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Tamar Herzog

Did European Law Turn American? Territory, Property and  
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## Did European Law Turn American? Territory, Property and Rights in an Atlantic World

### I. The Questions

In 1648, analyzing the titles that Spain may have to the New World, Solórzano Pereira advanced the theory that these depended on its vassals first having “searched, found and occupied” the territory. Although the American continent was not truly a no man’s land, Spain’s entitlements, he insisted, were nevertheless guaranteed “because [its original inhabitants] abandoned it, leaving it uncultivated.” Natural law and the law of nations, as well as the practice “in all the provinces of this world” instructed this abandoned land to be given to the Spaniards in reward for their “industry.”<sup>1</sup>

Some forty years later, in 1690, in his “Two Treatises of Government,” John Locke also sustained that property and industry were tied together. Those who cultivated a land that had been abandoned or was insufficiently worked, by mixing their labor with the earth created a new object to which

1 SOLÓRZANO PEREIRA (1972), book I, chapter IX, points 12 y 13. The original version reads: “y verdaderamente para las islas y tierras que hallaron por ocupar y poblar de otras gentes, o ya porque nunca antes las hubiesen habitado o porque si las habitaron se pasaron a otras y las dejaron incultas, no se puede negar que lo sea y de los más conocidos por el derecho natural y de todas las gentes, que dieron este premio a industria y quisieron que lo libre cediese a los que primero lo hallasen y ocupasen y así se fue practicando en todas las provincias del mundo, como a cada paso nos lo enseña Aristóteles, Cicerón, nuestros jurisconsultos y sus glosadores” and “los lugares desiertos e incultos quedan en la libertad natural y son del que primero los ocupa en premio de su industria.” In the seventeenth century, “industria” was identified as “the diligence and easiness in which one does something with less work than others.” With a comparative perspective in mind, it designated those who knew better and performed better: COVARRUIAS OROZCO (1995), 666. It is possible, however, that by the mid-eighteenth century it came to designate simply “a mastery or an ability in any art or profession:” Real Academia Española (1732), Diccionario de la lengua castellana, 258.

they had now acquired title.<sup>2</sup> This entitlement, Locke argued, harmed no one. After all, a land that had been abandoned or was insufficiently cultivated was a land that no one truly needed. Applying this theory to the Americas, Locke concluded that, because Native-Americans did not improve the land (nor did they mix their industry with it), they had no title to it, nor could they prohibit its occupation and use by others.

By 1758, both these theories were enshrined as doctrines of the Law of Nations (and thus of nascent international law). Emmer de Vattel, who had reproduced them in his recompilation, also insisted that cultivating the land was an obligation imposed upon man by nature, that all nations were bound by natural law to labor the territory that they occupied, and that those who did not “failed in their duty to themselves, injured their neighbors and deserved to be exterminated like wild beasts of prey.” No one, he concluded, could “take to themselves more land than they have need of or can inhabit and cultivate,” and no one “may complain if other more industrious nations, too confined at home, should come and occupy part of their land.”<sup>3</sup>

Most scholars have assumed that these developments marked an American addition to European (now also international) law. They pointed out that both Solórzano and Locke were deeply engaged in the “European Expansion,” and both sought to legitimate what their countries were doing overseas. While Solórzano was a colonial judge working in Lima, Locke was a lawyer that, although living in the Old Continent, represented colonial interests.<sup>4</sup> Vattel, who had made these theories part of a coherent body of law, may have had no commitment to colonialism per se, but his dedication to both philosophy and diplomacy geared him to search for a clear statement of what he thought was (or ought to be) the legal norms of his time. Scholars have also insisted that these developments demonstrated the contribution of the Americas to the consolidation of private property. It was first in the Americas, they sustained, that property was not only sanctified, but was also made a-historical.<sup>5</sup>

Part of a transatlantic conversation taking place in the seventeenth and eighteenth centuries, these conclusions serve here as an excuse to examine

2 JOHN LOCKE, *Two Treatises of Government*, second treatise, chapter 5, points 27–51, especially points 31–32.

3 VATTEL (1916), book I, chapters VIII and XVIII, 37–38 and 85–86.

4 ARNEIL (1996) and ARMITAGE (2004).

5 LARKIN (1969), 1–52.

the relations between Early Modern European and American law. We already know that European law crossed the Atlantic and, in the process, also gained ground as an international law of sorts. We also know that it was constructed in a multilog between various actors working from different national traditions. But to what degree was this European law Americanized? Was there, indeed, a *derecho indiano*, as Spanish scholars have named the process of European law having gone native?

I suggest looking at these questions by observing both sides of the Ocean, centering not on how these theories had evolved, but instead on how some of their tenants were de facto implemented in both the Old and the New world.

## II. The Spanish-American Observatory

Ideas linking use (mainly cultivation) to rights were clear in Spanish America as early as the sixteenth century, and they mainly operated to justify native dispossession. Although not necessarily codified in law books and regulations, they nevertheless found ample expression in court decisions that declared certain lands as occupied and thus belonging to the native inhabitants and others as vacant and thus open for colonization. The jurisdiction of the *audiencia* of Quito (present day Ecuador and southern Colombia) may serve as an example. Studying land litigation in Quito clarifies that, following royal instructions, Spanish judges were willing to recognize the right of native communities to the “land of their ancestors.”<sup>6</sup> However, they also authorized a gradual process that led to native dispossession, which historians have since lamented.<sup>7</sup>

As I have argued elsewhere in greater detail, recognition of ancestral rights did not guarantee continuity.<sup>8</sup> Instead, it introduced major changes in the way native rights were both defined and defended. The reason for this mutation was simple: Indigenous communities who wanted their right to land recognized by the Spaniards had to address the colonial courts. In Quito, at least, these courts responded to these claims by examining whether

6 MARILUZ URQUIJO (1978) 24–27. Also see PAGDEN (1986) and ADORNO (2007).

7 OTS CAPDEQUI (1959) 82 and 85 and GONZÁLEZ RODRÍGUEZ (1990) 171–198.

8 HERZOG (2013) and (2014) 115–126.

the land was indigenous according to Spanish criteria.<sup>9</sup> Rather than being interested in reconstructing what had happened in the past, or what an Indigenous, pre-Colonial law- may have recognized and mandated, these judges affirmed, time and again, that the only test for the existence of rights was occupation. Rather than examining old entitlements, they proceeded to verify factors such as residence and continuous use. In most cases, they equated “use” with agricultural pursuits, both planting and pasturing. Gathering was sometimes also described as a legitimate activity giving rights to the territory. Hunting, on the contrary, never was. Spanish judges thus asked who was present on the land, what they were doing and not what title they held. They favored sedentary communities over others who used the territories in other ways and, subjecting rights to “actual use,” they required that all natives continuously use the land, arguing that unless they did, territory could never be recognized as their own.

The accumulation of all these factors guaranteed that in the process of “recognizing indigenous right to land” the Spaniards profoundly transformed these rights; eliminating many that may have existed during the pre-colonial period, they created and gave others that were completely new. The judges, however, were only complementing what the king was doing too. During the colonial period, the Crown routinely distributed land to new or resettled indigenous communities.<sup>10</sup> Yet, in all these cases, land granted to natives was not considered their own. According to the law, this land was royal property (*realengo*) and it was to remain in native hands only

- 9 Documentation regarding land claims in the *audiencia* of Quito was mostly found in the National Archives of Ecuador/Quito (hereafter ANQ), sections titled cacicazgo, tierra, fondo especial, casas and gobierno. Additional documentation proceeds from the Spanish colonial archives in Seville (Archivo General de Indias, hereafter AGI) and the Biblioteca de la Real Academia de la Historia in Madrid (hereafter BRAH/M). See, for example, the questionnaire submitted by don Juan Zumba cacique de Uyumbicho, Quito 28/8/1565, ANQ, Tierras 1, exp. 1 de 14/8/1565, fols. 12r–13r on 12v and the royal provision to the *corregidor* of Ríobamba, Quito, 16/8/1649, ANQ, Indígenas 16, exp. 2 de 2/9/1686, fols. 1r–4r, on fol. 2r.
- 10 HERZOG (2007). For an older bibliography on these issues see MÁLAGA MEDINA (1974) and SOLANO (1976). On its functioning in Quito see petition of Andrés Zumbaña in ANQ, Tierras 1, exp.1 de 14/8/1565, fols. 18r. The grant of land to Indians on the occasion of their resettlement (*reducción*) was also mentioned in the petition of the *protector de naturales* of Cuenca, ANQ Tierras 17 exp. 19/6/1692.

as long as natives needed it for their survival and tax payment.<sup>11</sup> If they no longer did (and the best proof that they did not would be insufficient use), the territory would revert to the Crown and could be redistributed to those who would allegedly use it better. Subjected to a “right of return” (*derecho de reversión*) in case of non-use (or insufficient use), all land granted to indigenous communities was thus conditional. Under continuous scrutiny, the Spaniards – both litigants and judges – periodically questioned whether the original grant was justified and whether, at the present, the community still needed the land. Extremely powerful during the periodical examination of land titles called *composiciones*, the tying of rights to (sufficient) use, became the most powerful mechanism of native dispossession.<sup>12</sup> Echoing what Solórzano, Locke and Vattel had described, it mandated a new moral economy according to which land should be the property not of those who had it first but instead of those who could work and use it better.

The legal reasoning that Solórzano, Locke, Vattel, and the judges of Quito followed to justify the dispossession of Indigenous peoples by arguing their neglect to work the land sufficiently could also operate vis-à-vis European powers. This was clearly the case in the Spanish-Portuguese borderland in the American interior. Although the Spaniards and Portuguese invoked papal bulls and bilateral treaties in their relationship with one another, the historical documentation generated on the border itself demonstrates that both parties were mostly obsessed with the question who was where and what they were doing.<sup>13</sup> Discovery and exploration – that is, the initial and early arrival to the territory – were important in such discussions regarding land

11 Petition of the *protector de indios*, Quito 9/11/1791, ANQ, Cacicazgo 3, exp. 3 de 9/11/1791, fol. 3r, ANQ, Indígenas 1, exp. 3 de 13/12/1597 and “provisión real a petición del protector general en nombre de Antonio Amaguano cacique de Nayon,” ANQ, cacicazgo 44, vol. 99, 23/2/1732, fol. 3r–v. The particular status of such lands was described in SOLÓRZANO PEREIRA (1972) 379–380.

12 Latin American *composiciones* were studied by many. See, for example, TORALES PACHECO (1990) and AMADO GONZÁLEZ (1998). Also see *Recopilación de Indias*, book 4, title 12, laws 15–21. Their operation vis-à-vis native communities was exemplified in petition of Salvador Ango Pilainlade Salazar cacique, Otavalo, 3/12/1692, ANQ, Tierras 18 exp. 15/12/1692, fol. 1v. and petition of Juan Guaytara, cacique, Quito, 15/3/1712, ANQ, Tierras 34, exp. 15/3/1712, fols. 2r–v.

13 These issues are analyzed in greater length in HERZOG (2014).

rights, but much more crucial than the question of who had arrived first was who had remained: who had established a permanent settlement, or had used the territory continuously for transit, commerce, the gathering of fruits, and so forth.<sup>14</sup> As a result, rather than discussing where the border between Spain and Portugal passed, the inhabitants of both powers were engaged in proving what they already possessed and occupied. They sent their respective monarchs reports about their progress, and they “authenticated” (*autenticar*) their claims by conducting judicial investigations and collecting oral declarations.<sup>15</sup>

Because rights depended on actual use of the land, the territorial possession that resulted was often discontinuous. Made of fields, farms, woods or settlements, entitlements took the form of an archipelago, with “islands” of occupation and use surrounded by a “sea” of “unoccupied land,” as well as corridors and routes connecting them.<sup>16</sup> And, while the territory in between occupied parcels was open for appropriation, how to define the islands already used became a major concern. The nucleated nature of the territory that the Spaniards and the Portuguese both possessed came into focus, for example, during discussions involving Colonia de Sacramento (in present day Uruguay). Colonia was built, destroyed, rebuilt, taken again, and returned once more, on several occasions during the late seventeenth and eighteenth centuries. While discussants in Europe referred to it as a solid, clear unit, this clarity dissipated in the Americas. What did Colonia consist of? Was it equal to the territory of its fort? Did it include all of the hinterland that its soldiers and residents occupied? And, if so, should not this

14 A letter of the Count of Bobadilla to Pedro Cevallos, Rio de Janeiro 29/2/1762, Archivo General de la Nación/Buenos Aires (hereafter AGN/BA), IX.4.3.5 and a letter of Domingo Ortiz de Rosas to Antonio Pedro de Vasconcelos, undated, although describing events taking place in 1743, Archivo General de la Nación in Montevideo (hereafter AGN/M), Archivos particulares, Caja 333, Colección de documentos de Mario Falcao Espalter, carpeta 3, titled “Documentos relativos a las luchas entre España y Portugal por la posesión de la banda oriental y proceso de población de dicho territorio,” 1685–1757.

15 “Auto de inquirição de testemunhas para justificação da posse e domínio do rio Branco pela coroa de Portugal,” 1775, attached to ofício do governador e capitão geral do estado do Pará e Rio Negro João Pereira Caldas para o secretario de estado da marinha e ultramar Martinho de Melo y Castro, Pará, 4/1/1776, Archivo Histórico Ultramarino, Lisboa (hereafter AHU), acl\_cu\_013, cx.74, d.6261.

16 HERZOG (2002) and GARAVAGLIA (2003).



territory be defined by a judicial investigation that would prove what they had truly occupied and what not?<sup>17</sup>

Because occupation and use mattered even on the international scene, individuals and authorities on the ground had to be both extremely active and extremely vigilant. They had to ensure that the territory they pretended was theirs would be constantly used and re-used; but they also had to certify that their rivals shied away from it, as well as from any new area. If the rivals did not, expressing protest was crucial because the lack of a response could be legally constructed and comprehended (by way of legal presumption) as consent.

Conflict regarding use, however, was not limited to land. Both the Spaniards and the Portuguese understood that controlling the local population was a means to control the territory. Distinguishing natives according to their degree of hostility to them and their potential for “domestication,” Europeans also classified them according to whether they were “inclined” to one country or the other.<sup>18</sup> In the process, natives, too, became objects to be possessed (or “used”). Not only did Europeans try to convert those who were their enemies into their allies or ensure (when they failed) their annihilation, they were also constantly suspicious of what their native “friends” may do.<sup>19</sup> They believed that those who had reached an “understanding” with them could turn into foes and ally with their rivals. From a Spanish

- 17 “Apuntamiento de secretaría ejecutado en cumplimiento del acuerdo del consejo de 20.6. pasado ...”, Madrid, 4.7.1716, AGI, Charcas, 263. The question of how defining the jurisdiction of Colonia affected the borders of Brazil was asked, for example, in 1713: “Parecer do Marquês de Frontera sorbe a paz com Castela,” Lisbon 31.7.1713, cited in RAU/GOMES DA SILVA (1955), V. 2, no. 177, p. 120.
- 18 “Instrução da Rainha para D. Antonio Rolim de Moura,” Lisbon, 19.1.1749, Arquivo Público de Mato Grosso (hereby APMG), Livro C – 03, Doc. 01, fols. 3–8, fol. 5, point 16 and “Carta do governador e capitão-general da capitania de São Paulo Rodrigo César de Meneses para o governador e capitão-general da capitania do Rio de Janeiro Aires de Saldanha ...,” São Paulo, 15.3.1724, AHU, ACL\_CU\_023–01, Cx. 3, D. 374. I would like to thank João Antonio Botelho Lucidio for sending me the information from Mato Grosso.
- 19 “Tratados que deberán observar con este superior gobierno el cacique Callfilqui a consecuencia de lo que ha estipulado ... con el,” AGN/BA, Biblioteca Nacional 189 exp. 1877. The bibliography on treaties with Indigenous groups have become especially abundant in recent years: LEVAGGI (2000); LEVAGGI (2002); NÉSPOLO (2004) and LÁZARO ÁVILA (1999). We are thus now a long way away from the affirmation made by Charles Gibson in 1978 according to which such peace treaties were absent in Spanish America: GIBSON (1978).

perspective, this apprehension was tied to the belief that the Portuguese were willing to appease the natives in ways the Spaniards were incapable of doing, offering them expansive and frequent gifts or promising them a better treatment.<sup>20</sup> The Spaniards thus reminded “their” Indians of their obligation to them. The Portuguese did the same.<sup>21</sup> Complaining that “vassals of Spain” convinced Indians inclined to their friendship to attack them, they circulated rumors that indicated that several such natives might have even joined the Spaniards in the effort to expel the Portuguese.<sup>22</sup>

In the process, the inhabitants of both powers portrayed Indian allies as their property.<sup>23</sup> Perhaps not quite “theirs” as the land was considered to be, but not so drastically different; these Indians, they argued, were already in their “possession”(sic) and could therefore not become the property of another. These beliefs led the Spaniards to complain in the 1770s, 1780s and 1790s, that the Portuguese “stole” (*robar*) “their” Indians.<sup>24</sup> Calling these activities “piracy,” they insisted that the Portuguese invaded native villages belonging to Spain, capturing their inhabitants and removing them, sometimes in bulk, but always violently, to Portuguese territories. The natives

- 20 “Memorial del padre Cristóbal de Acuña sobre el descubrimiento del rio de las Amazonas, 1639; AGI, Quito 158, fol. 3v and a letter of Lázaro de Ribera to the viceroy of Buenos Aires, Asunción, 18/9/1797, AGI, Estado 81, No. 15 (1e).
- 21 “Consulta do Conselho Ultramarino referente a uma carta do governador e capitão-general da capitania de São Paulo Conde de Sarzedas ao rei informando êste monarca do perigo da perda de Cuiabá ...,” Lisbon, 5/5/1733, AHU, ACL\_CU\_023-01, Cx. 8, D. 899.
- 22 “Representação dos oficiais da Câmara de Curitiba ao rei pedindo-lhe que aquela vila fosse assistida pela provedoria da praça de Santos ...,” Vila Real de (Curitiba), 2/9/1744, AHU, ACL\_CU\_023-01, Cx. 15, D. 1491 and “Noticias dadas por huma copia em 1/4/1775,” attached to “Ofício do governador de Iguatemi José Custódio de Sá e Faria ao governador de São Paulo Martinho Lopes de Saldanha,” Iguatemy, 20/7/1775, AHU, ACL\_CU\_023-01, Cx. 30, D. 2707.
- 23 A letter of Joaquim Tinoco Valente to the governador of Pará, Barcelos, 20/7/1765, Arquivo Provincial Esatdo do Pará, Belém do Pará (hereafter APEP), Cod. 155, Doc. 41 and a letter of Pedro Domínguez to Jose de Espinola, Fuerte Borbón, 20/7/1797, Archivo Histórico Nacional, Madrid (hereafter AHN), Estado 3410, No. 13. I would like to thank Heather Flynn Roller for sending me documents from Para.
- 24 The interrogatory elaborated by Juan Francisco Gómez de Villasufre y de Arce, governor of San Joaquin de Omagua on 26/5/1775 and the declarations that followed it, ANQ, Fondo Especial 30, vol. 83, no. 3226, copy of letters by Francisco Requena to Antonio Caballero y Góngora dated 20/8/1783 and 8/10/1783, AHN, Estado 4677-1, No. 5 and a letter of Felipe de Arachua y Sarmiento to Francisco Requena, 15/7/1783, AHN, Estado 4611.

captured in this way by the Portuguese, the Spaniards argued, belonged to “nations friendly with Spaniards” (*afectas a España*), were already conquered by Spain (*conquistados por España*), were vassals of the Crown, or were outright Spaniards. If they allowed the Portuguese to take them without issuing a protest, as would happen with territory, the Portuguese would become proprietors of all the land.<sup>25</sup> Responding to these allegations, the Portuguese normally attested that the Indians were not extracted by force but instead willfully came to live among them.<sup>26</sup> Nonetheless, Portuguese documentation clarifies that the Portuguese actively engaged in campaigns to transform Indians favorable to Spain (or, according to Spanish versions, already in Spanish possession) into allies of Portugal. They also apprehended, or gave refuge, to natives who abandoned Spanish missions and arrived at Portuguese territories.<sup>27</sup> Records also indicate that in order to influence these natives, the Portuguese may have offered them gifts and a better treatment. Indians may have been told that the Spaniards wished to kill them and that they habitually maltreated the indigenous population.<sup>28</sup> It is also possible that, on occasion, natives were threatened that either they willfully submitted or they would be forced to.<sup>29</sup>

Although bitterly resenting the Portuguese, the Spaniards may have used similar strategies. Already in 1697, the Portuguese governor of Maranhão

- 25 Joaquín Alos, governor of Paraguay to viceroi Nicolás Arrendondo, Asunción, 19/9/1791, AHN, Estado 4387, No. 5.
- 26 The original version reads: “como sean los referidos indios personas libres, pues los contempla así la santa sede apostólica y los mismos soberanos a cuyos dominios pertenecen, pueden usar de su libertad que les da facultad como señores de ella mayormente para que usen de ella con sosiego a donde les pareciere sin ninguna sujeción de esclavos como en cierto modo los quiere vuestra merced ...” Feliz José Souza to Francisco José Texeira, Fuerte el Príncipe de la Vera 23/11/1784, AHN, Estado 4436, no. 10.
- 27 “Ofício do governador e capitão geral da capitania de Mato Grosso Luís de Albuquerque de Melo Pereira e Cáceres ao secretário de estado dos negócios do reino Marquês de Pombal” Vila bela, 8/1/1777, AHU, ACL\_CU\_010, cx. 18, d. 1146.
- 28 A letter of Pedro de Cevallos to Ricardo Wall, ministry of State, San Borja 7/12/1757, reproduced in *Campaña del Brasil. Antecedentes coloniales*, Buenos Aires 1939, vol. II, 245–6 on page 245.
- 29 Copy of a letter of Joseph García de León y Pizarro a Antonio Caballero y Góngora 18/4/1784, AHN, Estado 4677–1, No. 5 and a letter of Juan Joseph de Villalengua, president of the audiencia of Quito to José de Gálvez, Quito, 18/6/1784, AHN, Estado 4677–1, No. 7. Also see letters of Lázaro de Ribera to viceroi Antonio Olaguer Feliú, Asunción, dated 18/9/1797 and 24/3/1798, AHN, Estado 3410, No. 13.

complained that Jesuits may have convinced Indians living in Portuguese *aldeias* to move to their (Spanish) missions. Affirming that these Indians were Portuguese vassals living on Portuguese territory and in Portuguese (Carmelite) missions, the Portuguese Overseas Council ordered this stopped.<sup>30</sup> The Jesuit explanation that these Indians chose to come to the mission of their own free will was (of course) rejected.<sup>31</sup> Portuguese complaints of Spanish attempts to remove Indians from their territories continued into the eighteenth century, intensifying as the century progressed. By the 1750s, the Portuguese accused the Spaniards of convincing Indians who “were inclined favorably to Portugal” to ally with Castile by suggesting to them that the Portuguese would make them slaves.<sup>32</sup> According to other sources, in the 1760s, the Spaniards encouraged “Portuguese” Indians to rebel.<sup>33</sup>

Indians could thus maintain their lands only if they continuously used it, and Europeans could make claims to territory and people only if they constantly occupied and controlled them. This was a world in turmoil, in which no right seemed permanent, and no success ever guaranteed. But were these developments a particularly American phenomenon, or were they also present in Europe?

### III. The European Observatory

The relationship between use and rights had, of course, European roots. Greek and Roman writers were already unanimous in holding that property was a man-made institution that had emerged as a consequence of the adoption of agriculture. According to them, while hunters had no property, pastoralists had owned their animals and farmers developed property in

30 “Consulta do conselho ultramarino para o rei sobre o missionário jesuita castelhano padre Samuel,” Lisbon, 12/11/1697, AHU, acl\_cu\_013, cx. 4, d. 340.

31 RODRÍGUEZ CASTELLO (ed.) (1997) 131 and 133.

32 A letter of Councilor Tomé Joaquim da Costa Corte Real to Antonio Rolim de Moura, governor of Mato Grosso, Lisbon, 7/7/1757, APMG, CMG-SG, Livro C-18, Estante-01, letter 1, fols. 9–17v.

33 A letter of Valerio Correa Botelho de Andrade, interim governor of Rio Negro to Manoel Bernardo de Mello e Castro governor of Grão Pará, Barcelos, 22/12/1762, APEP, Cod. 99, Doc. 94, 1R.

land.<sup>34</sup> Most medieval and early modern authors seemed to agree.<sup>35</sup> Many pointed out that God gave man the land so that he could fulfill his needs and that, as a result, all property in land was conditioned by proper use. Making the cultivation of the land also a religious duty, they insisted that property was supposed to advance, not diminish, public utility. In Spain, these visions were dominant during the *Reconquista*, allowing individuals and communities to obtain title to land, which others had allegedly abandoned or insufficiently worked.<sup>36</sup> They were also continuously invoked in the sixteenth and seventeenth century by *arbitristas* who insisted on the obligation of kings to reward those who cultivated the land by giving them title to it, and to punish those who did not by forcing them to either use the land or surrender it.<sup>37</sup>

The clearest example of how in early modern Spain, too, use and rights were closely related is that of the repopulation campaigns carried out in the seventeenth and eighteenth centuries.<sup>38</sup> These campaigns, which identified the depopulation of the country as one of the major reasons for its economic decline, advocated the need to use vacant territories (*despoblados*) and, above all, to resettle those places that were once cultivated. In the eyes of many, these depopulated areas incarnated Spain's problems. Having once been "useful," they became "waste." To reverse these tendencies, royal action was necessary. The king had to force those who possessed *despoblados* to cultivate them or allow others to do so.

Repopulation campaigns, particularly prominent in the late seventeenth and eighteenth centuries, caused major social upheaval.<sup>39</sup> While those who wanted access to land pressured royal delegates to translate royal orders into

34 Roman law may have authorized the seizure of uncultivated land (*agri deserti*) in order to guarantee that it would be worked and taxes would be paid on them: CONCHA Y MARTÍNEZ (1946) 139–144. The theory linking property to agriculture survives to date: DODGSHON (1987), 24–71.

35 TULLY (1980) 65–69, 80 and 100, RODRÍGUEZ PUERTO (1996–1997) 495–503 and 510–525, on 499–500 and 518 and PAGDEN (1998) 172.

36 CONCHA Y MARTÍNEZ (1946).

37 NIEHAUS (1976); RODRÍGUEZ (1984); MARAVALL (1972), vol. 2, 325–339 and VASSBERG (1974) 384–385 and 393–394.

38 PALACIO ATARD (1989); OLIVERAS SMITIER (1998) and HELGUERA QUIJADA (1995).

39 Archival documentation regarding these resettlement campaigns is mainly located at the AHN, Consejos, although some of it is also reproduced in municipal and provincial archives, as well as the archives of royal courts, and the Royal Academy of History.

action, those who possessed land often refused to collaborate. As a result, repopulation campaigns often degenerated into long discussions involving municipalities, proprietors and hopeful colonists. At stake were classificatory questions, mainly, which territories were depopulated or insufficiently used. Also debated was what was the land's true potential and who was best suited to pursue its improvement. Given these conditions, seventeenth- and eighteenth-century repopulation campaigns are a good starting point for understanding the relationship, in Peninsular Spain between land and use, use and rights.

Repopulation campaigns made two issues clear. First, most individuals and groups who requested permission to cultivate a territory, which they considered empty or insufficiently used, usually argued that pasture, when arable agriculture was possible, was a waste.<sup>40</sup> According to them, grazing did not improve the land, nor did it ensure that its potential would be met. Land dedicated to pasture was not only wasteful, it was also dangerous. Uncultivated and left in a state of nature, it served as refuge for dangerous people and wild animals, even disease.<sup>41</sup> Leaving land in this barren state, they argued, was never an informed decision. On the contrary, it was mainly due to neglect, willful and at times even criminal.<sup>42</sup>

If the first point of almost general agreement was criticism of grazing, the second was the allegation that improving the land by making it achieve its (true) potential was not a choice but an obligation. Tying the reform of land to the reform of its people, improvement would ensure that, through access to land, poor vagabonds would be transformed into responsible, law-abiding individuals.<sup>43</sup> Improvement would also guarantee the domestication of nature itself: uncultivated land became arid to the point of no return.<sup>44</sup>

40 AHN, Consejos 4057, fol. 1r–4r and 6r.

41 The report written by Pablo de Olavide, Seville, 20/11/1773, AHN, Consejos 4048, fols. 6r–9r and AHN, Consejos 4061, no. 15, fols. 30r–36r.

42 Contemporary documentation does clarify, however, that some fields may have been abandoned as a result of the “difficulties of the time,” epidemic outbreaks, or foreign occupation: AHN, Consejos 4047 and petition of the “lugares de las valles de Broto y Tena ...” undated, Biblioteca Nacional, Madrid (hereafter BNE) VE/200/11.

43 Petition of Manuel Rodríguez, Madrid, 23/11/1798, AHN, Consejos 4061 n. 2 and AHN, Consejos 4061 n. 13, fols. 6r–9r.

44 ARRIQUIBAR (1779) 238–239 and la Real Sociedad Matritense de Amigos del País en 1780 according to: Archives of the Real Sociedad Matritense de Amigos del País (hereafter RSMAP) 37/1.

Cultivating the land was deemed a patriotic activity as the re-conquest of barren terrain, some argued, was “more glorious, useful and secure than the conquest of distant lands.”<sup>45</sup>

Who was best suited to reform the land was another debated issue. Landlords tended to argue that the poor certainly were not. After all, even if they did not lack experience as laborers, they certainly lacked the knowledge, the means and the tools necessary to improve the land.<sup>46</sup> Settlers who were “refugees and beggars” (*prófugos y mendigos*) were equally unsuitable.<sup>47</sup> Colonizers, therefore, should be of adequate age, economic stature and education.<sup>48</sup> In short, intention to improve the land was perhaps a necessary but certainly not a sufficient condition. Furthermore, those wishing to become colonizers were to have a true “vocation.” They would have to have a true interest in improving the land (not only in acquiring possession of it), and they would also have to prove that they were capable of carrying out what they promised.<sup>49</sup>

Although repopulation campaigns did not always involve property rights – in many campaigns colonists would have to pay fees to landlords, who would maintain their property –, on most occasions, (proper) use was to lead (eventually) to rights. One popular way to attract colonists, for example, was precisely the promise to transfer land rights after a certain period. Without such an outlook, it was feared, nothing would be achieved.<sup>50</sup> And, if improvement gave title to land – if not immediately, at least eventually –, the

45 The original version reads: “un reino podría formarse de sólo estos desiertos espantosos y su reconquista sería más gloriosa, útil y segura, que la de países distantes.” ARRIQUIBAR (1779) 235. Also see: Joaquín Navarros, Plan de repoblación para el lugar de Zarpuz en el reino de Navarra, 1778, RSMAP 25/11.

46 “Informe del alcalde mayor Antonio Joseph Cortés,” 26/2/1783 and 19/5/1783, AHN, Consejo 4084 1r–4r and 12r–13r.

47 Alegations of the villa de Melgar de Fernamental in Real Chancillería de Valladolid (hereafter RCV), Pleitos Civiles, La puerta 2153/1.

48 Petition of Cristóbal García de Cantos of 1798 and the conclusions of the junta in on 1/10/1798, AHN, Consejos 4061, cuaderno 8 and “real provisión en que se contiene en fuero de población de la Nueva Villa de Encinas del Príncipe ...” 1779, AHN, Consejos 4084.

49 Petition of Cáceres and su jurisdiction, 31/5/1800, AHN, Consejos 4060, expediente de Cayo Joseph López.

50 “Los colonos destinados al despoblado de Peñacerracín,” 26/7/1788, AHN, Consejos 4088, and “Real resolución,” Madrid, 15/3/1791, ANH, Consejos 4088.

opposite was also true: landlords who refused to cultivate their land could lose not only their possession, but also their property rights. This could happen, contemporaries argued, because owners who did not cultivate their land had no rights at all. After all, they received the land under the condition that they would use it, and their failure to do so was sufficient to justify repossession and redistribution of the land. In the words of a contemporary observer: “For centuries, these lands have been fruitless. Their owners did not have, nor have at the present, nor can have in them any utility other than what they could have in possessions situated in imaginary spaces.”<sup>51</sup> What was also helpful was the conviction that, on these occasions, the king could intervene in the existing legal order and both relinquish and create rights. This, it was argued, was the meaning of sovereignty: the king’s superior and eminent domain over all the land allowed him to distribute it according to public need, denying certain (existing) privileges and creating others anew.

Given this background, it is not surprising that, by the eighteenth century, like Solórzano, Locke and Vattel, Spanish authors also identified work with property.<sup>52</sup> They argued that labor, rather than land, produced riches and they reasoned that progress required allowing individuals to profit from the fruits of their labor. However, Spain was not the only European country in which these issues played a major role during the seventeenth and eighteenth centuries. England, where Locke wrote his essays, is another example.

From as early as the sixteenth century and more clearly in the three following centuries, the English countryside underwent a profound transformation.<sup>53</sup> Although historians have disagreed about its origin, development and results, they have all coincided that during this period many lands previously considered public were made private through a process that they termed “enclosure.” According to them, economic pressures led to the fencing of lands, on the one hand, which demanded a more efficient usage, on the other.<sup>54</sup> Contemporary, was a new ideology that connected property to

51 The original version reads: “pues ni han tenido ni tienen ni pueden tener por el orden regular en ellas más utilidad, que lo que pudieran figurarse en unas posesiones situadas en los espacios imaginarios.” ARRIQUIBAR (1779) 236.

52 JOVELLANOS (1795) 8 and 12–13.

53 SLATER (1907) and TAWNEY (1965).

54 This mixing of elements eventually allowed authors such as Grotius and Locke to consider the lack of enclosure a sign of absence of improvement and thus the lack of title or property: ARNEIL (1996) 62.



improvement, arguing that only those sufficiently knowledgeable and capable of making the land truly profitable should be allowed to hold it. Tied to the commercialization of agriculture and to a general attack on both public and communal land-holding (making private property a social and political ideal), these processes led to the dispossession of many individuals, families and communities, converting them from small peasants into landless agricultural (and eventually industrial) wage workers.

Although these developments gradually gained strength, until the eighteenth century enclosure, at least, it was a controversial measure that many criticized.<sup>55</sup> They debated its political, economic, social and legal wisdom and asked whether it was beneficial, to whom, and to what extent. Defenders of these policies insisted that they guaranteed the “common good” because they supplied the country with more food (the assumption was that fields better used would produce more) but also because they would reform the peasant and the poor, leading the country from “backwardness” to “modernity.” Identifying enclosure and the privatization of land with its “improvement,” such actors sustained that this was the only means of encouraging investment and innovation. Labor was central to this debate as it was assumed that the state of agriculture depended on human action, not natural conditions.<sup>56</sup> Portrayed as an activity confronting man with nature rather than with other men, improvement (and the subsequent appropriation it entailed) were thus considered a heroic struggle against territories – for example, grazing grounds – still in a “state of nature.”<sup>57</sup> By the end of this process, the call to improve the land was couched as a religious duty to transform chaotic nature into a domesticated garden.

The argument supporting enclosure and improvement justified the transfer of property from those “unworthy” to those who would use it “correctly.” Yet, if in theory, it could undermine not only the rights of communities to their common lands and the poor to their own, but also endanger the entitlements of wealthy landowners who did not use their properties sufficiently, such was not the case.<sup>58</sup> As happened in the Americas, in practice, this powerful discourse was mainly applied to some sectors and to them

55 NEESON (1993).

56 ARNEIL (1996) 96–103.

57 LARKIN (1969) 1–2 and BRACE (1998) 161–162.

58 WEAVER (2004) 80–82.

alone. It was as if the inherent assumption – almost never questioned – was that collective and poor was the same as bad use, whereas individualistic and wealthy equaled good. These presumptions allowed continuous scrutinizing and criticizing of the first, yet no real attempt to measure the performance of the second. Put differently, rather than being based on a case-to-case analysis (as the theory may have suggested), asking in each case what was the true potential of each section of land and how it could be improved and by whom, certain stereotypes supplied an automatic response that while undermining the rights of certain sectors, defended those of others.

By the eighteenth century, the literature that criticized the English poor and English communities for insufficiently attending to their land compared the members of these European groups to Native- Americans. Sometimes implicitly, others explicitly, it argued that it made equal sense to dispossess one and the other.<sup>59</sup> After all, both the English poor and the American Indians were “backward,” and both hindered “progress.” It is also possible that practices in England informed behavior in the colonies. Not only because enclosure and improvement were first used in Ireland against the local inhabitants, not only because John Locke may have been inspired by developments in the Old World in order to elaborate his theories regarding the colonies, but mainly because there is evidence that English peasants who experienced dispossession at home ended up replicating it vis-à-vis natives, whose property they coveted and whom they could accuse of insufficiently working the land.<sup>60</sup>

#### IV. Conclusions

In the Americas as in Europe, by the late sixteenth century and clearly in the seventeenth and eighteenth centuries, the right to land was tied to its “proper use.” What proper use meant could be endlessly debated, but it was clearly the case that in both England and Spain, as well as in the Old and the New

59 NEESON (1993) 30 and BRACE (2001) 16–17. According to BRACE (1998) 164, “The virtuous disciplined improver was defined not only in contrast to the property-less and wasteful hunter-gatherer in America, but also as directly opposed to the ungodly, undisciplined and unemployed in England.” On how improvement became an imperial policy see DRAYTON (2000).

60 BUCK (2001) 47.

World, these adjectives were mostly applied generically to certain activities of certain people, who were stereotyped as wasteful or, at least, not as sufficiently active or informed as to transform “deserts” into fertile gardens.<sup>61</sup> The road leading from criticism to criminalization was short but meaningful. By the end of this process, not only were some Native- American and Europeans dispossessed, but this dispossession was presented as their own fault. It was a punishment of sorts for their own neglect, a means to force them to improve their ways and become “modern.”

Although commonalities existed, so did differences. Improvement was seen as an individualistic endeavor in England; in Spain and overseas it had stronger communal overtones as many believed that it would only happen through the formation of new or the conservation of old communities. Yet, despite these differences, and the fact that property was not always immediately transformed in Spain, eventually in all three places (England, Spain, and Spanish America) indigenous communal property ended up in the hands of individual outsiders.

One feature that tied all these questions together was the constant debate unleashed on both sides of the Ocean on how to reorganize land regimes in ways that seemed more “reasonable” to contemporaries. Whether “reasonableness” was the motive or the excuse we will never know – it is probable that both were equally present – but, regardless, it is clear that rather than debating titles and historical rights, what contemporaries did was to discuss how to change them, how to undermine them, or how to relinquish them altogether. It was as if they were willing to reinvent the social contract and the legal basis for ownership by putting a new spin on existing theories. This was an important development within a society (still) marked by tradition and in which, for centuries, the right to land depended on the passage of time. Now, instead of “historical rights” what mattered was a certain “public utility.” Historical amnesia, in short, was equally present on both sides of the Ocean, although its results may have differed according to place and time. *Tabula rasa* was not an American invention; it was tied to a process we now identify as “modernity.”

61 It is thus debatable whether England had indeed developed a particular discourse that, contrary to other European nations, focused “on the possession of territory to the exclusion of its inhabitants” and had passed from judging ownership and cohabitation to evaluating use: TOMLINS (2010) 132–134.

Insistence on the present rather than the past, however, may have been particularly useful in the Americas, as it allowed ignoring the rights of previous occupiers; nonetheless, it was also powerful in Europe. Tied to the growing notion of sovereignty and royal responsibility, it imagined a modernizing upper class leading the rest of humanity (mainly indigenous peoples and the poor) to “progress.” Rather than Americanized, law was modernized. The Americas, in short, may have accentuated European debates on what occupation and proper usage were, but they did not invent them, nor did they clearly depart from existing notions as experimentation took place on both sides of the Ocean contemporaneously.

The inability to distinguish European from American developments was one feature of this modernization process. Although some institutions, laws and doctrines found a more fertile ground on one side of the Atlantic versus the other, the constant dialog between both and the continuous influx of ideas and practices made these worlds to some degree united. Practices experimented in Europe were implemented in the Americas, while also influencing the Old World. Success or failure in one could be detrimental to the experiment on the other side, but exact genealogies are hard, perhaps even impossible, to establish. On certain occasions, the Americas appeared almost as a platform on which ideas about Europe were debated. On others, it was a cause and a reason to reconsider old truths. But whatever the precise dynamics may have been, this continuous conversation ensured that the law constantly changed. Under the guise of continuity, it mutates according to place, time and circumstances.<sup>62</sup> And, although innovations could be the result of an encounter with new circumstances, more often than not and as usually happens with law and legal change, they included new visions and new ways of interpreting the existing canon.

62 MARILUZ URQUIJO (1976) 389–402.

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