

DONAL K. COFFEY  
STEFAN VOGENAUER (EDS.)

# Legal Transfer and Legal Geography in the British Empire

Donal K. Coffey and Stefan Vogenauer

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**MAX PLANCK INSTITUTE**  
FOR LEGAL HISTORY AND LEGAL THEORY

## 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 "law-fare" 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  
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