The Theory and Practice of Indigenous Dispossession in the Late Nineteenth Century : The Saami in the Far North of Europe and the Legal History of Colonialism

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Abstract

The dispossession of indigenous peoples is one of the central issues of the postcolonial world. The purpose of this article is to explore the Saami dispossession in the nineteenth century in the far North of Europe through a comparative approach. By comparing the theory and practice of the Saami dispossession with examples from Oceania, North America and Africa, the article analyses the role of legal and anthropological doctrines in the process of dispossession. Linking the history of colonialism with the idea of progress inherent in Western historical thought, it follows the complex convergence and transfer of ideas of property and indigenous rights that still influence debates on indigenous land rights.

Keywords: legal history, indigenous land rights, legal anthropology, colonialism, dispossession, comparative law

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[*] Academy of Finland Research Fellow, University of Helsinki. The article is a part of a long research project on the history of legal primitivism that recently culminated in the publication of the book *Lawyers and Savages* (Routledge, 2014). I wish to thank the CLH editors and the anonymous reviewers for their comments. Earlier incarnations of this paper were presented in different venues and I would like to thank for their comments on these occasions: Reetta Toivanen, Susanne Dahlgren, Sonal Makhija, Bill Nelson, Dan Hulsebosch, Lauren Benton, Sally Merry, Frederick Cooper, members of the Research Project Europe 1815-1914, and especially Martti Koskenniemi, and the Center of Excellence for Global Governance Research led by Jan Klabbers.

Introduction

During the nineteenth century, the indigenous Saami people of Lapland underwent a curious transformation in the eyes of the state officials who governed them. What had been a group of equal citizens was slowly turned into a primitive people without land rights. While previously the Saami had been able to register their land rights, by the mid-nineteenth century the customary grazing grounds of the Saami were taken into state ownership and increasingly parceled out to settlers. For the state governments ruling over Saami lands there was nothing peculiar about this. According to them, the lands had always been state lands and the Saami had only limited usage rights.

The case of the Saami dispossession is an anomaly, a European example of the practices generally associated with colonial settler states. At the same time, it is a typical case of indigenous dispossession in the nineteenth century, where agriculturalist settlers displaced nomadic indigenous peoples. The purpose of this article is to examine the intellectual history of the nineteenth-century indigenous dispossession as a legal process. Using the Saami case as a starting point, the aim is to trace how different instances of dispossession rested on surprisingly similar intellectual foundations. As a global phenomenon that defined nineteenth century colonialism, indigenous dispossession was driven by economic motives and population expansion, but it was justified by varied, often contradictory and mostly utilitarian theories. Earlier scholarship has interpreted the legal foundations of dispossession mostly within the national legal traditions, giving limited attention to the transfer of ideas like the *terra nullius* doctrine.[1] In contrast, this article argues that behind the legal justifications of

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[1] See the bibliographical review of Totten and Hitchcock (Samuel Totten and Robert K. (eds), *Genocide of Indigenous People* (Transaction Publishers, 2011). In addition to historical studies, anthropological works have analysed the processes of dispossession, for an overview, see Pauline E. Peters, 'Challenges in Land Tenure and Land Reform in Africa: Anthropological Contributions' (2009) 37 World Development 1317. In recent years there has

dispossession, there was a remarkably unified interpretation of progress that rested on an understanding of Western legal history and Roman law. From these legal and historical foundations, this study follows the complex and diverse repercussions of the idea of progress in the nineteenth century, ranging from the conviction of the superiority of individual ownership, the linkage between civilization and rights, and finally, to evolutionary theories of development.

The nineteenth-century dispossession of indigenous peoples and their loss of land rights has been a topic of considerable interest politically, legally and historically. Though much of the scholarship has focused on individual cases, there have been some attempts at drawing general outlines from this complex, multifaceted and evolving phenomenon. In a recent book, Stuart Banner outlined the numerous ways in which the American Indians lost their lands to white settlers and how the modes and practices of dispossession changed over time, but that in theory the property rights of Native Americans were recognized.[2] Later, Banner sought to expand this analysis to indigenous property rights in the Pacific area.[3] Recent works have implied that there is a global trend apparent in the dispossession of indigenous peoples in the colonial encounter of the nineteenth century.[4] Using remarkably similar policies and

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been resurgence in studies that have a comparative approach in the transfer of ideas and situating national cases within international trends. For example, Stuart Banner, *How the Indians Lost Their Land* (Belknap Press of Harvard University Press, 2005); Mark Hickford, *Lords of the Land* (Oxford University Press, 2011). For an overview of the recent literature, see Bain Attwood, 'History, Law and Aboriginal Title' (2014) 77 *History Workshop Journal* 283.

[2] See Banner (n 1).

[3] Stuart Banner, *Possessing the Pacific* (Harvard University Press, 2007). Banner emphasized the importance of the *terra nullius* doctrine. For a critique, see the review byBelich (James Belich, '*Review: Stuart Banner, Possessing the Pacific: Land, Settlers and Indigenous People from Australia to Alaska (2007)*' (2008) 113 *American Historical Review* 1472).

[4] For recent examples of the emerging field of comparative colonial studies, see Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge University Press, 2014); Kathleen Wilson, '*Rethinking the Colonial State*' (2011) 116 *American Historical Review* 1294); Richard Boast, 'The Effects of Tenurial Change in Nineteenth-Century Latin America and New Zealand' in Nicola Gilmour and Warwick E. Murray (eds), *Parallel Pasts, Convergent Futures? Comparing New Zealand, Iberia and Latin America* (Stout Research Centre for New Zealand Studies, 2011) 35–52; Kay Anderson, *Race and the Crisis of Humanism* (Routledge, 2007).

justifications, colonial settler states around the world took control of land previously held by indigenous inhabitants and gradually transferred large parts of it for the benefit of white settlers. While older postcolonial critical historical scholarship had explored the development of dispossession in practice,[5] it was less concerned with the influence of legal and anthropological doctrine in justifying and enabling these processes.[6] Earlier legal studies on dispossession have emphasized how the doctrine of international law influenced indigenous dispossession through the understanding of questions of sovereignty and how sovereignty has been linked with civilization in the understanding of rights.[7] In contrast, what this article is proposing is that the approach of dispossession through international law and sovereignty, while it has been important in many of the instances of dispossession such as in the US, is only a partial explanation limited to certain cases. Rather there is a more pervasive intellectual foundation behind indigenous dispossession, that of the historical idea of progress and civilization.

The idea of progress and development, propagated by the nineteenth-century legal, historical and anthropological authors maintained that primitive peoples lacked the concepts of ownership that were central to the societies of civilized cultures, instead existing on a lower level of communalism. The foundations of these theories lie within the history of Western law itself. Its theoretical manifestations may be seen in the evolution of the conceptions of

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[5] These works range from the nuanced, like Frederick Cooper, *From Slaves to Squatters* (Yale University Press, 1980) to the purely accusatory, such as Charles D. Rowley, *The Destruction of Aboriginal Society* (Australian National University Press, 1970).

[6] Mahmood Mamdani, *Citizen and Subject* (Princeton University Press, 1996). Less concerned did not mean unaware, but rather that the legal ramifications of the dispossession were seen as a façade, a sham to disguise the brutality of the dispossession. See, for example, Ward Churchill, *Struggle for the Land* (City Lights Publishers, 2002) and its focus on the struggle.

[7] Fitzmaurice (n 4); Lauren Benton, *A Search for Sovereignty* (Cambridge University Press, 2010); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004); Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge University Press, 2002); Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge University Press, 2001); James Alanya, *Indigenous Peoples in International Law* (Oxford University Press, 1996); Anthony Pagden, *Lords of All the World* (Yale University Press, 1995); Robert Williams, *The American Indian in Western Legal Thought* (Oxford University Press, 1990); Gordon Bennett, *Aboriginal Rights in International Law* (Royal Anthropological Institute, 1978).

property that span from Spanish neo-scholasticism through nineteenth-century theories.[8] Theories of the superiority of individual ownership and the lack of indigenous ownership of land were instrumental in the legal process of dispossession that dominated the nineteenth century colonial experience. New scholarship has increasingly recognized how the colonial experience was shaped by the meeting of conflicting ideas about property and land.[9] What this article seeks to argue is that there were in fact two narratives of property and progress that influenced colonial dispossession. The first narrative grew from the theory of savage outlawry, the idea that uncivilized indigenous peoples possessed no rights and were beyond human community – a narrative that developed in reaction to the discovery of the Americas and was popular in the early international law discussions. The second narrative grew from the nineteenth-century theory of the gradual development of civilization and property that was refined through historical studies and proved influential in the creation of anthropological theories of evolution.[10]

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[8] Adam Kuper, *The Reinvention of Primitive Society* (Routledge, 2005); see Fitzpatrick (n 7). The culmination of the evolutionary theories was Lewis Henry Morgan, *Ancient Society* (Harvard University Press, 1877). See also Williams (n 7) and Anthony Pagden, *The Fall of Natural Man* (Cambridge University Press, 1986) on the foundation of the early studies on indigenous cultures and their approaches to property.

[9] See Peters (n 1). Already Herman Merivale, *Lectures on Colonization and Colonies II* (Longman, Brown, Green, and Longmans, 1842) wrote about the issues of indigenous population in the colonies and later Vincent Liversage, *Land Tenure in the Colonies* (Cambridge University Press, 1945) viii, outlines plans for colonial territories 'peopled by indigenous, more or less primitive peoples.' Jovita Baber, 'Law, Land, and Legal Rhetoric in Colonial New Spain, A Look at the Changing Rhetoric of Indigenous Americans in the Sixteenth Century' in Saliha Belmessous (ed), *Native Claims* (Oxford University Press, 2012) 41–59, and Mark Hickford, 'Framing and Reframing the Agon: Contesting Narratives and Counter-Narratives on Maori Property Rights and Political Constitutionalism, 1840–1861' in Saliha Belmessous (ed), Native Claims (Oxford University Press, 2012) 152–175, describe how the discourse between settlers and indigenous actors utilized fluid positions and strategies in land issues. See James Heartfield, *The Aborigines' Protection Society: Humanitarian Imperialism in Australia, New Zealand, Fiji, Canada, South Africa, and the Congo, 1836–1909* (Columbia University Press, 2011) for an example of how philanthropically minded organizations influenced matters both in the colonial center and the colonies. Zoë Laidlaw, 'Slavery, Settlers and Indigenous Dispossession: Britain's empire through the lens of Liberia' (2012) 13 *Journal of Colonialism and Colonial History* 5, is quite negative on the impact of humanitarianism in the colonial realities.

[10] See Benton (n 7); Kaius Tuori, *Lawyers and Savages* (Routledge, 2014).

What this study seeks to provide is a new approach that links two global developments. The first concerns the development of the legal doctrine of dispossession and the second concerns the development of its practice. This study demonstrates how the two developments were interlinked. Like all links between theory and practice, demonstrating them is problematic as evidence can be tenuous. The writings of a scholar like Locke about property rights are not the reason why the indigenous peoples lost their lands during the nineteenth century, but such writings may be seen as indicators of a tendency to evaluate property rights in a certain way. The latest scholarship has maintained that legal discourse was of secondary importance and there was considerable ambiguity about indigenous land rights among colonial actors. Legal doctrines were imported from the colonial centers, but indigenous property rights were determined primarily by the political situation.[11]

In addition to the history of colonialism, the imposition of Western law, and the misrepresentation of indigenous legal ideas, the intellectual history of the dispossession of indigenous peoples also has contemporary legal relevance through the movement for the restoration of indigenous land rights. Through a number of landmark cases, the litigation surrounding restoration claims has forced settler states to revisit the process of dispossession and its legal justification. The historical and legal re-evaluation of this history has served as simultaneous processes in which the actions of the settler states have been criticized and even reversed.[12]

Analysing a global development of immense complexity and scale is necessarily a comparative enterprise. When tackling a multifaceted issue such as the dispossession of indigenous peoples on a global scale, where the strongest uniting factor appears to be chronology, the main task is to track connections and transmissions between processes taking place globally. This kind of interconnectedness has been studied through various lenses,

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[11] See Attwood (n 1) 289.
[12] Miranda Johnson, 'Making History Public: Indigenous Claims to Settler States' (2008) 20 *Public Culture* 97. The most important restitution cases thus far have been the Australian *Mabo v Queensland no. 2*, the South African *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC), and the Canadian *Delgamuukw v British Columbia* (1997) 3 S.C.R. 1010.

among them the theory of legal transplants, comparative legal history, global legal history, the study of empires and imperialism, colonial and postcolonial legal studies, subaltern studies and so forth.[13]

The article will first outline both the Saami experience of dispossession and the global development of indigenous dispossession. It will discuss some of the factors behind the colonial enterprises fueling the massive migration of people from Europe to the colonies and settler states. It will further demonstrate that these developments followed a similar pattern and chronology, which will be elaborated in four case studies. These studies will identify common patterns within heterogeneous and varied circumstances and within different legal and political contexts and will begin to trace signs of transmissions and influences. Secondly, it will address the possible explanations for the uniformity of developments and discuss its potential impact. The purpose is not to attempt to find a single explanation for a complex global process, but rather to elaborate on the interplay of political, economic, social, legal and intellectual factors.

The Saami Dispossession

In the North of Europe, the traditional lands of the Saami peoples in Lapland were transferred to state ownership in the nineteenth century. Though the Saami were historically a complex group comprised of reindeer herders, farmers, fishermen and other occupations, the policies that were applied to them began from the assumption that they were nomadic peoples without permanent residence. Compared with similar debates in North America or Australia, the Saami dispossession has thus far not received much attention from scholars of colonial legal history. However, the transfer of indigenous lands first to the state and then to settlers through the policies of claiming "unoccupied" or underutilized property as state land was not limited to Africa, Asia, America or Oceania. The Saami (earlier known as the Lapps, hence

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[13] The comparative approach to legal history has been pioneered by Mathias Reimann and Alain Levassuer, 'Comparative Law and Legal History in the United States' (1998) 46 *American Journal of Comparative Law Supp. 1*; James Gordley, 'Comparative Law and Legal History' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 753.

the name Lapland) are a group of indigenous peoples that share ethnic and linguistic ties. Numbering currently over a hundred thousand, they live in the northernmost parts of Norway, Sweden, Finland and Russia. Because the Saami comprise a fairly heterogeneous group that live in a number of different countries with distinct laws and practices, making general statements about the process of dispossession is difficult. Nevertheless, the common feature was that dispossession began in practice with the extension of state government to their lands during the nineteenth century, the increase in settler activity and the introduction of modern land registries.[14]

The first time the Swedish state made a claim of ownership on Saami lands was in a legal case over rights to pasture at the local court of Jokkmokk in 1793, over a century after the title was supposedly transferred. A new magistrate called Carl Fredrich Furtenbach, who had been appointed the previous year to the village of Jokkmokk, grew tired of dealing with feuding Saami families. Because they were seeking to bar each other from grazing reindeer on their lands, Furtenbach resorted to declaring that he could grant no injunction because the lands in question actually belonged to the state. This first incident proved to be of little general consequence at the time, but from then onwards whenever cases over the rights to Saami land reached officials outside the region, the administration's reaction was increasingly to assert the state ownership of land. An indication perhaps of how little interest there was in establishing state control over Saami areas, land cases were presented up to the 1830s under the assumption that the Saami had ownership of their lands. In the same local court of Jokkmokk in 1832, a Saami widow named Ingrid Nilsdotter had sought adjudication from the court concerning land rights. Nilsdotter had requested that the court grant her ownership of grazing grounds left by her late husband. The court rejected the claim, however, because the land would have to have been Crown land. Even though the Saami were in part

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[14] This view was only reversed by Kaisa Korpijaakko, *Saamelaisten oikeusasemasta Ruotsi-Suomessa. Oikeushistoriallinen tutkimus Länsi-Pohjan Lapin maakäyttöoloista ja -oikeuksista ennen 1700-luvun puoliväliä (The Legal Status of the Saami in Sweden-Finland before Mid-eighteenth Century)* (Lakimiesliiton kustannus, 1989). See also Kaisa Korpijaakko, 'Saamelaisten oikeusasemasta Suomessa – kehityksen pääpiirteet Ruotsin vallan lopulta itsenäisyyden ajan alkuun (The Legal Status of the Saami in Finland after Swedish rule to Independence)' (2000) 1/1999 *Diedut* 1.

living a nomadic lifestyle that included seasonal migrations, ever since the late Middle Ages they had lived in close contact with the Norwegian, Swedish, Finnish and Russian populations. As recent studies have demonstrated, for most of their common history under the Scandinavian kingdoms, their legal status was comparable to that of the rest of the population. This meant that they were granted title to their lands. Like in North America, in Lapland the change in status of the Saami was based on the reinterpretation of an old royal proclamation; in this case, on the reinterpretation of a statute by the king of Sweden in 1683 regulating the use and ownership of forests. Not that anyone would have noticed it at the time. The Forest Statute of 1683 authorized officials to delineate the borders of the lands belonging to villages and houses. At the same time it was announced that lands outside these boundaries belonged to the Crown by default. The purpose of the statute was probably to ease the founding of new settlements and homesteading on virgin lands and to prevent existing villages from making exorbitant claims regarding the extent of their forests. At the time, the Saami population was held to be on equal footing with the Swedish and Finnish populations in the application of this statute. In general, from the seventeenth to the early nineteenth centuries the Saami, like everybody else, paid their taxes, gained titles to their lands, made contracts to rent, sell and buy land, and when there were quarrels over land rights, these were taken to the local courts.[15]

The situation changed only in the mid-nineteenth century, when new legislation over land use in the North was discussed especially in Norway and Sweden. In the process, a new theory was proposed, claiming that the Saami were a nomadic people with no understanding of ownership comparable to that of 'civilized peoples'. Some made references to racial theories and the perceived inferiority of the Saami, others noted that they were pagans. In general, the arguments were based on evolutionary theories: The Saami were nomadic

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[15] Kaisa Korpijaakko-Labba, 'Naturen av samernas rättigheter och naturen av statens rätt' in *Vem får jaga och fiska* (Fritzes Offentliga Publikationer, 2005) 101–156. The most important studies on Saami land rights are the works of Korpijaakko-Labba; Otto Jebens, *Om eiendomsretten til grunnen i Indre Finnmark* (Cappelen akademisk forlag, 1999) and Nils-Johan Päiviö, 'Lappskattelandens rättsliga utveckling i Sverige' (2001) 3 *Diedut* 58. The Saami land tenure was initially through the category called taxed land or taxed Lapp land, a form of tenure that was both protected and transferrable.

savages and barbarians, whereas the settlers were cultivating land, which was understood as the precondition for civilization. Thus the foundation of true ownership was the use of land in farm settlement and agriculture. Because the Saami were not cultivating the land, they had no use for land ownership. Even though some argued that their long-standing usage rights over the land should be recognized, the fact was that overnight the Saami had been aboriginalized. The Saami were now categorized as a primitive people, who were in no way comparable to the settler population. This primitivistic interpretation of the Saami proved to be so resilient that even as late as the 1970s the Saami were described as a primitive culture in the scholarly literature.[16]

The changed status of the Saami to a primitive people corresponded with the rise of the primitivistic interpretation in early anthropological research; likewise the changed status of the Saami land rights corresponds to the developments in colonial states in Africa, Oceania and North America. As in North America and New Zealand, initially the states recognized the sovereignty of the Saami, for example in the Lapp Codicill of the border treaty of 1751 between the Nordic states. In the treaty, the states agreed that the status and the law of the Saami would be maintained unchanged. The Saami would continue to have administrative autonomy and would apply their own legal traditions in the Lapp Court. Only during the latter half of the nineteenth century did the Norwegian, Swedish and Finnish officials begin to exert their influence in the North with any regularity. The extension of state ownership over indigenous lands began, when Crown ownership was declared over the land in northern Norway in 1848.[17] Finland and Sweden followed suit in 1886 (Sweden with the Reindeer Act of 1886 and Finland with the Forestry Act of 1886, though these were preceded by acts of similar effect), although both countries maintained that Crown ownership over Saami lands was confirmed already in 1683. The rising nationalistic tendencies in the Nordic countries led

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[16] See Korpijaakko 2000 (n 14) 201–206; Committee for the Investigation of the Economy of Lapland, KM 1905:3 13–16; Steinar Pedersen, 'Fra bruk av naturgodene etter samiske sedvaner til forbud mot jordsalg til ikke-norsktalende' (2001) 34 *Samiske sedvaner og rettsoppfatninger* 291; Mattias Ahrén, 'Indigenous Peoples' Culture, Custom and Traditions and Customary Law: The Saami People's Perspective' (2004) 21 *Arizona Journal of International & Comparative Law* 63.

[17] Odelstingsproposisjon nr. 21, 1848.

to increasing demands for establishing control over the indigenous regions. In Norway, nationalists claimed that the Saami were nomadic barbarians who were wasting the land and that it should be granted to settlers instead. After 1848 ethnic Norwegian settlement was encouraged on Saami lands. The Norwegians went so far as to abolish the grazing rights of the Saami in Finnmark and to establish unlimited state control over the land. This was justified with the doctrine of *terra nullius* to claim that there were no obstacles in taking the land. As in the other Nordic countries, in Finland there was, in addition to the development of legislation, an administrative development, which strove to strengthen state control over land. Behind this was the increasing commercial value of forests that dominated the 1851 Forestry statute and the founding of the Finnish forestry bureau in 1863. In all these countries, settlement in the northern regions was encouraged and old limitations on homesteading on traditional Saami lands were revoked. As was typical in the treatment of indigenous peoples and settlers, Saami rights to lands were based on unwritten practice, while settlers were granted title to the land. As the land registries were being formed at the same time, this division became increasingly embedded into the system of land tenure.[18] The Saami had, at best, usage rights to public land, while settlers were given full title.

Saami land rights were on the whole precarious. In Sweden and Norway, for example, there was a lengthy debate extending to the latter half of the twentieth century over whether the Saami actually had any rights over land, or whether their land use should be filed under general use of public lands. In Norway, where the existence of Saami customary land rights had been repeatedly denied both in law and legal practice, the supreme court reinstated customary land rights only in the Brekken case of 1968. In Sweden, however, the law of 1886

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[18] See Ahrén (n 16) 74–92. The legal basis of Saami, state and settler rights have been disputed vigorously on the basis of customary law, human rights law, natural law, state laws etc, see Asbjørn Eide, 'Legal and Normative Bases for Saami Claims to Land in the Nordic' (2001) 8 *International Journal on Minority and Group Rights* 127 for the main arguments. See also Steinar Pedersen, 'The State and the Rejection of Saami Customary Law – Superiority and Inferiority in Norwegian–Saami Relations' in Tom G. Svensson (ed), *On Customary Law and the Saami rights Process in Norway* (Universitetet i Tromsø, 1999) 127–141.

confirmed Saami usage rights, even though the Swedish supreme court opposed this interpretation.[19]

In earlier studies, the changed status of Saami land rights has been attributed to the introduction of cultural hierarchy theories. However, even Ahrén admits that scientific theories played little or no direct role in the transformation.[20] He cites the various justifications and contextualizations presented at the time and later on by people arguing both for and against Saami dispossession. Thus, it would appear that everything from the recognition of sovereignty (similar to the US Indian law), *terra nullius* doctrine, racial theories, linkages between agriculture and possession, valuation about the beneficial use of land and so forth were all utilized. However, even without establishing a link between actions in the far North of Europe and theories like Locke's, it is clear that the Saami dispossession was a colonial phenomenon taking place inside a European country. What is unclear is what kind of colonial context it had.

Land and the Colonial Encounter

The gradual erosion of Saami land rights has numerous similarities with the situation of other indigenous peoples in the colonial settler states of the nineteenth centuries. Land ownership was one of the major issues if not the major issue affecting colonial policies from the nineteenth to the mid-twentieth centuries. The nineteenth century was characterized by a very strong population growth in Europe, which lead to increases in emigration and settlement activity. Population growth, when combined with inefficient methods of cultivation and restricted access to arable land, contributed to social unrest, rebellions and, at times, famine (on a devastating scale in Ireland 1845–1852 and in Finland 1866–1868). Even though industrialization was spreading, the main source of income for the majority of the European population was agriculture. Land, as is well known, is a finite resource, and despite the

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[19] Kirsti Strømm Bull, 'Saami customary law and the proposals of the Saami Rights Committee' (2004) 3 *Diedut* 163; Nils-Johan Päiviö, 'Skattemannarätt or Privilegium Odiosum' (2004) 3 *Diedut* 152.
[20] See Ahrén (n 16) 82.

introduction of new techniques and clearing new plots, the problem of excess population persisted in many European countries. One of the major aims of European colonization was to find a solution for the problem by settling the excess population to colonies outside Europe and to settler states in North and South America. This development, commonly known as the second phase of colonialism, led European settlers ever farther inland to find land for cultivation, leading to increased conflicts with the indigenous populations over the control of land.[21]

The massive transfer of land from the indigenous peoples to settlers was a defining feature of the nineteenth century's second phase of colonialism. Because the transfers of lands that took place were one-sided, to say the least, historical works on that period usually frame the question: How did the natives[22] lose their lands?[23] Reading the accounts of the legal history of dispossession, there emerges a fairly uniform sequence. Even though great variations exist and they are described below, the process of the indigenous population losing the possession of the lands they had previously settled would, at a first glance, appear divided into four main phases that took place during the nineteenth century:

1. Extending state sovereignty over indigenous communities
2. Declaring overall state ownership of land and making native title communal and non-alienable
3. Separating and distributing vacant lands
4. Privatization of tribal lands

This remarkably uniform procedure appeared to take place within the major regions of the world where colonialism as a process was significant.[24] What is noteworthy is how well this corresponded to the history of Saami dispossession as described by scholars like Ahrén.

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[21] The centrality of land tenure is evident even in contemporary accounts, see, for example, Merivale (n 9).
[22] The term "native" is here used solely as a historical term as used by contemporaries to denote the indigenous inhabitants in opposition to European settlers.
[23] See Banner (n 19 for a sample of the literature on the US developments. On the advent of the settler states, see James Belich, *Replenishing the Earth* (Oxford University Press, 2009).
[24] A slightly different scheme for the African development was proposed by Robert Debusmann, *Land Law and Land Ownership in Africa. Case Studies from Colonial and Contemporary Cameroon and Tanzania* (Bayreuth University, 1996) viii–ix.

There are naturally numerous variations and in many cases just the first two or three steps were taken.[25]

If we follow this outline in the general historical development of colonialism in the nineteenth century, the impression of similarity is further strengthened. In the first stage, state sovereignty over indigenous populations was asserted. As Lisa Ford has maintained, this took place within a few decades in the US, Canada, Australia and New Zealand. Though initially tribes and other indigenous groups were treated as sovereign states, in an uncannily simultaneous process during the 1820–1840s they were legally reduced to being under the overall jurisdiction of the settler state.[26] This takeover was often justified by the lack of civilization as a sign of the lack of sovereignty.[27]

The legal doctrine of ownership came into play during the second stage. Because natives were considered not to have similar conceptions of private ownership and instead appeared to practice some kind of communal or tribal system of land tenure, the land was habitually considered to be state land, which it held in trust for the natives. The Roman law of usufruct was often employed to convey the idea that the natives were allowed to use the land undisturbed, but they are not allowed to sell it. The practical purpose of this policy was often thought to be philanthropic, to protect the natives from exploitation and dispossession that would lead to the transfer of lands to white settlers.[28]

In the third stage, usually under pressure from settlers and other local economic interests to put the land to more efficient use, land surveys were made to separate what were considered vacant lands. Those lands were then distributed to willing parties, which were often settlers

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[25] The examples selected are by no means exhaustive nor do they claim to be representative on a global scale.
[26] Lisa Ford, *Settler sovereignty* (Harvard University Press, 2010). See also Fiona Bateman and Lionel Pilkington (eds), *Studies in Settler Colonialism* (Palgrave Macmillan, 2011).
[27] See Anghie (n 7).
[28] Martin Chanock, 'Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure' in Kristin Mann and Richard Roberts (eds), *Law in Colonial Africa* (Heinemann, 1999) 61–84, 63–64, 69, discusses how the control of the alienation of land was central to the British colonial rule.

and investors. Native lands were collected into reserves, which are administered by state officials and in some cases native authorities. The native lands were often administered according to the principles of native customs or what was considered to be the appropriate version of the native customs.[29]

In the fourth and final phase, allotment of native lands, the lands reserved for natives were distributed among the inhabitants, for example, those living on the land or those belonging to an entity such as a tribe. The privatization of lands often gave, for the first time, full title to the natives. In the US, this was exemplified by the termination policy. In many cases these allotments were not viable economic units and have often resulted in further loss of traditional lands through the selling of privatized lands.[30]

As stated, this very simple sequence corresponds with the events taking place in Lapland. However, this simplistic sequence of dispossession has no explanatory value in itself. In the following, I first explore how this development unfolded in various parts of the world, and the variations in how these actions were conceptualized in different legal cultures. While there is undisputable appeal in a common trajectory, what is noteworthy is that while there were similar developments, rationalizations and practices, the shared traits were always taking place within the context of the local legal system, mixed with elements and vocabulary that were specific to a time and place. Thus the meaning of words like crown, state, wardship, protection, waste, trust and development were deeply contextual.

On the surface, it would thus appear that the Saami dispossession and the colonial indigenous dispossession went through similar processes. But does this claim bear closer scrutiny and, more importantly, does it offer clues to the reasons behind the primitivization of the Saami?

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[29] Chanock (n 28) is a notable exception in the descriptions of this process in that he takes up the conflicting forces of colonial traditionalism and the social and economic opportunities brought by the enforced peace of colonial rule.

[30] Richard Boast, 'Individualization - an idea whose time came, and went' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership* (Routledge, 2010) 145–166.

In the following, I will compare the relative universality of the developments and their rationalizations and implications in colonial policies. I will also examine the intellectual history of land dispossession using a number of examples from North America, Oceania, and Africa and compare them to those taking place at the same time in Europe with regards to the Saami. In all of the examples one is dealing with very different legal systems employing their own internal logic and modes of argumentation. The purpose of this comparison is to demonstrate how heterogeneous legal systems adopted and utilized similar modes of action and justifications with seemingly little connection. In Australia and parts of the United States, the doctrine of *terra nullius* was used to claim that there was no owner to the land prior to the advent of Western settlers. In South Africa, indigenous lands were first interpreted as belonging to the tribal chiefs, allowing for a transfer to overall state ownership by elevating the head of state to the position of supreme chief. In New Zealand and most of the United States and Canada, tribal tenure was seen as part of the sovereignty of the indigenous peoples, a communal tenure under the general ownership of the state, while the rights of the nomadic indigenous peoples were sidelined as something less permanent and therefore less valuable than the rights of agriculturalist settlers. In the following, I will look at three specific aspects of indigenous tenure through a comparison of historical examples. First I examine how the issue of sovereignty determined the different approaches taken to indigenous land tenure in the US and Canada; second, I follow the way judgments concerning civilization determined the use of the *terra nullius* doctrine in Oceania; and, third, through the example of Southern Africa, I note how communal tenure was transformed into dependency on the state.

North America: Sovereignty and International Law

In certain respects, the context of the North American indigenous dispossession is closest to the Saami experience, since in both cases there had been centuries of cohabitation before important changes led to a rapid dispossession.[31] However, they show an interesting discrepancy. In the US, the legal framework of dispossession was in the first place formed

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[31] See, for example, Roger Nichols, *Indians in the United States and Canada* (University of Nebraska Press, 1998); Richard White, *The Middle Ground* (Cambridge University Press, 1991). For a review of the literature, see Ken Coates, 'North American Indigenous Peoples' Encounters' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook for the History of International Law* (Oxford University Press, 2012) 787–812.

through international law concepts such as tribal possession and sovereignty, while in Canada indigenous rights were individual rights. Like in the case of the Saami, in North America the doctrine was formulated through the reinterpretation of an early royal declaration. The North American situation of land tenure was determined by the use of dual strategies, one of *terra nullius* and one of recognizing communal title under the overall ownership of the state.[32] Since the developments in the US and Canada have been well covered, I will here restrict my observations to the general developments and their larger significance on a global scale. The convoluted wording of the British Royal Proclamation of 1763 had been interpreted differently in the US and Canada, with Canada recognizing indigenous title in theory but reducing it as a usufructuary right, while the US, through the doctrines of purchase and extinguishment, completed the whole cycle of recognizing sovereignty, reducing it by enforcing the communality and non-alienability of indigenous title, dividing former Indian lands to settlers and privatizing tribal lands.

In North America, the colonization period had begun comparatively early and a number of different actors were involved in formulating the process of land tenure, including Locke himself. The British Crown, as the ruler of territories in eastern North America pursued their own set of policies, while the French and the Spanish had their own colonial policies. The British had in the Royal Proclamation of 1763 reserved for the use of Indians, under its own dominion and protection, all lands beyond the Eastern watershed. This was in important cases such as *Johnson,* understood as the statement of the doctrine of discovery or conquest and the fact that vacant lands belonged to the crown. Nevertheless, the Indians were no longer owners of their lands and, consequently, could not sell it.[33] The legal status of Indians was further reduced by declaring them wards of the state. While actions to that effect had taken place in the American colonies already in the seventeenth century, in 1747 Massachusetts

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[32] Daniel Richter, 'The Strange Colonial North American Career of *Terra Nullius*' in Bain Attwood and Tom Griffiths (eds), *Frontier, Race, Nation* (Australian Scholarly Publishing, 2009) 159–184.

[33] Brian Slattery, *The Land Rights of Indigenous Canadian Peoples* (University of Saskatchewan Native Law Centre, 1979); Johnson & Graham's Lessee v McIntosh, 21 U.S. 543, at 595–596 (1823).

made all Indians in the colony wards of the government, an action imitated by most of the other colonies and later emulated by the Marshall court.[34]

In Canada, aboriginal title had been based on the same Royal Proclamation of 1763, which regulated the purchase of indigenous lands. The Privy Council case *St. Catharine's Milling and Lumber* (1888) interpreted indigenous title as a personal and usufructuary right depending on the will of the sovereign.[35]

A similar policy was adopted even in colonial America, a policy that was equally followed by the newly independent United States. During the nineteenth century the general trend of American Indian law had been one of greater federal control. Until 1817, American and British laws acknowledged the equal status of the Indian tribal jurisdiction, but from there on, in a mere sixty years, the tribes were brought under direct US administration. First, the independent power of the tribes was restricted and, second, in the wake of the Marshall court decisions, American jurisdiction and government extended their authority over the tribes. Finally, in the 1880s the tribes were taken under direct American administration with the creation of the Bureau of Indian Affairs.[36]

Though the uncontrolled purchase of Indian lands was not encouraged, neither was the Indian right of ownership recognized as absolute. Laws prohibiting or limiting Indians from selling land were made in many states prior to the Civil War. For much of the nineteenth and early twentieth centuries, US Indian policy was driven by two conflicting goals, one supporting the protection of Indian rights as understood by the philanthropists, while the other favoured the

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[34] Deborah A. Rosen, *American Indian and State Law* (University of Nebraska Press, 2007) 10–11.

[35] St. Catherine's Milling and Lumber Co. v The Queen (1888) 14 App. Cas. 46; Delgamuukw v British Columbia (1997) 3 S.C.R. 1010. Kent McNeil, 'Judicial treatment of indigenous land rights in the Common law world' in Kent McNeil, Benjamin J. Richardson and Shin J. Imai (eds), *Indigenous Peoples and the Law* (Hart Publising, 2009) 261. In the *Delgamuukw* case, it was stated that even though native title was recognized in the proclamation, it was based on the prior occupation of Canada by aboriginal peoples.

[36] Frances Svensson, 'Imposed law and the manipulation of identity: The American Indian case' in Sandra B. Burman and Barbara E. Harrell-Bond (eds), *The imposition of law* (Academic Press, 1979) 70.

displacement of Indians by settlers, informed by ideas like manifest destiny, civilizing mission and so forth. At a very basic level, in the face of land hunger by the settler population it was felt that because the Indians did not cultivate their land its seizure was justified. The official policy towards Indian tribal ownership fluctuated between (1) tribal sovereignty and (2) the right of conquest. In the first situation, the tribes were recognized as sovereign entities that exercised sovereignty within their territories, making purchase by treaty the preferred way of acquiring land. From the 1820s onwards, however, the shift towards the second situation, the right of conquest, gave the Federal government title to Indian lands. The issue was further complicated with the question of what was to be done with the Indian population itself, assimilation or separation. The Marshall court ruled in 1823 in *Johnson v. M'Intosh* in favour of the conquest/purchase doctrine and the inferiority of Indian property rights, but recognizing native title as the usufructuary right of use enjoyed by the Indians. Because settlers had received their title directly from the government, they were granted full title. In addition to this, the court ruled that as "fierce savages" Indians could not form a part of American society. In using the law of nations instead of the common law, Marshall effectively recognized the residual sovereignty of the Indian tribes.[37]

The three Marshall court cases outlined the Indian policy for a considerable time. *Johnson*, as mentioned, granted tribes right of occupation while giving title to the Federal government.[38] *Cherokee Nation v. Georgia* (1831) ruled that the Indian tribes are wards of the Federal government, who acted as their guardian, while *Worchester v. Georgia* in 1832 stated that only the Federal government, not states, could deal with the tribes. The policy of transferring Indian lands to settlers, known from things like *Indian Removal Act* (1830) and the Trail of Tears, is well documented, as is the setting up of reservations. The reservations, many of which operated on the principle of communal ownership, were meant to be parceled out to individual plots by the Dawes Act of 1887. Though traditionally the systems of land ownership in the tribes had varied greatly, with some tribes embracing private ownership, the

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[37] Rosen (n 34) 10–13, 219–221; McNeil (n 35) 262–263; Fitzpatrick (n 7) 164.
[38] Banner (n 1) 178–188 discusses the motivations of Marshall in the case and the effect it had in validating purchases of Indian lands. Banner claims that the right of occupancy in the meaning he had used it, was not an established part of English law as he had maintained but actually a new idea.

Dawes Act sought to impose common law ownership on all tribes, while setting up restrictions on sale even to other Indians. The intended aim of the Dawes act was to transform Indians into prosperous landowners, who would need less assistance from the federal government. However, the Dawes Act contained a system, by which reservation lands that were left over after each family had been allotted their share measured in acres, were declared surplus and open to sale to non-Indians. It is estimated that almost half of the land in Indian hands was thus sold to white settlers by the Bureau of Indian Affairs, which took control of the reservations. From 1887 to 1934 Indians lost two thirds of their land holdings. Only with the Indian New Deal policy from 1934 to the Second World War was there a change towards granting Indians more property rights.[39]

The North American experience has been immensely influential in the framing of the legal doctrines of indigenous dispossession.[40] Debates over the use of the *terra nullius* doctrine and the sovereignty theory formed an important precedent for the future. Contradictory tendencies were numerous, on one hand it was common usage to depict the Indians as lawless savages and, on the other, seeking to protect their communal land holdings and advocating for development to reduce what was seen as the waste of arable land under Indian control. Partly this was a question of utility and audience. It has been claimed that the doctrines of Roman law like *terra nullius* were mainly used against imperial competitors to assert sovereignty. In local circumstances, however, land would be bought to maintain peace, even though purchase would in principle recognize indigenous ownership.[41] For understanding the Saami experience, the most important distinction was that of sovereignty. While the US policy was mainly based on the recognition of the residual sovereignty of tribes and the tribes as administrative units with property rights, the Saami enjoyed only limited recognition of their sovereignty and their traditional customary law in any of the countries they resided.

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[39] Dalia Tsuk Mitchell, *Architect of Justice* (Cornell University Press, 2007) 65–67; Stephen J. Rockwell, *Indian Affairs and the Administrative State in the Nineteenth Century* (Cambridge University Press, 2010). On the Dawes Act and its motivations and consequences, see Janet A. McDonnell, *The Dispossession of the American Indian 1887-1934* (Indiana University Press, 1991).

[40] For example, Hickford (n 1) 49 notes how the rulings of the Marshall court were referred to as authoritative in New Zealand.

[41] Attwood (n 1) 286–288.

Instead, a policy similar to the Canadian one was followed, whereby the overall declaration of state ownership of land was combined with the recognition of indigenous usage rights to the land. What was typical of the legal determinations of the era in North America was how indigenous land rights were given better protection if they had effective control over their lands for example through agriculture and established political structures.[42]

Australia and New Zealand: Terra Nullius and the Evolution of Civilization

The British adopted very different approaches towards the land rights of indigenous peoples in Australia and New Zealand, in the former using the *terra nullius* doctrine to deny the permanence of all indigenous land rights, in the latter recognizing their collective land rights but seeking to purchase land at discount prices. For this inquiry, these two examples are indicative of how determinations made about the level of civilization that the indigenous peoples had attained were employed to decide whether their land rights were recognized. The first British colonists began to arrive in Australia during the late eighteenth century. While Australia had been declared empty, a land which was thought to be inhabited by a small group of incredibly primitive people, who had no states or social structure,[43] New Zealand was populated by the Maori, who had a system of communal title and a complex tribal organization. Because the literature on the process of dispossession on both New Zealand and Australia is quite extensive, I will here restrict my outline to the general developments in relation to the process of dispossession.

While in New Zealand there were disputes over the nature and extent of tribal tenure, in Australia the aboriginal population was deprived of land rights altogether. As hunter-gatherers they were perceived to be at the lowest rungs of evolutionary development, prompting questions about the possibilities of progress. It is fascinating that the idea of the aboriginals as living in a state of nature without any rights or laws, presented already by Cook in his diary, persisted for so long. From the early years of the conquest, the public was

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[42] Coates (n 31) 797.
[43] Lester Richard Hiatt, *Arguments about Aborigines. Australia and the Evolution of Social Anthropology* (Cambridge University Press, 1996).

under the impression that the aboriginals had no ownership of land, while in contrast successive ethnographers had since 1804 presented an opposite view that emphasized the various conceptions of ownership and rights among the different aboriginal communities. These conceptions were close to those of the Europeans. In fact, along with Blackstone, the philanthropic community heavily criticized the fiction of *terra nullius* and conquest to legalize what they considered to be the shameless plundering of the property of the natives.[44]

The idea that individual ownership was a sign of civilization functioned also in reverse: granting indigenous peoples individual titles would encourage individual initiative and progress. This was the rationale in North America, South Africa, New Zealand and Australia. The conviction that aboriginals were uncivilized , the remnants of the evolutionary process that had advanced and left them behind, had other tragic implications. For example, in Victoria, the Aborigines Protection Act of 1886 promoted the idea that half-castes, the children of mixed parentage, were capable of being incorporated into civilized society. Pure-blood aborigines were confined to stations and reserves with the expectation that they would become extinct, while half-castes would merge into the white society. The tool for assimilation would be the experience of individual ownership of land. In practice, the policy took a ruthless turn in that half-castes were to be separated from full-blooded aborigines, which meant that they were to leave the community to merge with the white society, sometimes when as young as four years old .[45]

In New Zealand, the chronology of events resembled closely the general scheme of indigenous dispossession, though the sequence varied from region to region. Nonetheless,

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[44] Hiatt (n 43) 18–19; Henry Reynolds, *The Law of the Land* (Penguin Books, 1987). The developments were influenced by the public perception of the aboriginals as childlike savages as well as race theories, of which see Anderson (n 4) 13. The early history of dispossession was extensively dealt with in the Mabo land case (n 12) and it was instrumental both in the formation of the Native Title Tribunal and the reorientation of legal scholarship of dispossession. There is extensive literature on the case and its repercussions.

[45] Paul G. McHugh, *Aboriginal Societies and the Common Law* (Oxford University Press, 2004) 278–279; Bain Attwood, 'Anthropology, Aboriginality and Aboriginal Rights' in Bruce Rigsby and Nicolas Peterson (eds), *'Tons and Tons of Material': Donald Thomson, the Man and the Scholar* (Australian Academy of the Social Sciences, 2005) 101.

claims to sovereignty, recognizing communal indigenous ownership, separation of lands to settlers and privatization of tribal lands all took place in New Zealand. The government claimed sovereignty over the Maori relatively late with the 1840 Treaty of Waitangi, while in practice they were even slower to actually claim jurisdiction.[46] The same treaty recognized that Maori lands were held tribally and communally and regulated under native custom, with no individual title or hereditary tenure pertaining to the individual. However, much of the controversy over the treaty has followed from the fact that there were actually two treaties, because the meanings of the English and Maori versions of the text were different, the English version limiting the Maori right to sell land.[47]

The dual policies of prohibition of purchase from the natives and assertion of communal ownership and individual right to use were, even in New Zealand, adopted from the 1860s onwards, with the first Native Land Act passed in 1862. Native land was divided into land under customary title and native freehold land and processes were initiated to turn the former to the latter. As is often the case, land considered unused or surplus or lands held by individuals or tribes that had rebelled, were sold to settlers. However, because of the stiff Maori opposition, there is a continuous history of land wars, land rights committees and negotiations from 1840 onwards.[48] Despite some opinions to the contrary, Maori title as recognized in the Symonds case in 1847 has been upheld, both based on custom and on usage. The main source of confusion was the overlapping claims of rights and the difficulty of translating sometimes very specific privileges to concepts understandable to the colonial administration.[49]

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[46] On the assertion of jurisdiction, see Shannaugh Dorsett, 'Sworn on the Dirt of Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of 'Barbarous' Customs in New Zealand in the 1840s' (2009) 30 *The Journal of Legal History* 175.
[47] Claudia Orange, *The Treaty of Waitangi* (Allen and Unwin/Port Nicholson Press, 1987). For the aftermath of reinterpretation of the treaty and the tribunal that was set up, see Janine Hayward and Nicola Wheen (eds), *The Waitangi Tribunal*, (Bridget Williams Books, 2004).
[48] Norman Smith, *Law affecting Native Land* (The Maori Purposes Fund Board, 1942) 4–6. Banner (n 3) 84 describes the individualization of title as conquest by land reform. On the aggressive land policies, see Richard Boast, *Buying the Land, Selling the Land* (Victoria University Press, 2008).
[49] McNeil (n 35) 265.

While the settler community demanded land, the government was making an effort not to disaffect the natives. In 1891 the government formed a Commission of Inquiry to look into native land laws. The Commission noted that while many land purchases were unproblematic in the sense that the price was agreed upon and the money was publicly divided among the members of the tribe, conflicts arose when several tribes claimed to be the owners of the land.[50] Thus, according to the Commission: "All the wars in New Zealand were either, directly or indirectly, caused by contentions arising from the disputed ownership of land."[51]

The distinction that was made by the British between the land tenure of Aboriginals of Australia and the New Zealand Maori was dependent on the level of social organization, which was equated with civilization. While the Aboriginals were thought to be at the lowest level of human and cultural development, little more than half-men that would be hunted as vermin, the Maori formed tribal groups and kingdoms, recognizable social and political units that made them count as men worth reckoning with in the eyes of the British. In Australia, the denial of land rights was abrupt and total. In contrast, the land policies of New Zealand resemble those of the US, where gradual purchases and evictions on the grounds of rebellion were the tools of dispossession. Though the Maori land rights were initially recognized, even there the terminology of waste and underuse was prominent. In recent works, it has been noted that purchase was first and foremost a practical and politically suitable policy, while the legal doctrine of aboriginal title was inconclusive and diverse.[52] When compared to the circumstances of the Saami, it is perhaps telling that only in Australia would the state so completely and unilaterally revoke the land rights of the indigenous peoples. The reason why this took place was possibly that neither the Aboriginals nor the Saami were mainly sedentary or had adopted hierarchical forms of social organization.

South Africa: Communalism and Transfer to State Ownership

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[50] The muddled state of land rights was depicted already by Smith (n 48) 4–6. Banner (n 3) 75 underlines the unequal positions of and information available to the seller and buyer.
[51] Commission of Inquiry Report (P.P. 1891, G. 1, p. vi), quoted in Smith (n 48) 6.
[52] Attwood (n 1) 289.

In Southern Africa, the process of dispossession in the nineteenth century varied regionally according to the scale of immigration by white settlers and the economic activities they undertook. For the current inquiry, the most interesting feature of indigenous dispossession was that there the native lands were taken into state ownership as a matter of course. Indigenous customary tenure was normally understood as communal and dependent on the goodwill of the state, while settlers were granted full title. If there were relatively few settlers, only the two first steps were taken, establishing sovereignty and the reduction of native land rights to communal rights dependent on the government. However, if there were strong economic interests such as European plantations or mining or logging rights at stake, the settlers or companies were often granted full title to the land. The privatization of communal lands was an often-discussed feature, but its realization was sporadic as it was opposed by most traditional tribal authorities.[53]

In Sub-Saharan Africa, the colonial land tenure process began earliest in the area of present-day South Africa, where widespread colonization had started already in the seventeenth century. In South Africa, colonial policies changed repeatedly from what was first the Dutch colony, then the British colony and the small states founded by Dutch settlers and finally the united South Africa. Like in India, early on a policy of treaties signed with local chiefs was taken in order not to take on the full responsibility of administration. Thus local chiefs were given some sovereignty and saddled with the responsibility of ruling their tribes ostensibly for the benefit of the colonisers.[54]

Land tenure in native areas was left mainly as it was. The few European administrators, missionaries, explorers and traders that visited tribal areas sometimes attempted to

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[53] General conclusions about the colonial systems of land tenure should not be made, as they were exceedingly complex and heterogeneous. On the curious dualism in Francophone Africa, see Jeswald W. Salacuse, *An introduction to Law in French-Speaking Area* (The Michie Company, 1969) 54–59.

[54] Edgar H. Brookes, *The History of Native Policy in South Africa from 1830 to the Present Day* (J.L. Van Schaik, Ltd., 1927) 12–15. As John L. Comaroff, 'Images of Empire, Contests of Conscience: Models of Colonial Domination in South Africa' (1989) 16 *American Ethnologist* 661 has demonstrated, the colonial policies in Southern Africa were to a large degree heterogeneous and contested.

understand how the native system of land tenure worked. In their writings, the communalistic narrative would emerge as the dominant way of understanding traditional land tenure in Africa. One of the earliest accounts of the indigenous law in South Africa, MacLean's 1866 *Compendium of Kafir Laws and Customs* stated that

> According to Kafir law all lands are held by the Chief, no man having a right to alienate or sell any piece of land, and no individual having an exclusive right to any spot as grazing ground.[55]

The principle of chiefs' control over ownership was later held to be almost universally applicable and subsequently amended with the idea that chiefs held the land in trust for the tribe, being unable to sell land without the tribe's consent. However, the crucial change of status that came with the British occupation was the introduction of the concept of ownership of all land by the Crown. According to this idea, the monarch had unlimited rights as the Supreme Chief of all tribes in South Africa and was holding the land in trust for the natives.[56]

Thus the general position of the British colonial administration towards indigenous tenure was a quasi-feudal arrangement in which the king or queen was the overall owner of the land, and the chiefs derived their rights from the monarch. Simultaneously, the tribal chiefs were also holding the land in trust on behalf of the tribes. The 1883 Native Laws Commission in South Africa offers a unique window onto the understanding of native customary law by colonial officials and the ideals, aims and developments occurring. In the extensive debates over the state of customary tenure and the possibilities of introducing progress in the form of private ownership, the traditionalist view prevailed. The commission took the view that native land theoretically belonged, according to native custom, to the supreme chief, who acted as a trustee for his people, who occupy it on "communistic principles". The Commission held that the well-intentioned efforts by the government "to extend the advantages of individual tenure to Natives" have not been successful. While securing

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[55] Colonel John MacLean, *A Compendium of Kafir Laws and Customs* (Frank Cass & Co. Ltd., 1968) 152.

[56] This was the interpretation of a contemporary observer, Brookes (n 54) 354–359. On the contemporary implications of this policy, see Ben Cousins, 'More Than Socially Embedded: The Distinctive Character of 'Communal Tenure' Regimes in South Africa and its Implications for Land Policy' (2007) 7 *Journal of Agrarian Change* 281.

individual property was held to be the ultimate aim of the government, it would take time for the Native Custom to "be superseded by the better system of holding land under individual right and by separate title deed." To enforce loyalty, the Commission suggested that lands under the individual title system could be forfeited in case of High Treason or conspiracy against the government.[57] This last mechanism resembled the one used in New Zealand.

The balance of ownership between the tribe and its chief was crucially changed in the *Hermansberg* landmark case in the Transvaal supreme court (1906), which gave the chief power to sell tribal land, facilitating the transfer of tribal lands to white settlers.[58] However, the case did further press into the judicial consciousness the primacy of communal ownership in native cultures:

> No doubt, when the natives first settled in this country, in Natal, and in other parts of South Africa, when they were governed entirely by their own customs and laws, the notions of separate ownership in land, or of the alienation of land, by a chief or anyone else, was foreign to their ideas.[59]

Subsequent legal action strengthened the argument that native land rights were both undefined and communal but liable to be transferred to white ownership, after which ownership became fixed and permanent. For example in the Privy Council case *In re Southern Rhodesia* (1919) the permanence of native title was rejected on the basis of social evolution: indigenous rights were not on the same level as the rights of civilized peoples.[60]

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[57] Report and Proceedings with Appendices of the Government Comission on Native Laws and Customs (1883) § 40–42 (1883). On the evolution of understanding of indigenous customary law, see Thomas Bennett, *Customary Law in South Africa* (Juta Law and Company, 2004).
[58] *Hermansberg Mission Society v Commissioner for Native Affairs and another*, TS 135 (1906). This power to sell lands with the consent of his own council removed the principal distinction between the chief's ownership and the chief holding the land in trust for the tribe.
[59] Hermansberg Mission Society v Commissioner for Native Affairs and another, TS 135, at 142 (1906).
[60] In re Southern Rhodesia, [1919] A.C. 211, p. 215; Heinz Klug, 'Defining the Property Rights of Others: Political Power, Indigenous Tenure and the Construction of Customary Land Law' (1995) 35 *Journal of Legal Pluralism* 119, 122–126. On the role of the Privy Council formulating policy for the British Empire, see Ivor Richardson, 'The Privy Council as the Final Court for the British Empire' (2012) 43 *Victoria University of Wellington Law Review* 103.

What made the South African policy peculiar was the onslaught of legislation starting from 1913 that sought to limit the rights of the black population to buy and own land in certain areas, leading to the Apartheid policy of designating rights of residence by race.[61] In the case of tribal lands the trend was clear. There would be a system of overall Crown ownership that was held in trust, sometimes with the demand of rent, for the tribes.[62]

While there was no unified system, the South African policy of native land as public land was replicated in other British colonies in Africa during the late nineteenth century: lands that belonged to natives under customary law were deemed as public land held by the government in trust for the use and benefit of the natives. In the German colonies, unoccupied land became similarly the property of the Crown, which often transferred native lands used in shifting cultivation to the Crown due to perceived abandonment. Despite examples to the contrary, the general tendency was clear in almost all African colonies: the natives were normally given rights to cultivate, not title, while Europeans were often granted title, and native land was expropriated for the benefit of European business interests. However, there were usually efforts to limit the transfer of land from the natives to Europeans and to protect native farmers as a way to limit social instability.[63]

Efforts by the government to expropriate native land as vacant or public land were not always met quietly. For example in the Gold Coast Colony (currently Ghana), a proposed Lands Law in 1894 would have moved the title of "public lands" to the government, giving it rights to decide mining concessions and timber licenses. This provoked massive protests engineered in part by a growing number of educated Fanti nationalists, who argued that the bill would

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[61] Natives Land Act, Act No. 27/1913. Though the act has been seen as the beginning of racial segregation, Feinberg and Horn have demonstrated that the act failed to stop the purchase of land by natives. Harvey Feinberg and André Horn, 'South African Territorial Segregation: New Data on African Farm Purchases, 1913–1936' (2009) 50 *The Journal of African History*, 41.
[62] The fact that the South African Republic ruled that 'natives' could not acquire ownership of land was a policy reversal that sought to unify a very complicated situation. Such decisions were common already in the Voortrekker states, for example Transvaal had made it illegal for natives to own land in 1855 See Volksraad Besluit No. 159 (1855), quoted in *Hermansberg Mission Society v Commissioner for Native Affairs and another*, TS 135, at 140 (1906).
[63] Debusmann (n 24) vii–xi.

amount to an illegal seizure of the country. After widespread protests, the bill was abandoned and in 1897 a new bill was introduced that would have given the government just the rights of administration to the land. The nationalists formed the Cold Coast Aborigines Right Protection Society to advance their cause and sent a delegation to argue their case against the government to the Colonial Secretary Joseph Chamberlain, the future prime minister. The delegation was successful in persuading the Secretary that native law should prevail and consequently the new law was withdrawn. One of the consequences of the incident was that a British-trained barrister named John Mensah Sarbah (1864–1910), a leader of Fanti nationalists, wrote the *Fanti Customary Law* (1897). His aim was to show how the African legal and social system was a result of a long development and that the system was not to be tampered with in terms of unjustified expropriations. The proposed bill, for example, would not just deprive the natives of their land, but would also destroy their way of life and society.[64]

The appropriation of indigenous lands led to both legal and political problems all around Africa. The Italian colonial administration encountered similar issues in trying to reform the convoluted traditional system of land tenure in Eritrea, which had become an Italian colony in 1890. The aim was to give land to settlers, but instead the effort led to a revolt.[65]

In the British Empire, the idea of indigenous communalism was cemented in 1921 in the Privy Council case *Amodu Tijani*, which rejected both the use of the legal notion of *terra nullius* in Africa and the feudal interpretation of chief's rights.[66] Instead, the court ruled that

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[64] Hollis R. Lynch, 'Introduction' in Mensah Sarbah (ed), *Fanti National Constitution: A short treatise on The Constitution and Goverment of the Fanti, Asanti, and other Akan Tribes of West Africa* (Frank Cass and Co., Ltd., 1968) vii. The Fanti had been traditional British allies against the Ashante. On the London side of the process, see also Heartfield (n 9).

[65] Carlo Conti Rossini, *Principi di diritto consuetudinario dell'Eritrea* (Tip. dell' Unione editrice, 1916) 335–357; Lyda Favali and Roy Pateman, *Blood, Land and Sex* (Indiana University Press, 2003) 107–111, 116–119.

[66] *Amodu Tijani v The Secretary, Southern Provinces*, Privy Council, 11 July 1921, quoted as [1921] 2 A.C. 399.

the lands were communally owned by members of the tribe.[67] However, it instituted another universal system of land rights, one based on communal ownership.[68] It had a tremendous impact all around the British Empire, and it was used as an authoritative guide around the world.[69]

In East Africa, a multitude of land laws restricted full title effectively to European holdings and the feudal assumption of the supreme title of the Crown enabled land transfers to European plantations.[70] Even later attempts to protect indigenous holdings were unable to stop the encroachment of European commercial farming on native lands.[71]

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[67] *Amodu Tijani v The Secretary, Southern Provinces*, [1921] 2 A.C. 349. *Amodu Tijani* was a case regarding the permanence of land rights by native inhabitants of the island of Lagos that was ceded to the British in 1861.

[68] The indigenous customary law was discussed in terms of concepts drawn directly from English law and Roman law. These were dangerous borrowings, liable to produce misunderstandings. Antony N. Allott, 'Aboriginal Rights and Wrongs: The Mabo Land Case' (1993) 118/119 *Law & Justice. Christian Law Review* 84, 96–100; Thomas Bennett, 'Terminology and Land Tenure in Customary Law: An Exercise in Linguistic Theory' (1985) 1985 *Acta Juridica* 173, 176–177. On Lord Haldane, see Frederick Vaughan, *Viscount Haldane* (University of Toronto Press, 2010).

[69] Allott (n 68) 94.

[70] This policy of turning native land to Crown land was in effect until the Second World War, while during the Mau Mau rebellion in Kenya it was quickly revised with the aim of producing contented peasants who would be willing to defend the land they owned. HWO Okoth-Ogendo, 'Imposition of Property Law in Kenya' in S. Burman and B. Harrell-Bond (eds), *The Imposition of Law* (Academic Press, 1979) 149–159; Rudolph W. James and GM Fimbo, *Customary Land Law of Tanzania. A Source Book* (East African Literature Bureau, 1973) 30–32. Cyprian F. Fisiy, 'Techniques of Land Acquisition: The Concept of "Crown Land" in Colonial and Post-Colonial Cameroon' in Richard Debusmann et al (eds), *Land Law and Land Ownership in Africa* (Bayreuth University, 1996) 226–227, quoting Kenyatta (Jomo Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu* (Secker and Warburg, 1965) 47). The Kenyan independence movement utilized the discontent that this caused, for example Jomo Kenyatta remarked that while the Gikuyu were never conquered by the force of arms, the European colonizers reduced them from the position of original owners of the land to tenants at the will of the Crown with the deceitful transition of their ancestral lands to Crown lands.

[71] Roland E. Richter, 'Land Law in Tanganyika since the British Military Occupation and under the British Mandate of the League of Nations, 1916–1946' in Debusmann et al (eds) (n 70) 64–67.

The Southern African development is an interesting case to compare with the Saami dispossession, as there was a similar line of argumentation that resulted in the transfer of land ownership from the indigenous population to the state or Crown. A second similarity was that the indigenous land rights that were recognized were bound to continuous usage. However, the most pervasive difference was the concept of trust used liberally to describe the overlapping land rights by the Crown, chiefs and people. Thus the arrangement may be described as a fairly odd combination of feudalism and paternalism.

The Ideology and Science of Land Tenure

From the survey of comparable cases, it is evident that while there was no direct comparison for the policies used in the Saami dispossession, the similarities were striking nonetheless. From these similarities, it is apparent that there were two shared convictions that shaped the colonial systems of land tenure and the Saami dispossession. The first was the linkage that was seen between rights and civilization. The second was the belief that there was an inherent development of ownership from communal to private ownership. The teleological nature of the historical idea of development as a line leading from communalism to private ownership may be seen influencing policies in North America, Australia and New Zealand, South Africa and Scandinavia. Similarly, it was clearly easier for colonial officials to recognize the land tenure of agriculturalists organized in structured societies than the rights of pastoralists or hunter-gatherers. From the survey, it is immediately clear that what one is dealing with in the Saami experience is a colonial situation utilizing colonial legal strategies. Even the curious mixture of different legal doctrines that were utilized seems to correspond to the current view of the secondary nature of legal doctrine to the political and economic process of indigenous dispossession. Legal argumentation was not consistent but rather a practical way of offering means and justifications for the colonial actors.

It has been recognized in studies on African land tenure, for example, that the colonial conception of communal land tenure under customary law was a politically-expedient simplification of complicated systems by colonial officials and African leaders in which land rights were vested in the tribes and their chiefs. However, the colonial system was also

influenced by ideas like the "tragedy of the commons", the interpretation of the history of communal lands in Britain as an impediment to progress. Individual tenure was thought to be a superior form of landholding and to lead to greater wealth. Even though this interpretation has been criticized and the success of privatization of land is open to question, it is still common among suggestions for reform to include securing individual land ownership.[72]

Because land and other resources were one of the main reasons for late nineteenth-century colonialism, the issue of land tenure and use was central in colonial societies all over the world. Land was also the prime motivator behind numerous contradictory ideals and aims of the colonial enterprises. Land had to be allocated to settlers for economic reasons, while the "natives" were to be protected from the adverse effects in the name of humanity and philanthropy. Finally, it was considered important that the natives would be educated in the new methods of agriculture in order to increase their economic productivity. While the humanitarian objectives were an integral part of the self-understanding of colonial powers, the facts on the ground were usually markedly less noble. The dynamics of the colonial confrontations, though often portrayed as the monolithic colonial state against the indigenous peoples, could be very complex. It has been shown how the government agencies in the colonial centers would at times aid the indigenous populations against the incursions of the settlers. In these conflicts, the actions of the colonial center were motivated not only by their own philanthropic ideals, but also influential agents like the British Aborigines Protection Society, which actively pressured the government. As in the case of the anti-slavery movement, securing indigenous land rights led to conflicting interests among the settlers and the central government.[73] Issues such as indigenous title and limitations of sale were not only a means of dispossession, they were also ways of controlling both the settlers and the natives.

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[72] In Africa, land tenure has been one of the major post-colonial policy issues engaging governments, international organizations, NGOs and donor agencies. The issue of land reform has often been linked with ideas of securing land tenure and thus encouraging investment and fighting poverty. Peters (n 1) 1317–1318.

[73] Heartfield (n 9). The negative view of the rapacious settler is evident in Merivale (n 9). However, modern observers largely agree with Banner that such philanthropic efforts were usually not successful beyond isolated cases. Banner (n 3).

The debates over land tenure also held a rich subtext in the history of Western political philosophy over the idea of property. As mentioned in the introduction, there were two main lines of argument that had been advanced in the legal and political scholarship since the early modern period. The first was the denial of nearly all rights to the 'savages', a theory originating from early international law scholarship that maintained that indigenous peoples like the American Indians were too uncivilized to be reckoned as a people who could, as a rule, exert ownership and be protected in their ownership rights. The second was the theory of the development of civilization and its linkage to ownership, which claimed that historically man had progressed from early communalism to private ownership and thus there was a fundamental unity in the developmental narrative. These two theories were both influential in the justifications of colonialism and indigenous dispossession, but because they were often used simultaneously and in conjunction with other theories like the popular racial or climate theories, telling them apart can be difficult.

The idea of the lawless and propertyless savage found its most influential expression in the theories of *terra nullius*. The colonial theory of *terra nullius* was founded loosely on the Roman law concept of *res nullius* or ownerless thing. According to Roman law, a thing that was not the property of someone else could be acquired by occupation, that is, through capture or otherwise taking physical possession of it. Most of the Roman law doctrine of *res nullius* concerned wild animals or war booty.[74] In the early modern international law scholarship these rules were reformulated under the name *terra nullius*,[75] where the Roman law doctrine was used very liberally to produce a theory of legitimating possession of land.[76]

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[74] Gaius 2.66-69, similarly Digest 41.2.1.1 and Digest 41.1.5.7; Digest 41.1.1.1 on the rules deriving from *ius gentium*.

[75] Randall Lesaffer, 'Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription' (2005) 16 *The European Journal of International Law* 25, 45. Benjamin Straumann, 'Is Modern Liberty Ancient?' (2009) 27 *Law and History Review* 55, 78 criticizes Lesaffer's view of Roman law not accepting occupation as a mode of acquisition as too limited.

[76] Lauren Benton and Benjamin Straumann, 'Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice' (2010) 28 *Law and History Review* 1.

To a large degree the doctrine of *terra nullius* can be summed up as a device meant to legitimate the taking of Indian lands. It was opposed by Francisco de Vitoria, who maintained that even the savage infidels could own property,[77] and Hugo Grotius, who disputed the nature of Spanish discovery.[78] Another limitation of the *terra nullius* doctrine was the effectiveness of occupation,[79] and a will to exert ownership.[80]

In the natural law scholarship, ownership and the protection of occupation were one of the primary duties of humanity. For example, Samuel Pufendorf claimed that even the natives had the full right to decide how they used their lands.[81] On the other hand, John Locke argued that if the native had no rights or concepts such as ownership, they had not asserted such rights in the social contract. Living in a state of nature, the Indians were simply individuals without social or legal rights derived from a society or laws. What made this reading of Locke's theory especially appealing to settlers was the weight it gave to tilling the land. According to Locke, only through labor invested in the land does one actually become the owner. Thus hunters, gatherers and herders, because they did nothing beneficial to the land

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[77] Francisco de Vitoria, 'Relectio de Indis' in JB Scott (ed), *The Spanish Origin of International Law* (Clarendon Press, 1934) Appendix A, v-ix, xi (section 1, subsections 4-7, 19); Aquinas, *Summa* 2.2. q. 10, a. 12. Benton and Straumann (n 76) 22–23 et passim.
[78] Hugo Grotius, *The Freedom of the Seas* (Oxford University Press, 1916) 13 (ch. 2); Richard Tuck, *Philosophy and Government* (Cambridge University Press, 1993) 176–179; Hugo Grotius, *De Jure Belli ac Pacis Libri Tres, vol. 2* (Clarendon Press, 1925) 296–296 (b. 2, ch. 8, 1) by occupation (*occupatio*) if it belonged to no one. In the *De Jure Belli ac Pacis* the discussion on the matter of ownerless things related mostly to wild animals, alluvial deposits forming new islands.
[79] Samuel Pufendorf, *De jure naturae et gentium libri octo* (Clarendon Press, 1934) 386 (book 4, ch. 6, 3–4).
[80] Christian Wolff, *Jus gentium method scientific pertractatum, vol. 2* (Clarendon Press, 1934) 142–143, 147–148 (§280, 291).
[81] Pufendorf (n 79) 364–365.

would have no enduring rights to it.[82] Similar arguments about whether Indians had any laws and rights were presented frequently in the early colonial debates.[83]

Enlightenment thinkers would develop two important theories that would have a crucial impact on the way indigenous land tenure would be conceptualized and understood. The first was the theory of territorial possession as a sign of advanced civilization. Mainly based on Vattel, this theory maintained that uncivilized hunters and nomads lacked the permanent attachment to a territory that would give them a legal claim of possession. Thus it would be lawful for other nations to occupy such a territory. The second was the idea of development as a linear path leading from savagery to civilization as a process of accumulation in which skills and features were added, popularized by Adam Smith. Initially, this distinction was used to delineate a clear juxtaposition between the civilized and the savage and to reduce the savage as a subhuman without laws.[84] However, during the nineteenth century this theory would undergo a crucial change that would change the way indigenous land tenure was interpreted.

There had been a long early modern discussion over communal ownership in early societies, where Grotius and Pufendorf maintained that communalism was the original state of mankind, followed by patriarchy.[85] What made the nineteenth-century intellectual atmosphere so different[86] from the previous debates was the importance of empiricism, the idea that scientific arguments should be founded on verifiable evidence. During the early nineteenth

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[82] John Locke, *Two Treatises of Government* (Cambridge University Press, 1988). On the uses of Locke as justification, see Nils Oskal, 'The moral foundation for the disqualification of aboriginal people's proprietary rights to land and political sovereignty' in Tom G. Svensson (ed), *On Customary Law and the Saami Rights Process in Norway* (The University of Tromsø, 1999). Anderson (n 4) 44.

[83] Jennifer Pitts, 'Empire and Legal Universalisms in the Eighteenth Century' (2012) 117 *The American Historical Review* 92, 112 referring specifically to the debate between Hastings and Burke on India.

[84] Fitzpatrick (n 7) 131, 157; Anderson (n 4) 56–57.

[85] Grotius (n 78) 188–190.

[85] Pufendorf (n 79) 569.

[86] As Anderson (n 4) 26 notes, there were numerous continuities but the nineteenth century intellectual atmosphere was notably different.

century this tradition was transformed by the extension of historical studies into the earliest Western past. Scholars like Barthold Niebuhr and Theodor Mommsen argued that early Romans had practiced communal land tenure,[87] while Jacob Grimm maintained that among early Germanic peoples, land was owned by the community and shared.[88]

Another defining feature of the nineteenth century was the prevalence of universalizing scientific theories, which sought to abolish the division between civilized and savage in favour of evolutionary development. Henry Sumner Maine held in 1871 that private property was a relatively recent invention and the original state of the Indo-Europeans was that of communal ownership in patriarchal village communities. A few years later, Lewis Henry Morgan outlined his theory of the progress of mankind through a series of steps from savagery and communalism to barbarism and finally to civilization, marked by private ownership. The lasting contribution of Maine and Morgan was the idea of the universality of development from communal to private ownership that coincided with the advance of civilization.[89] Much of the background of all this extends to the Greco-Roman classical tradition, where ownership and cultivation of land were often preconditions of participating in civic life. Cicero defined ownership and securing ownership of land as the foundation of law.[90] Even in the early modern scholarship, the influence of biblical and classical sources was fundamental in the formulation of the developmental narrative. Grotius compared

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[87] Barthold Georg Niebuhr, *Römische Geschichte* (Verlag von G. Reimer, 1830) 176–198; Theodor Mommsen, *Römische Geschichte* (Weidmannsche Buchhandlung, 1888) 86, 182–184; Arnaldo Momigliano, 'Niebuhr and the Agrarian Problems of Rome' (1982) 21 *History and Theory* 3, 11–15. Christopher John Smith, *The Roman Clan: The Gens from Ancient Ideology to Modern Anthropology* (Cambridge University Press, 2006) 81–85.
[88] Jacob Grimm, *Deutsche Rechts Alterthümer* (Dieterichschen Buchhandlung, 1828) 494–495.
[89] Henry Sumner Maine, *Village-communities in the East and West* (John Murray, 1895) 103–109; Morgan (n 8); Friedrich Engels, *The Origin of the Family, Private Property and the State In the Light of the Researches of Lewis H. Morgan* (International Pub., 1970).
[90] Cic. Off. 1.7.21.

biblical narratives to tribes in America,[91] while Pufendorf sought the origins of communalism from ancient Rome and Germany,[92] as described by Livy,[93] Caesar,[94] and Tacitus.[95]

While the early modern developmental narrative had been one leading from the biblical and classical origins of virtuous simplicity to the corruption of riches, the theory of savage lawlessness presupposed a completely opposite situation. Authors like Locke and Austin maintained that property was the basis of law and thus, in the state of nature, men simply have no rights. Only through the introduction of agriculture and property rights would there be law and civilization. Later theories by Montesquieu and Smith focused on the progress from savagery to civilization.[96] Throughout the nineteenth and early twentieth centuries a fierce scholarly debate continued on the original Roman communalism[97] and the German and Slavic tradition of communal tenure.[98] Georg von Maurer argued that early Germanic tribes shared land as their common property, dividing arable land for cultivation,[99] while August von Haxthausen discussed Russian systems of village collectivism, where the patriarchal head of the family distributed common lands for individual use.[100]

From this background of biblical and classical examples, combined with accounts of the Germanic and Slavonic peoples, there emerged a set of universal theories of the development from communal to private ownership. What was different in these theories was that the main

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[91] Grotius (n 78) 186–187 (book 2, ch. 2.2.1).
[92] Pufendorf (n 79) 569–570.
[93] Liv 5.55.
[94] Caes. Gal. 4.1.4–7, 6.22.2.
[95] Tac. Ger. 26.
[96] Peter Fitzpatrick, *The mythology of modern law* (Routledge, 1992) 72–91.
[97] Liv 8.21.11; Momigliano (n 87) 16; Arnaldo Momigliano, 'From Mommsen to Max Weber' (1982) 21 *History and Theory* 16, 25–30.
[98] However, Fustel de Coulanges argued that even the earliest Germanic tribes were agriculturalists who knew private ownership of land. Numa D. Fustel De Coulanges, *Recherches Sue Quelques Problèmes d'Histoire* (Librairie Hachette, 1885) 189–205.
[99] Georg Ludwig Maurer, *Geschichte der Markenverfassung in Deutschland* (Verlag von Ferdinand Enke, 1856) 1–3, 63.
[100] August von Haxthausen, *Studien über die innern Zustände, das Volksleben und insbesondere die ländlichen Einrichtungen Rußlands* (Hahn'schen Hofbuchhandlung, 1847) vi-xii.

agent of change was progress in the economy, the systems of production. Morgan's theory was that with the introduction of agriculture in the "Middle Status of Barbarism" comes the idea of the ownership of land.[101] Morgan's critics, like Lubbock, noted that evidence from indigenous communities does not support his theory of agriculture leading to ownership, since many hunting communities among American Indians have communal tenure, while Australian aboriginals have strict ownership of land.[102] Lubbock argued that ownership was not tied to agriculture, but individual property in land was always preceded by a period in which moveable property alone was individual, while land was common.[103]

The theory of primitive communism, attributed to Marx and Engels, held to this idea that the original primitive form of property had been communal ownership in which rights and social obligations were balanced through redistribution of land.[104] Engel's 1884 book on primitive communism was a commentary on Morgan, where he ties in matriarchal theories, patriarchy and slave-ownership to describe how the original communism developed into capitalism.[105] The influence of this theory was considerable, as we saw, extending to discussions in the South African 1883 Native Laws Commission.[106] Even emerging anthropological studies on ownership held on to the developmental scheme of communalism, redistribution and individual ownership, leading to vast comparative analyses like those of German legal ethnologist A. H. Post.[107] This idea of the universal historical development of ownership permeated even the colonial mindset, where communalism and chief's ownership were the default options.[108]

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[101] Morgan (n 8) 12, 17, 26–27, 527–538, 541–542.
[102] John Lubbock, *The Origin of Civilisation and the Primitive Condition of Man* (Longmans, Green, and Co., 1882) 455–458.
[103] Lubbock (n 102) 456–457.
[104] Émile de Laveleye, *De La Propriété Et De Ses Formes Primitives* (Librairie Germer Baillière, 1874) iii–7.
[105] Engels (n 89) 77–78, 87, 199–200, 230–231.
[106] 1883 Native Laws Commission at 40.
[107] Albert Hermann Post, *Grundriss der ethnologischen Jurisprudenz* (Schulzesche Hof-Buchhandlung und Hof-Buchdruckerei, 1894) 334–336, 340–342.
[108] Sebald Rudolf Steinmetz, *Rechtsverhältnisse Von Eingeborenen Völkern in Afrika Und Ozeanien* (Springer, 1903) 12. See Andrew Lyall, 'Early German Legal Anthropology: Albert Hermann Post and His Questionnaire' (2008) 52 *Journal of African Law* 114 on the questionnaire.

Even in Europe, nationalistic scholars would use the linkage between the development of ownership and the advancement of civilization to argue for the glorification of the past. While in Finland of the late nineteenth century the Saami people were interpreted as uncivilized nomads, the roots of the Finnish population was seen as more civilized because the earliest evidence from folklore could be seen as supporting the existence of ownership and agriculture.[109]

The ideas of primitive communalism and lack of individual legal rights were by no means new, but what their scientific formulation offered was confirmation of their veracity. It may be argued that one of the reasons why the theories of primitive communalism and primitive communism were so popular was that they offered a universal theory based on the Western historical experience and the early colonial encounters between white settlers practicing agriculture and the natives. Early modern scholars like Grotius agreed that the original state of man was one of communalism. Moreover, historical scholarship on early Germans and Romans supported the assertion that, in the earliest state of development, land was held in communal ownership. It was relatively easy to conjecture, therefore, that indigenous peoples occupied an earlier stage of development. The idea that agriculture was the path to development from undeveloped communalism to private property explained both the European past and the future of the colonies. It may also explain why settler states often chose to respect the land rights of those indigenous peoples who practiced agriculture while disregarding those living a nomadic lifestyle.[110]

The relevance of these theories to the process of indigenous dispossession was in the legitimation they offered. As always, the driving force behind the dispossession was social, economic and political need, backed by military might. However, as Banner has suggested, it was not just that the brute realities of conquest and suppression were papered over with

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[109] Toomas Kotkas, 'Lemminkäinen-sånger i Kalevala - en historia om arkaisk rätt' in Jukka Kekkonen et al (eds), *Norden, rätten, historia* (Suomalainen Lakimiesyhdistys, 2004) 101–102.
[110] Banner (n 3) 316; Fitzpatrick (n 7) 179–181.

treaties and scholarly opinions.[111] It is clear from the cases that theories informed the legal framework and the justifications they offered were utilized. The theories made their way to the opinions of the Marshall court, which made treaties and purchases the legally preferred mode of dispossession, as they informed the indigenous land policies of Australia, South Africa, Lapland and a host of other places. One must not overestimate the importance of theories in the events on the ground, which were mostly determined by local considerations. However, when policies were drafted in the colonial centers, theories were clearly significant in the formulations of those ideas. Because policies and legal frameworks determined what could be considered a legal claim to land, they would indirectly guide the actions taken in the colonies.

One should not underestimate the impact of such potent social and intellectual changes with respect to their subsequent influence on these theories in colonial policies. For example in the early years of the nineteenth century there is a crucial change taking place. Initially, the theory of lawless and propertyless savages was used, for example, in the Australian application of the *terra nullius* doctrine and in the opinions of the Marshall court in the US. However, the use of international law to both deprive the indigenous peoples of their rights and land and to separate them from the human community provoked criticism. In Australia, there was vocal criticism against the *terra nullius* doctrine in the 1830s and 1840s, which claimed that it was factually false and should be replaced by the recognition of aboriginal title.[112] The historical theory of development was elevated in the place of international law doctrine. While the use of international law had led, in the US, to the recognition of indigenous sovereignty, their land tenure and legal autonomy, the influence of the historical approach may be seen in the way the modern state envelopes the indigenous communities in its legal system, land registries and approaches to protections through internal boundaries and limitations of capabilities. The noble savage is turned into a welfare case.

While all of the cases were markedly different, there were numerous connections and transmissions. These may be divided into two categories, institutional and intellectual. Of the

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[111] Banner (n 1) 1.
[112] Attwood (n 1) 284.

institutional links the most obvious one is the British Empire,[113] which had a direct role in many of the examples presented above. Not only was there a common language and exchange of ideas, but the imperial center provided the colonies with administrators learned in certain practices and regulated colonial legal policies through the decision of the Privy Council and administrative decisions. A further legal connection was, and is, the way judicial personnel circulated in the dominions, colonies and later Commonwealth countries. In addition to these, Britain was at the time the leading colonial power and its policies and practices were, if not followed, emulated and taken into consideration elsewhere. Policies of trust, protection and development were elements that had an empire-wide reach.

Of the interconnectedness of ideas, the clearest linkages may be found in the conceptions of ownership, in which the common theme appears to be one of effective possession. Indigenous land tenure was more likely to be recognized and protected if it was based on extensive and exclusive usage, for example in agriculture. Because use and possession were commonly understood to be the preconditions of indigenous ownership or tenure, other land uses were penalized because they were conceptualized as non-permanent usage rights rather than rights approaching full ownership. Saami reindeer herders, African and American pastoralists, hunters and gatherers in Australia and elsewhere were, with surprising uniformity and on a global scale, reduced to guests on their own land. The fixation on the permanent holding of land is apparent in the way rotating cultivation or leaving land fallow was penalized in Africa and elsewhere.

The idealization of permanent ownership of land and cultivation as the sign of civilization, the precondition of civilization or the byproduct of civilization was a central feature in numerous examples of development thought. Australian aboriginals, New Zealand Maori, American Indians and South Africans were all equally thought to be able to advance their conditions through the experience of civilization. As in the case of the Saami in Lapland, the civilizing process was often inseparable from the process of assimilation.

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[113] David Armitage, *The Ideological Origins of the British Empire* (Cambridge University Press, 2000).

The most enduring shared idea is that of indigenous tenure as something distinct and separate from regular ownership of land. In all of the cases, indigenous land holdings were unequal to those of the white settlers and conceptualized in a different manner. While settler ownership was permanent, based on written procedure and protected by land registries, indigenous tenure was dependent on occupation and usage, liable to be lost if either would cease. Indigenous tenure would often be based on the good grace of the state, while settler ownership would be protected even against the state's incursions.

Finally, one may ask whether the legitimacy offered by the various theories on indigenous land tenure had an effect in the process of dispossession? What has often been overlooked is how much the appearance of legitimacy counted in the self-understanding of many of the colonial powers and settler states, who had to take into account a public opinion often favourable to philanthropic ideals. We must not forget that there was vocal public opposition to openly dispossessing indigenous peoples in cases like the US Indian Removal Act, the application of the *terra nullius* doctrine in Australia, not to mention numerous incidents in Africa. Though colonial land policies in Africa and elsewhere were from the 1960s onwards condemned as the evils of colonialism, the tenor of earlier observers was very different, describing colonial governments as protectors.[114] As in all Nordic countries with Saami populations, the colonial governments saw themselves as the proverbial good shepherds, protecting the indigenous population from themselves while administering the land in a beneficial and rational manner. In the administrative sense, the belief in the legal validity of their own actions and the rights of the government to the land were based mostly on the tautological arguments of the governments themselves, repeated *ad nauseam*, until scholarly activists like Slattery began to question the validity of the claims themselves.

The issues were very complex and there are no simple answers due to the myriad ways in which these processes took place, a fact that has often been clouded by straightforward narratives of dispossession and genocide. As has been shown, the theories formulated by jurisprudence and anthropology played an integral part in the developments and their

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[114] Arthur Berriedale Keith, *The Constitution Administration and Laws of the Empire* (W. Collins Sons & Co., Ltd., 1924) 120–130.

justifications, creating an appearance of beneficial and legally-sound actions. Instead of approaching the issue as pure top-down imposition or oppression, it has increasingly been shown that there was a dialogue between the colonial center and its periphery as well as various indigenous and colonial actors.[115] However, in the latest studies the role of law has been problematized as the linkages between legal doctrine and the colonial world in the practice of indigenous dispossession have proven to be increasingly complex.[116]

As always, it is difficult to demonstrate beyond any doubt the extent to which the history of ideas directly impacted upon colonial practice. It would be easy to say that what was written in a few elite universities in Europe for an academic audience was confined purely to the ivory tower. However, the colonial discourse shows how it was permeated by the same ideas of development and the juxtaposition of primitive and civilized. Not only were the decision-makers of the colonial service often educated in the same universities, but also the public discourse in newspapers, events and publications were influential in the spread of ideas.[117]

In the case of the Saami, the colonial context of their dispossession remained unrecognized for a very long time. The main reason for this was that the self-understanding of the administration in the Nordic countries steadfastly held the matter to be purely about registered land rights and their formalistic interpretation. Thus, even though the Saami experience was clearly parallel to the colonial narratives of dispossession, administrative officials applied the same criteria to Saami and settler populations. As the Saami did not have the modern land registry certificates issued to the settler population, their land rights were not recognized. While in earlier studies the groundwork for the Saami dispossession has been sought as far afield as the theories of Locke, even here the Nordic situation appears to follow the general trend in colonial administration. Legal doctrine was utilized without much

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[115] Lauren Benton, *Law and Colonial Cultures* (Cambridge University Press, 2002); Kristin Mann, 'African and European Initiatives in the Transformation of Land Tenure in Colonial Lagos (West Africa), 1840–1920' in Saliha Belmessous (ed), *Native Claims: Indigenous Law against Empire, 1500-1920* (Oxford University Press, 2012) 223.
[116] Fitzmaurice (n 4).
[117] On the popular and scientific debates of the era, see George W. Stocking, *Victorian Anthropology* (The Free Press, 1987) and Banner (n 3).

consistency and with a utilitarian motive, where the most suitable of the available alternatives was harnessed to legitimize the political and economic decisions made.[118]

[118] Benton and Straumann (n 76) have argued that despite the extensive use of legal argumentation, the use of law in colonial discourse was based on a fairly poor understanding and, mostly, based on very pragmatic aims.