDowell (1984) 35. However, "[t]he drafters of the Electricity (Supply) Act 1927 did not declare outright that the Electricity Supply Board (ESB) was to be the sole and exclusive electricity supplier […]. They recognized 'authorized undertakers' that had been previously granted exclusive rights to generate, distribute or supply electricity in

integrated undertaking, with full responsibility for the generation, transmission, distribution and marketing of electricity.[140] The plan for the body was to deliver universal access to electricity at a low cost, regional employment and to secure state control over electricity production.[141]

This electricity was to be provided by a hydroelectric dam on the Shannon River at Ardnacrusha, Co. Clare, called the "Shannon Scheme". The focus on water power emerged from two committees set up after the First World War to examine natural resources; the Sinn Féin Commission of Enquiry into the Resources and Industries of Ireland (Dublin 1923) established by the first Dáil of 1919, and the UK Water power resources of Ireland sub-committee (Dublin 1921).[142] In both committees, the lack of investment in electricity were heavily criticised. Led by Thomas A. McLaughlin,[143] the "Shannon Scheme" was built with the central assistance of the German electrical engineering company Siemens-Schuckert. Efforts had been made to attract US multinationals to do the project, however "most of the big [international] corporations objected to the government's stipulation that unprofitable rural lines might have to be built without any guaranteed government subsidy".[144] There was also concern that a private system would conflict with the State's plans for 'defensive' industrial development.[145]

The project helped build a highly educated and entrepreneurial workforce under the ESB that would go on to deliver electricity systems across the island (including in Northern Ireland) and the world, including to other new states such as Bahrain and Egypt.[146] The creation of the ESB occurred in the context of other state priorities, including recognition of the Irish state at an international level and extending the Land Commission tenant purchases

specified areas […]. The ESB, however, was granted substantial powers to acquire, take control of, and alter the supply areas of such authorized undertakings […]. In addition, new entrants were prohibited absent the ESB's permission." Ibid.

140 Manning / McDowell (1984) 16.

141 Shiel (2003) 18.

142 Manning / McDowell (1984) 13. Though Robert Kane had first put forward the idea of harnessing the Shannon in 1844 in Kane (1844), which was based on the recent findings of the Irish Ordnance and Geological Surveys.

143 Manning / McDowell (1984) 14.

144 Manning / McDowell (1984) 7.

145 Cross (1996) 70.

146 Barrett (2015) 63.

of land from large estates.[147] In these endeavours, as during the War of Independence, nationalists and labour had combined their aims. However, Ardnacrusha exemplifying the new state's willingness to subordinate the cause of labour (and the environment) to "the national interest".[148]

While the "Shannon Scheme" was promoted with literature invoking an ancient Brehon Ireland and a continuation of Celtic tradition,[149] the "Shannon Scheme" involved severe ecological damage such as the drowning of the primordial Gearagh forest, the removal of local fisheries rights and it remains a primary contributor to the slow extinction of the European eel.[150] Similarly, while the public ownership of Ardnacrusha and the ESB was seen as intimately connected to socialist programmes such as Russian electrification,[151] the building of the project represented how the state saw itself in this new era of independence. Just one month after the contract between the Irish Free State government and Siemens-Schuckert was signed on 13 August 1925, a major dispute arose over low pay and poor, overcrowded conditions, resulting in a strike on 10 September. The Government sided with Siemens-Schuckert and sought to break the strike, a choice made in the overarching context of agrarian unrest. The dispute was underpinned by fear that higher wages for workers on the Ardnacrusha project would bolster *spailpíní* (landless labourers) who were already demanding better conditions and redistribution of large 'rancher' farms.[152] For Michael McCarthy, "[t]he defeat (of the strike) was a crucial blow for Irish labour in general, coming as it did only four years after the foundation of the State".[153] Nevertheless, the project remains in the Irish imagination as a reinterpretation of energy for a Gaelic Utopia that married traditionalism and modernity.[154]

147 The first state to recognise the young Irish state was Bolshevik Russia, which was in the midst of its own national rural electrification project. See O'Connor (2004).

148 Maguire (1998).

149 Ibid.

150 Laffan (2020).

151 Ardnacrusha was described as "the cloven hoof of socialism" in the Seanad, see Maguire (1998) 61. The ESB was described by the Irish Times as "the first fruits of Bolshevism in this country", see Sheil (2003) 18.

152 Manning/McDowell (1984) 43.

153 Quoted in Maguire (1998) 60.

154 Maguire (2000); O'Brien (2023). See contemporary use in the arts: Sweeney/O'Dwyer (2020).

e) Fossil developmentalism and capitalist decommodification: The Irish Energy system until the "new dawn" of the *Electricity Regulation Act 1999*

Irish hydroelectric developmentalism became fossil developmentalism[155] with the ending of the Second World War. In 1945, the government passed the *Electricity (Supply) (Amendment) Act*, which began Rural Electrification Scheme in earnest. The Scheme prioritised delivery not on the basis of highest price offered or ability to pay, but was directed by the needs and request of the most isolated communities.[156] The following year, the government passed the *Turf Development Act 1946*, which established the state company Bord na Móna, to research and exploit Ireland's peat resources.[157] The government began to invest heavily in turf production, including use in electricity generation. This was to ensure secure indigenous fuel to deliver rural electrification, for national security reasons, to create employment in the Midlands and create educated industrial expertise. The *Electricity Supply (Amendment) Act 1955* further accelerated the project. However, this developmentalism did not engender a labour republic. From 1949–1950, one of the longest strikes in Irish labour history occurred in Castlecomer coalfield.[158] The resolution of the strike finally ushered in the recognition of pneumoconiosis as an industrial disease, as well as other features of stability.

After World War II, many European states followed Ireland and Russia in nationalising their energy systems, bringing power generation, network infrastructure and retail supply under state companies. These are known as "vertically integrated electricity undertakings" and were used to deliver universal access to electricity and high-quality employment.[159]

Energy was to fulfil a range of social aims, including employment, industrialisation and the delivery of the benefits of electricity such as education. While attempting to embed energy production in social ideals rather than capitalist ones, decolonising and postwar European states were still working off the colonial legal techniques which (continually) dispossessed their pop-

155 Chatterjee (2020).
156 O'Brien (2023) 4.
157 McMahon (2019).
158 Boran (2021). The strike was led by Nixie Boran, nicknamed, interestingly, "the miners' brehon and champion".
159 Joskow (2008) 10.

ulations. The abstracted treatment of land led many states to take on ecologically devastating and locally contested projects, called "high modernist ideology" by James C. Scott.[160]

Up to the 1990s, Ireland continued its process of fossil developmentalism; a "moral economy"[161] of "a certain democratization of consumption"[162] within fossil fuel-based energy infrastructures. However, when it came to the land and natural resources that created that energy, they were largely treated in a manner facilitative of extractivism, particularly from the 1960s onwards. While opening up the economy and encouraging foreign direct investment, successive political leaders such as Taoiseach Seán Lemass refused to cut the employment and non-profit mandate of the ESB, or to reduce the use of highly subsidised peat by Bord na Móna.[163] Energy remained a low cost, universal and efficiently provided state service, the ESB in particular.

However, this relative de-commodification did not mean that energy provision was anti-capitalist.[164] Conor McCabe[165] and Amanda Slevin[166] in their different approaches have shown how Ireland marketed its facilitative tax regimes, labour laws and cheap nature[167] to extractivist industries and multinational corporations. Ireland also marketed its well-managed, reliable, cheap and distributed energy system – resulting in the building of high energy polluting industries next to power stations. An example is the Russian-owned Rusal Aughinish Alumina, the largest alumina refinery in Europe, which ships mineral ore buaxite from Guinea to undergo high-energy processing on the Shannon river estuary near Moneypoint power station.[168] Irish capitalism at this time appears to have depended "existen-

160 Scott (1998).
161 Chatterjee (2019) 18.
162 Chakrabarty (2014), cited after Chatterjee (2020) 15.
163 Manning / McDowell (1987) 100–101; Andrews (1982).
164 Hall (2023).
165 McCabe (2014) 121–140.
166 Slevin (2015).
167 "For capitalism, Nature is 'cheap' in a double sense: to make Nature's elements 'cheap' in price; and also to cheapen, to degrade or to render inferior in an ethico-political sense, the better to make Nature cheap in price. These two moments are entwined at every moment, and in every major capitalist transformation of the past five centuries." Moore (2016) 2–3.
168 Crotty (1986) 94–96; Horrigan (2014). Moneypoint is run on cheap imported coal from the Cerrejón mine in Columbia, which is the subject of numerous reports on human rights abuses.

tially on" a decommodified electricity system.[169] Another example of this is the offshore fossil fuel industry. In 1971, gas was discovered by the multinational corporation Marathon Oil off the Old Head of Kinsale, coming onshore by 1978. In order to distribute and supply this gas to the public, the semi-state company Bord Gáis Éireann (BGÉ) was established under the *Gas Act 1976*. The government also nationalised the largest distributor, the Dublin Gas Company, under the *Gas (Amendment) Act 1987*.[170] However, these changes operated alongside the introduction of a remarkably facilitative offshore exploration regime from 1985.[171]

This relative decommodification and approach of fossil developmentalism, flawed as it may be, came to an end with the introduction of the *Electricity Regulation Act 1999*. The 1999 Act transposed the European Commission's 1996 First Energy Package, which sought to apply internal market rules to the electricity and gas sectors.[172] In introducing the original Bill, the then Minister for Public Enterprise, Mary O'Rourke, opined that "[it] will herald a new dawn for Ireland as we face into the next century".[173] The Act required the unbundling of national electricity systems (including generation, transmission, distribution and supply) to introduce competition to the profitable parts of generation and supply. It also opened up 28% of the Irish electricity market to competition. The reforms were based on the belief that effective competition would reduce energy costs and increase freedom of choice for consumers.[174]

Subsequent EU Energy Packages have further dis-embedded legal practice from the land. In 2009, the Third Energy Package introduced the aim of an EU Target Model; a fully liberalised internal EU-wide electricity market.[175]

169 Hall (2023) 558.

170 See Minister for Energy Ray Burke in introducing the Gas (Amendment) Bill 1987. Dáil Éireann (1987).

171 Slevin (2015).

172 Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity. The legal basis for the opening up of the energy sector are Articles 114 and 194 of the Treaty on the Functioning of the European Union.

173 Dáil Éireann (1999).

174 Barrett (2014) 37.

175 The Third Energy Package consisted of two Directives and three Regulations including Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC. In 2019, Directive 2009/72/EC was replaced by the

The Target Model aims to develop a single, integrated EU gas and electricity market. The end goal is a 'supergrid' – a fully disembedded Lawscape in which financial traders can pick and choose where and how to direct energy flows. Trading itself is increasingly automated, run by and through algorithms and data mining. This Lawscape, however, for all its dissimulation and apparent abstraction, is reliant on continued fossil fuel extraction (especially gas) and substantial energy use, including in data centres used to run financial trading networks.[176] With the concurrent financialisation of climate action and biodiversity commitments: "[t]his is where commoning can finally be ended – through the full financial externalisation of collective responsibility, turning what need to be collective decisions on the fate of the commons into a financial product in a global market".[177]

4. Conclusion

Law is central to an understanding of not only how the Anthropocene came into being through the treatment of land and energy, but how such practices have become institutionalised and continue, apace. This article has sought to show how *energy is placeless in the law.* Energy is a commodity in a free financial market driven solely by the price imperative, that can be bounced from place to place, shorn of the major impacts it has on the land and communities it pollutes, or is extracted from. This results from the treatment of energy as a distinct, "unit equivalence through which we can compare human civilisations",[178] a standardisation procedure which has its origins in the creation of land into "an amalgam of economic units"[179] during the legal and cultural conquest of Ireland. In tracking these connections through a legal geographical analysis, this article has sought to add another layer to

Fourth Energy Package 'Clean energy for all Europeans' in 2019, but the gas aspect is still in place.

176 Brodie (2020). Europe's continuing reliance on gas was exposed with the Russian invasion of Ukraine in 2022 leading to volatility in energy prices. The EU has sought to address energy crises with the Fifth Energy Package and the REPowerEU plan which phases out Russian fossil energy imports. However, the plan has led to entrenchment of reliance on fossil fuels, especially US imports of Liquified Natural Gas.

177 Patel/Moore (2018) 178.

178 Daggett (2019) 2.

179 Bhandar (2018) 40–43.

the narrative of the Anthropocene, bolstering critiques of the epoch as a Capitalocene or Plantationocene.

This article should not be taken as an example of "colonial fatalism", which outlines the "structural inevitability" of legal regimes[180] and their drive towards mass extinction and climate chaos. The process of fungible placelessness is also fuelled by the emptiness of energy; its status as a vessel for political desires and dys/utopias.[181] Energy historian Vaclav Smil articulates that "[d]espite its crucial importance in human development, there is no concrete grasp of what energy is. We know that energy is conserved, it is the ability to do 'work' and that matter (specifically mass) and energy are equivalent. As our understanding of these concepts has evolved, so has our civilization".[182] If energy is such a formless concept, open to co-option by various ontologies, it can be reimagined and reconstructed. Re-imagining life beyond the Anthropocene – whatever its origins – means coming to terms with the systemic colonial-capitalist structures that maintain the idea of *placeless energy*. The above paragraphs have sought to unsettle the ground so that those next steps can be taken.

Addressing the 'lack' of a subject in environmental and energy law is not simply about re-materialising land or the academic endeavour of crafting "hazy dreamscapes",[183] but about securing and institutionalising the practices of spatial justice that enable land to be managed.[184] This work is for another day and another article, but I will mention here that concepts of re-territorialisation and the attendant rights to cultural as well as economic popular sovereignty over land and energy infrastructures may be one concept we can turn to in Ireland.[185] This may involve rooting energy in place, giving due credence to the land and its elements in law (including rights to nature), meaningfully securing collective popular rights to land (at home and abroad), alongside protecting the public participation rights of those who depend on the land.[186] Implementing this process could require a first step of (re-)de-commodification of energy infrastructures; re-bundling Irish

180 Proulx/Crane (2020) 62.
181 Daggett (2018) 1.
182 Quoted in Lowans et al. (2023) 414.
183 Ajl (2022) 1415.
184 Byer (2023b).
185 See Saloman (2022).
186 Byer (2023b); Strecker (2018).

energy infrastructures under national public ownership and requiring the ESB to adhere to a mandate of public good, poverty eradication and climate/biodiversity action rather than the price imperative. This will involve actions such as a ban on fossil fuel energy infrastructure and exploration, requiring large scale investment in energy efficiency and just distribution of energy use on the basis of human/non-human need, not greed.[187] This is not merely a national project, but requires an internationalist campaign to deliver just transformations of land and energy systems abroad as Ireland and Europe rely on cheap fossil fuel supply chains that have enabled the offshoring of emissions, human rights violations and egregious environmental damage. As just one example, a just transition or transformation may require supporting and funding the transition away from coal mining in Cerrejón, Columbia, which currently feeds Moneypoint power plant in Co. Clare as well as other EU countries.[188] A just transition in this context may involve an international agreement between the EU and Columbia to ensure protections for workers' rights and trade unions, the return of sovereignty over land and resources, such as to indigenous peoples, with reparations for wider land, community and climate rehabilitation. For lawyers, questions must also be asked of Ireland's financial and legal sector, which is a direct contributor to the Anthropocene through the facilitation of international investment in fossil fuel and other extractive industries. We can work instead to replace concepts of the Energy Lawscape and its reductive re-ordering of the townland as sites of licensable extraction, with a landscaped, living heritage; working alongside those counter-mapping the land in more just, eco-feminist ways.[189]

Rather than tired re-draftings or small edits to a fundamentally corrosive and deadening legal regime, new worlds and new concepts can be built, working with other peoples to develop a pluriverse of ideals, underpinned by a principle of non-domination.[190] Energy in the law can be returned to a concept of *fuinneamh* and *comhshaol* – ensuring human/non-human vitality in the collective-life-world.

187 Gough (2017).
188 Christian Aid (2020).
189 See Cirefice (2023); Cirefice et al. (2022); Brennan et al. (2022).
190 Getachew (2019).

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Index of Names

Index of Subjects

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The legal history of the British Empire is still in its infancy. This book attempts to fill some of the gaps by focusing on legal transfer and legal geography. Its chapters are based on papers given at the stream "Legal Transfer in the Common Law World" for the Third Legal Histories of Empires Conference, held at the National University of Ireland, Maynooth, in 2022. They take us to present-day Australia, Canada and the United States, as well as to the Caribbean, East Asia and East and South Africa.

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