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Property and the Early Modern Condition

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Property and the Early Modern Condition*

Interest in the relations between land and law in the early modern period has been growing steadily among historians of the Americas in recent decades. While some authors have made this a central focus of research, others have explored it in the broader context of how law structured intercultural relations between European colonizers and native populations. Alan Greer's book *Property and Dispossession* places both of these issues in the center of its analysis, and makes the very correct argument that capitalist development, private property, and modernity played a very limited role in the early colonization of North America (3). This argument does not seek to establish a difference between European and American developments. Rather it is a manner of stating that since modern representations of the economy and control over land did not exist anywhere in Europe during the early modern period (18), colonization was not a process of ›introducing‹ property or modernity between developmentally asymmetrical world regions. Greer's argument thus seeks to deconstruct a widespread historiographical narrative about colonization that assumes that property ideas came from Europe to the Americas fully formed and ready to use. Instead, Greer proposes focusing on »concrete on-the-ground actions, actions that had the effect of instituting colonial property for both settlers and surviving indigenous populations« (4). For these insights alone, this book is a must-read for anyone interested in the problems of colonialism, colonization, land relations, and indigenous dispossession in the Americas.

The author selects three different experiences of European colonization in three very different regions, making it necessary to spend many pages bringing the reader up to speed on the manifold differences between British, French, and Spanish colonization and the different local indigenous social conditions they found upon their arrival. The layout already suggests some problems in Greer's ambitious approach. The five chapters of part 1 serve more as introductory chapters that lay the groundwork for the analytical chapters of part 2, which seems particularly long given that these chapters offer not much more than a summary of the state of the art for each particular topic. Perhaps the most important payoff of these chapters is that they reveal that there was no paradigmatically ›European‹ approach to land tenure; the manner in which land was regulated in different colonial spaces was determined by local conditions; and different empires approached the question of land tenure with different interests and rules.

The most compelling chapters of the book are those of part 2, dedicated to studying different »aspects of property formation«: the colonial commons (chap. 7); the spatial dimensions of property (chap. 8); surveying (chap. 9); and the relation between colonial sovereignty and property formation (chap. 10). The final chapter gives an outlook into the 19th century.

Chapters 7, 8, and 9 are particularly persuasive, containing nuanced and counterintuitive accounts of how the native inhabitants of America and Europeans represented land and their claims to it. In the chapter on the colonial commons, for example, Greer correctly notes that »common property was, in fact, a fundamental feature of landholding in both the New World and the Old in the early modern centuries« (248). The chapter describes the diverse forms in which common holdings were treated in Spanish, English, and French law, and how these forms of communal landholding played an important role in the dispossession of indigenous land. In the chapter on »Spaces of Property«, the author presents ›European‹ representations of space by showing the limitations of mapping and measurement, and by highlighting the importance of *place* among Euro-

* Alan Greer, Property and Dispossession. Natives, Empires, and Land in Early Modern North America, Cambridge: Cambridge University Press 2018, 464 p., ISBN 978-1-316-61369-6

pean settlers. When speaking of land, place – more than referring to an abstract space – treats the land as bound to local knowledge and »the lived experience of its inhabitants« (291). Since maps, cadasters, and other abstract representations of space were flawed and limited until the 19th century, Greer argues that »the living memory of peasant communities would remain the most important record of property rights and boundaries« (294). Finally, chapter 9, dedicated to processes of surveying, shows, among other things, that both European and indigenous ways of measuring land had more similarities than differences: rather than abstract units, »measures [were based] on a human scale that were rooted in local communities« (322).

These chapters reveal that the narrative of the European settlement of the New World is very different when the early modern condition is taken seriously. It is therefore puzzling, from a legal historical perspective, that the author chose such a normatively-laden and anachronistic concept such as property to describe the multiplicity of experiences of the relation between people and land that are discussed in the book. »The ideals of private property and absolute ownership shone as beacons of hope in the midst of the general effort to make the world anew« (389), writes Greer in the beginning of his epilogue about the developments which started with the revolutionary period. Property began to be thought of in diverse ways: it became a right that the state was obligated to protect, tied less to the scale of the community and instead becoming an abstract notion tied to the supreme worth of the individual. If this is the place that property was granted in the late 18th century, how does this compare to what was actually happening during the process that Greer identifies as »property formation« and, more paradoxically, with what Greer studies as »indigenous forms of property« in chapter 2? If »property« preceded European colonization, what »property« is being formed in the process of »property formation«? Does it make sense to conflate all of these different contexts under the individualistic and rights-oriented notion of property that has only become commonplace in the last two centuries?

The conceptual problem that underlies this interpretation is common and was already pointed out in Wesley Hohefeld's famous 1913 article on judicial reasoning. The idea of property, Hohefeld noted, is used by professional lawyers and laymen in such a manner that confuses legal with non-legal meanings, being sometimes used to describe the physical object (e. g. land) or the legal rights, privileges, or exclusions that describe the legal interest associated with the physical object. And most problematically, adds Hohefeld, »the term is used in such a ›blended‹ sense as to convey no definite meaning whatever«.[1] Therefore, it is unfortunate that Greer did not take the *legal* dimension of property more seriously, most importantly because even understanding property in »fluid and dynamic terms«, as the book suggests, does not resolve the tension between the rights-centered nature of property and the empirical complexity and contingency that the book seeks to explore. This could have been perhaps better reflected through the nuanced use of other legal institutions, such as possession or dominion, or through the analysis of other sources of law such as custom. Property, essentially, refers to *one* legal relation used to describe relations between persons, land, and third parties that, however, cannot be presumed to describe *all* the forms in which this relation occurred, especially when speaking of the early modern American world.

Perhaps the incongruity between the strength of the argument and the conceptual limitations of this book cannot be solely attributed to its author. Specialized research into the multiplicity of legal institutions and sources of law that defined land relations in the New World is still for the most part lacking. The particular importance of custom and possession in generating rights to land, for example, has only recently begun to gain attention; and the manner in which land was tied to corporate bodies (families, the Church, towns, and *pueblos*), and not necessarily to individuals, has so far not been explored in a detailed legal historical perspective. This, ultimately, points to the limitations of the categories that 21st-century historians rely on when speaking of a world and peoples – European

1 Wesley N. Hohefeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, in: The Yale Law Journal (1913) 23,1, 22.

and natives – that had a radically different manner of understanding their relation to the land: a world in which no one had property. *Property and Dispossession* shows that mapping, measuring, surveying, and owning had particular early modern qualities and particular manifestations in different parts of North America. The larger question of what categories organized the relations between people, their land, and third parties in this context remains open and is a question that legal historians of the Americas should begin to take seriously.

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Thomas Duve

Verstanden?*

Verstanden die europäischen Invasoren und die Angehörigen indigener Völker in Amerika sich eigentlich, wenn sie Verträge schlossen, über Rechte verhandelten, vor Gericht miteinander stritten? Fanden sie einen *middle ground* oder agierten sie nach dem Prinzip des *code switching*? Diese Fragen stehen im Mittelpunkt des von den US-amerikanischen Rechtshistorikern Brian P. Owensby und Richard J. Ross herausgegebenen Bandes *Justice in a New World. Negotiating Legal Intelligibility in British, Iberian, and Indigenous America*. Sieben Fallstudien rekonstruieren Momente der rechtlichen Interaktion zwischen Angehörigen indigener Gemeinschaften und Euro-Amerikanern in Anglo- und Iberoamerika zwischen dem 16. und dem 19. Jahrhundert. Sie werden gerahmt von einleitenden Überlegungen der beiden Herausgeber zur Möglichkeit des Vergleichs zwischen britischen und iberischen Rechtsräumen sowie zwei zusammenfassenden Beobachtungen.

Die vielleicht etwas speziell anmutende Fragestellung mag nicht gleich erkennen lassen, welche Bedeutung das Thema hat: Es geht um die Rolle indigener Akteure im Prozess der Etablierung der kolonialen normativen Ordnungen, damit auch um Inhalt und Ausgestaltung dieser Ordnungen. Waren Angehörige der indigenen Völker dem Recht der Europäer hilflos ausgesetzt oder hatten sie so etwas wie *legal agency*? Verschwanden ihre Rechte, gab es Konvergenzen, Hybridisierungen, Rechtspluralismus, nutzte man das Recht der anderen?

Das Buch kann auf eine inzwischen recht umfangreiche Forschung zur Justiznutzung durch indigene Akteure in Anglo- und Iberoamerika zurückgreifen, fügt dieser gründliche Fallstudien hinzu und verfolgt mit seiner vergleichenden Perspektive ein anspruchsvolles Projekt. Schon die Rekonstruktion der Kommunikation zwischen den Angehörigen indigener Völker und den Kolonisatoren ist alles andere als einfach, sind doch die meisten Quellen, auf die wir zurückgreifen können, durch mindestens einen, meistens sogar mehrere koloniale Filter gegangen – bei der Formulierung, bei der Niederschrift, bei der Archivierung. »Indigene« und »koloniale« Rechtsvorstellungen sind deswegen, wenn überhaupt, nur mit erheblichem Aufwand und großer Unsicherheit rekonstruier- und kontrastierbar. Die große regionale Vielfalt innerhalb des spanischen Imperiums, die koloniale Dynamik, manche Ähnlichkeiten und große Unterschiede zwischen dem spanischen und dem portugiesischen Amerika machen allgemeine Aussagen schwierig. Gänzlich unmöglich scheinen sie zu werden, wenn man Britisch-Amerika hinzunimmt.

Diese Kombination bietet allerdings auch Potenzial. Die Einzelbeobachtungen können aus

* Brian P. Owensby, Richard J. Ross (Hg.), Justice in a New World. Negotiating Legal Intelligibility in British, Iberian, and Indigenous America, New York: NYU Press 2018, 352 S., ISBN 978-1-4798-0724-6