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Résumé de l'article

Le présent article expose une généalogie inédite du droit moderne de propriété qui ne peut être rabattue ni sur le récit qui lie le droit de jouissance exclusive à la progression des libertés individuelles ni à celui qui en fait une construction européenne formalisant l'appropriation capitaliste des moyens de production, notamment lors du mouvement des enclosures. Il explore l'histoire de la première colonisation et l'extraordinaire effort d'élaboration juridique qui l'a accompagnée. La conquête ibérique est un temps de césure dans le régime des droits médiévaux. En Amérique espagnole, pour la première fois, le droit n'a plus eu la fonction de réguler les usages, les pouvoirs et les échanges dans un régime d'obligations et de prérogatives enchevêtrées liées à la terre : sous des formes empruntées au droit médiéval, il a institué un ordre social radicalement nouveau lié à la violence extrême des premières décennies de la conquête. L'histoire de cette institution témoigne des vives tensions opposant les pratiques d'extorsion imposées aux territoires et aux peuples conquis et la représentation ancienne de la destination du droit, particulièrement du droit des personnes lié au statut de sujet de la Couronne espagnole. Parmi les formes juridiques médiévales qui ont trouvé une destination nouvelle, l'encomienda a été l'une des premières et l'une des plus importantes. Mais si elle peut être légitimement considérée comme l'une des racines du droit moderne de propriété, ce n'est pas comme prototype archaïque de la propriété exclusive, puisqu'elle n'est pas elle-même un droit foncier. Elle fût avant tout un droit de commande sur les personnes colonisées, ou, plus précisément, un double droit : un droit de destruction puissante des usages existants légitimé par la christianisation, et un droit de contrainte au travail productif. L'encomienda disloque ainsi dans son principe l'enchevêtrement juridique médiéval imbriquant le statut des personnes et des terres, et institue les rapports sociaux qui ont conditionné l'émergence du principe capitaliste de la propriété des moyens de production en tant que propriété exclusive.

A COLONIAL FACTORY OF PROPERTY RIGHTS: CONTRIBUTION TO AN ARCHEOLOGY OF NATURALISM

*Aliénor Bertrand**

This article presents a new genealogy of modern property rights that cannot be overridden either by the narrative that links the exclusive right of use to the progression of individual freedoms, or by the narrative that makes it a European construction formalizing the capitalist appropriation of the means of production, particularly during the movement of enclosures. It explores the history of the first colonization and the extraordinary effort of legal elaboration that accompanied it. The Iberian conquest was a time of a break in the medieval rights regime. In Spanish America, for the first time, the law no longer had the function of regulating uses, powers and exchanges in a system of entangled obligations and prerogatives linked to the land: in forms borrowed from medieval law, it instituted a radically new social order linked to the extreme violence of the first decades of the conquest. The history of this institution testifies to the strong tensions between the extortion practices imposed on conquered territories and peoples and the ancient representation of the destination of the right, particularly the right of persons linked to the status of subject of the Spanish Crown. Among the medieval legal forms that found a new destination, the *encomienda* was one of the first and one of the most important. But if it can legitimately be considered as one of the roots of modern property law, it is not as an archaic prototype of exclusive ownership, since it is not itself a land right. It was above all a right of command over the colonized persons, or, more precisely, a double right: a right of powerful destruction of existing uses legitimized by Christianization, and a right of coercion to productive work. *Encomienda* thus dislodges in its principle the medieval legal entanglement interweaving the status of people and land, and institutes the social relations that conditioned the emergence of the capitalist principle of ownership of the means of production as exclusive property.

Le présent article expose une généalogie inédite du droit moderne de propriété qui ne peut être rabattue ni sur le récit qui lie le droit de jouissance exclusive à la progression des libertés individuelles ni à celui qui en fait une construction européenne formalisant l'appropriation capitaliste des moyens de production, notamment lors du mouvement des enclosures. Il explore l'histoire de la première colonisation et l'extraordinaire effort d'élaboration juridique qui l'a accompagnée. La conquête ibérique est un temps de césure dans le régime des droits médiévaux. En Amérique espagnole, pour la première fois, le droit n'a plus eu la fonction de réguler les usages, les pouvoirs et les échanges dans un régime d'obligations et de prérogatives enchevêtrées liées à la terre : sous des formes empruntées au droit médiéval, il a institué un ordre social radicalement nouveau lié à la violence extrême des premières décennies de la conquête. L'histoire de cette institution témoigne des vives tensions opposant les pratiques d'extorsion imposées aux territoires et aux peuples conquis et la représentation ancienne de la destination du droit, particulièrement du droit des personnes lié au statut de sujet de la Couronne espagnole. Parmi les formes juridiques médiévales qui ont trouvé une destination nouvelle, l'*encomienda* a été l'une des premières et l'une des plus importantes. Mais si elle peut être légitimement considérée comme l'une des racines du droit moderne de propriété, ce n'est pas comme prototype archaïque de la propriété exclusive, puisqu'elle n'est pas elle-même un droit foncier. Elle fût avant tout un droit de commande sur les personnes colonisées, ou, plus précisément, un double droit : un droit de destruction puissante des usages existants légitimé par la christianisation, et un droit de contrainte au travail productif. L'*encomienda* disloque ainsi dans son principe l'enchevêtrement juridique médiéval imbriquant le statut des personnes et des terres, et institue les rapports sociaux qui ont conditionné l'émergence du principe capitaliste de la propriété des moyens de production en tant que propriété exclusive.

Este artículo presenta una genealogía inédita de los derechos de propiedad modernos que no puede ser anulada ni por la narrativa que vincula el derecho exclusivo de disfrute a la progresión de las libertades

* A similar French version of this article, « Archéologie coloniale du droit de propriété », was published in *Éric de Mari et Dominique Taurisson-Mouret, dir. L'empire de la propriété* (Paris: Victoires Editions, 2016).

individuales, ni por la narrativa que la convierte en una construcción europea que formaliza la apropiación capitalista de los medios de producción, particularmente durante el movimiento de los recintos. Explora la historia de la primera colonización y el extraordinario esfuerzo de elaboración legal que la acompañó. La conquista ibérica fue una época de ruptura con el régimen de los derechos medievales. En la América española, por primera vez, la ley ya no tenía la función de regular los usos, poderes e intercambios en un sistema de obligaciones y prerrogativas enredadas vinculadas a la tierra: en formas tomadas del derecho medieval, instituyó un orden social radicalmente nuevo vinculado a la extrema violencia de las primeras décadas de la conquista. La historia de esta institución atestigua las fuertes tensiones entre las prácticas de extorsión impuestas a los territorios y pueblos conquistados y la antigua representación del destino del derecho, en particular el derecho de las personas vinculadas al estatuto de súbdito de la Corona española. Entre las formas jurídicas medievales que encontraron un nuevo destino, la encomienda fue una de las primeras y una de las más importantes. Pero si se puede considerar legítimamente como una de las raíces del derecho de propiedad moderno, no es un prototipo arcaico de propiedad exclusiva, ya que no es en sí mismo un derecho sobre la tierra. Se trata, sobre todo, de un derecho de mando sobre las personas colonizadas, o más precisamente, de un doble derecho: un derecho de destrucción poderosa de los usos existentes legitimado por la cristianización, y un derecho de coerción al trabajo productivo. De esta manera, la encomienda desplaza en su principio el enredo legal medieval que entreteje el estatus de la gente y de la tierra, e instituye las relaciones sociales que condicionaron el surgimiento del principio capitalista de propiedad de los medios de producción como propiedad exclusiva.

In his *Lectures at the Collège de France, 1978 to 1979*¹, Michel Foucault stated that “the history of property rights” formed a “bridge” between the ancient right of sovereignty, revisited by the revolutionary edifice of the rights of man, and biopolitical governmentality whose “framework” is liberalism²:

between these two heterogeneous systems – that of the revolutionary axiomatic, of public law and the rights of man, and that of the empirical and utilitarian approach which defines the sphere of independence of the governed on the basis of the necessary limitation of government – there is, of course, a ceaseless connection and a whole series of bridges, transits and joints. Consider the history of property rights, for example.³

In fact, two main narratives dominate the history of property rights and compete with one another today: the first traces the growing influence of the right of exclusive use over the medieval regime of usages by linking it to the advancement of individual freedoms; and the second deals with this history as a formal effect of the global economic transformations of emerging capitalism. This second narrative can be subdivided: exclusive property is described as either an element of utilitarian rationalization or, in line with Marx’s theories, an ambiguous legal form. In the latter case, modern property rights are defined, not as the right to private property they claim to be, but rather as a homonymous right⁴ that formalizes the social balance of power. Under the pretext of exclusive use, property that is wrongly called “private” is in fact capitalist property which enshrines the owners’ acquired rights to the means of production at the same time as it validates the dispossession of workers from their former rights. These two narratives do have one point in common. However, they both consider property rights to be a modern European legal construction accompanied by the Hobbesian vision of the war of all against all, the resistances sparked by the enclosure and the inclusion of property rights as one of the Rights of Man during the French Revolution.

The hypothesis defended here takes an entirely different perspective. I explore the idea that Foucault’s “bridge” between the ancient right of sovereignty and utilitarianism could find its foundation in the history of the first colonization. Indeed, in Spanish America, for the first time, rights no longer had the medieval function of regulating uses, powers and exchanges in a system of interwoven obligations and prerogatives: it was clearly used for the economic exploitation of conquered territories and peoples. At the time, it was only put forward as a technical solution to the unprecedented problems associated with the colonial situation. In its forms rooted in

¹ Michel Foucault, *The Birth of Biopolitics, Lectures at the Collège de France (1978-1979)* (New York: Palgrave Macmillan, 2008).

² The liberalism so defined is the mode of government that defines the market as the principle of the organization of social relations that defines the market as the principle of the organization of social relations; it is the framework of biopolitics: “Studying liberalism as the general framework of biopolitics”. *Ibid* at 328.

³ *Ibid* at 43.

⁴ Karl Marx, *Capital: A Critical Analysis of Capitalist Production*, ed by Fredrich Engels, translated by Samuel Moore & Edward B Aveling (London, UK: Swan Sonnenschein, 1908) vol 1 ch 8 at 230ff [Marx].

medieval law, it enabled a radically new social order to be established. The establishment of this order created immediate tensions between the new colonial practices of production and extortion and the ancient representation of the purpose of rights, especially since the human rights were arising from their status as subjects of the Spanish Crown. Of all the medieval legal forms that were exported, the *encomienda* was one of the first and most decisive. It was a right of *commenda* over colonized people and more specifically, the right to force them to work. Although it can be considered as one of the roots of modern property rights, it was not, however, an archaic prototype of exclusive property, since it was not a land right in itself. Nevertheless, it marked the shift from a legal regime of reciprocal personal obligations to a regime regulating labour relations between the producers and the means of production. It thus established the social relations that led to the emergence of the capitalist principle of property as exclusive property.

In order to explain the profound transformation of the modern legal edifice while fully acknowledging the role played by the history of the rights of colonies, it is therefore enlightening to turn to the second major account of the history of property rights in its version that follows Marxist tradition, which is structured by the antagonism between the owners of the means of production and the workers. However, the project to establish a colonial archaeology of the right to ownership as proposed in this article encounters a new obstacle. The Marxist description and all the descriptions that claim to hold together the history of property rights and capitalism – understood as a global historical phenomenon – present a bizarre hiatus. Whereas the history of capitalism finds one of its essential conditions of possibility in the first European colonial expansion regardless of the angle from which it is contemplated⁵; meanwhile, the Marxist history of property rights has remained somewhat outside the study of colonial modes of primitive accumulation. The colonial archaeology of modern property rights thus invites us to revisit some of the “well-known” pages of the history of property rights by cross-referencing them with the long history of capitalism, going back to the phenomena that Marx referred to as “primitive accumulation.” What was the function of property rights in the shift from a medieval social organization to capitalism?

After describing the colonial experimentation of a new right as the instigator of new social relations marked by war and depredation, this article will retrace its subsequent implementation in European legal and political discourse and practices under the categories of modern property rights, especially considering John Locke’s thinking. It will thus outline a non-legal question, but one that is nonetheless vital for understanding the way in which property rights had the power to instigate: what was the relationship between the colonial generalization of forced labour and its consecration by law in the emergence of the anthropological form of property

⁵ For an example of the recent Marxist re-evaluation of the relations between the history of Marxism and the history of colonization, see John Bellamy Foster and Brett Clark, “Ecological Imperialism and the Global Metabolic Rift: Unequal Exchange and the Guano/Nitrates Trade” (2009) 50:3-4 *International Journal of Comparative Sociology* 311; Jason W Moore, *Capitalism in the Web of Life: Ecology and the Accumulation of Capital* (London, UK: Verso, 2015).

relations and production relations in modern Europe? To what extent did the property rights developed in the colonies contribute to the reconfiguration of the legal and political practices of the modern Western world? What were the conditions of their establishment? By shaking up the usual Euro-centred narrative frameworks of the origin of modern property rights and linking the European and colonial practices that history has tried to disassociate, the alternative approach proposed in this article will present a new hypothesis on the historical roots of the modern equivocality of property as criticized by Marx and Foucault. A background perspective will then emerge, centred on the nature of the relationship between the “administration of the colonies” and the birth of the modern State. It should be remembered that the property rights established in the colonies under the dual aspect of spoliation and then exclusive appropriation were imposed through a form of government aimed at a “population” that was not recognized as subject of the Crown. It anticipated the biopolitical arrangements that would develop much later in modern Europe.

I. *Encomienda, Sesmeria, Repartimiento: Colonial Metamorphoses*

The voluminous historiography of *encomiendas* has long been divided between socio-economic approaches and legal analyses: the former have shown how *encomiendas* conditioned colonial society; the latter, from an almost opposite perspective, have authorized interpretations that have gone so far as to cast doubt over their role in the subsequent concentration of land ownership in Latin America, because strictly speaking *encomienda* was not a land ownership regime.⁶ However, it is not contradictory to assert that *encomienda* was not a land ownership regime in formal terms and to state that it played a pivotal role in the archaeology of modern property rights, precisely because of the novelty of the social relations it imposed.

The specific forms of Spanish colonial appropriation in the Americas originated in the law of the *Reconquista* (Reconquest).⁷ As was the case under the medieval legal system, it defined the rights and personal obligations linked to the sovereign’s will to occupy, populate and use reconquered lands. Portuguese colonization also followed the *sesmaria* system, which involved a donation of land granted for services rendered and intended for cultivation.⁸ In Spanish America, *repartimiento* was a concession of land granted to military orders or individuals as

⁶ We should note Silvio Zavala’s belated self-criticism on this matter: Silvio Arturo Zavala, *Contribución a la historia de las instituciones coloniales en Guatemala*, 4th ed. (Mexico: Guatemala Universidad de San Carlos de Guatemala, 1967) cited and discussed in Luiz Ablas, “De la sesmaria au grand domaine: racines de la structure foncière au Brésil” (1995) 27 *Cahiers du Brésil Contemporain* 97. See also Sylvio Zavala, *The Political Philosophy of the Conquest of America*, translated by Teener Hall (Mexico: Editorial Cultura, 1953); Silvio Zavala, *La Encomienda Indiana* (Madrid: Centro de Estudios Historicos, 1935).

⁷ Tomás Gómez, *Droit de conquête et droit des Indiens : la société espagnole face aux populations amérindiennes* (Paris: Armand Colin, 2014) at 39-42 [Gómez]; Carmen Bernand & Serge Gruzinski, *Histoire du Nouveau Monde* (Paris: Fayard, 1991).

⁸ Luiz Ablas, “De la sesmaria au grand domaine: racines de la structure foncière au Brésil” (1995) 27 *Cahiers du Brésil Contemporain* 97 at 97-111.

reward of remarkable accomplishments made as a visible contribution to the *Reconquista*. The *encomienda* system also revisited a former institution whereby free peasants or small landowners placed themselves in the hands of powerful lords, exchanging protection for produce of the land, royalties or personal services. Under these medieval categories, as early as 1495, the *encomenderos* were asked to build a house on their land, start a lineage and respond to any royal requisition to defend the country with arms and horses.

The colonial situation in America quickly overturned these ancient uses that had originated during the *Reconquista*: the law was no longer intended primarily to regulate the practices and uses of the land among the people inhabiting it, in a manner that was no doubt extremely unequal and hierarchical, but rather with reciprocal personal obligations and duties. Through its dual legal “authorization” of the right to collect tribute and the duty to evangelize populations, the *encomienda* destroyed the subjugated indigenous collectives,⁹ relations and uses of the land, and reorganized their way of living around the export of goods and extractive production in favour of the *encomenderos*. This colonial shift away from the legal system in place during the *Reconquista* found its historical source in the reproduction and formalization of the Mediterranean states practice of establishing trading posts: the Genoese and the Portuguese,¹⁰ and even earlier the Venetians in Cyprus and Crete, as well as the Portuguese in São Tomé, and finally the organization of large sugar estates around Murcia and Valencia. Columbus had personal links with the sugar traders, especially those from Madeira with whom he had family ties. On his second voyage he transported sugar cane from the Canary Islands, and on his following voyage he was accompanied by 300 settlers planning to move to the Caribbean under the model of what Pierre Dockès called “the sugar paradigm”¹¹: single-crop farming that evolved on natural islands or isolates whose original population had been more or less wiped out, and cultivated on vast slave estates controlled by a small number of traders. Columbus also took the personal initiative of transporting slaves on the return cargo

⁹ The term “collective” is used here in reference to its use made by Philippe Descola in “Par delà nature et culture.” A collective is a collection of humans and non-humans, animals, plants, spirits and other natural entities. The political terms “First Nations” or “Indigenous Peoples” are inadequate, because they conceptually isolate “societies” from the world entities with which they are interlinked. I reserve the use of these terms to the contemporary context, modeled by *jus gentium* Western categories.

¹⁰ From 1418 for Madeira and 1427 for the Azores, the lands conquered by the Portuguese were subjected to a policy of systematic exploitation. In 1492, Madeira was already a sugar island and the Azores were used as a granary and livestock supplier. Sugar cane was introduced to the Canary Islands in the 1480s, but the Mediterranean maritime powers established trafficking that previously devastated the inhabitants and natural environment (orchids, shells, tree sap) since the 13th century. See Antonio M. Macías Hernández, “Les îles canaries, 1480-1525. Irrigation et première colonisation atlantique : le domaine de l’eau”, in Salvatore Ciriaco, ed, *Eau et développement dans l’Europe moderne* (Paris: Maison des sciences de l’homme, 2004) at 37-48. On the relationship between the conquest of America and of the Canary Islands, see also Gómez, *supra* note 7.

¹¹ Pierre Dockès, “Le paradigme sucrier, (XIe-XIXe siècle)” in Fred Célimène & André Legris, eds, *L’Économie de l’esclavage colonial : Enquête et bilan du XVIIe au XIXe siècle* (Paris: CNRS, 2002); Pierre Dockès, *Le sucre et les larmes. Bref essai d’histoire et de mondialisation* (Paris: Descartes & Cie, 2009); Jean Crusol, *Les îles à sucre, de la colonisation à la mondialisation* (Paris: Les Perséides, 2007).

ships,¹² but this was thwarted by the Crown, which decided in 1500 to grant these “Indians”¹³ their freedom and send them home. As is well known, although this initial effort to send slaves to Spain failed, in the Americas slavery has a long history: in Spanish America, the enslavement of populations deported from Africa was authorized as early as 1501, while the enslavement of “Indians” was legal until 1679. These practices were part of a long tradition of human trafficking originating in the capture of the Moors, privateering and the slave markets of Spain and Italy. However, the dominant legal form that stabilized in order to organize the exploitation of the “Indians” was more a generalized forced labour than the organization of an actual slave market.¹⁴ Despite revolts by the Taino people¹⁵ in 1499, the colonists’ practices and abuse of “Indians” were legitimized by the institution of the *Repartimiento*. Columbus later legalized the practice of distributing “Indians” under *commenda*, imposing a tax of one gold peso per “Indian” originating from Hispaniola. This institutionalization was thus a *fait accompli* policy – “the law after the facts.”¹⁶ Although the wording of these texts establishing the *repartimiento* and *encomienda* systems changed numerous times¹⁷, this pattern of institutionalization was repeated throughout the Conquest. The law usually formalized and endorsed the conquistadores’ practices; when it went against them, it was not applied.

In Spanish America, the *encomienda* destroyed or destructured the subjugated Indian Indigenous collectives and imposed new social relations marked by a new kind of domination: the transformation of the colonized people into a servile

¹² Hervé Pujol, “D’Hispaniola à la Nouvelle-Espagne : expansion coloniale et techniques d’encadrement de la main-d’œuvre indigène” in Bernard Durand & Martine Fabre, eds, *Le juge et l’outre-mer* (Lille: Centre d’histoire judiciaire, 2008) at 24 [Pujol].

¹³ The expressions “Indians” or “Indian People” are used in reference to the manner in which the Spanish and more generally Western societies historically categorized those they have dominated, thereby lastingly constructing the representations of colonial racism. These expressions will be used between quotation marks.

¹⁴ On slavery in New Spain, see Jean-Pierre Berthe, “Aspects de l’esclavage des Indiens en Nouvelle-Espagne pendant la première moitié du XVI^e siècle” (1965) 54:2 *Journal de la société des américanistes* 189.

¹⁵ This is the description given by Las Casas: “Then they behaved with such temerity and shamelessness that the most powerful ruler of the islands had to see his own wife raped by a Christian officer. From that time onward the Indians began to seek ways to throw the Christians out of their lands. They took up arms [...]” Bartolomé de Las Casas, *The Devastation of the Indies: A Brief Account* (Baltimore: John Hopkins University Press, 1992) at 33; The cruelty of the Spanish was such that “this Island of Hispaniola, once so populous (having a population that I estimated to be more than three millions), has now a population of barely two hundred persons” *Ibid* at 29; and “our Spaniards have no more consideration for them than beasts. [...] But I should not say “than beasts” for, thanks be to God, they have treated beasts with some respect; I should say instead like excrement on the public squares.” *Ibid* at 32.

¹⁶ “During this initial period of colonization, the law constantly followed the facts. Legislation had legalized the most reprehensible practices, and when it was intended to do justice, it was not enforced, or barely. Spain thus experienced a kind of fatality which threatened its colonial reality. The same process was repeated many times. We might consider, for example, the successive failures of attempts to reform the status of indigenous population in Algeria under French rule.” Norbert Rouland, Stéphane Pierré-Caps & Jacques Poumarède, *Droits des minorités et droits des autochtones* (Paris: PUF, 1996) at 102.

¹⁷ For a detailed chronology of the different legislations, see Gómez, *supra* note 7 and Pujol, *supra* note 12.

workforce. What the Spaniards thus instituted was the distribution of a human “labour force” either directly through forced labour and slavery in mines, forests and fields or indirectly through surplus labour required for the payment of tribute. Under the formal appearance of legal regulation based on reciprocal personal obligations, the *encomienda* and the *repartimiento* systems legitimated a major eco-social upheaval that dispossessed the conquered collectives of their uses and submitted them to the discipline of productive labour. The title of Las Casas’ account criticizing the *encomiendas* encapsulates what resulted from it: “The Devastation of the Indies.”

However, the establishment of the *encomienda* and the *repartimiento* systems that were imposed on the collectives of the Caribbean, Mesoamerica and the Andes did not “only” result in the social destruction of the Indies. It also reconfigured the ecological systems in which the Indigenous collectives lived, leading to mass reforestation through the forced abandonment of crops that reshaped the entire continent.¹⁸ Locally, it determined new geographical polarizations. In Peru, for example, the coastal town of Lima replaced the former Andean capital of Cuzco and became a hub of intense commercial activity linked to the transport of goods to Europe: spices, sugar, quinine bark, indigo, cochineal and metals – gold, silver and mercury. Mining towns grew rapidly and disproportionately: in Potosí, the largest indigenous city of the South American continent, the population grew six-fold in just over 20 years, increasing from 20,000 to 120,000 between 1549 and 1572.¹⁹ In 1611, there were 38,000 “Creoles,” 40,000 Spaniards, 76,000 “Indians” and 6,000 “Blacks”.²⁰ These figures are misleading, however: the “Black and Indian population” was constant but not identical, for the vast numbers of workers who died were immediately “replaced.”

The bodies of those Indians and of the slaves who died in the mines produced such a stench that it caused a pestilence, especially at the mines of Oaxaca. For half a league around these mines and along a great part of the road one could scarcely avoid walking over dead bodies or bones, and the flocks of birds and crows that came to fatten themselves upon the corpses were so numerous that they darkened the sun.²¹

Nevertheless, some had been speaking out against the legitimization of this destructive legal depredation²² for a long time, indeed ever since the first years of colonization. The Dominicans were famously vocal on this matter, particularly friar Antonio de Montesinos in his sermon of 21 December 1511 in Hispaniola:

¹⁸ The most remarkable aspect of this anthropogenic upheaval is the traces of climate change detected in the ice cores, to the extent that two statisticians have recently proposed establishing 1610 as the year in which the Earth entered the Anthropocene Epoch. See Simon L Lewis & Mark A Maslin, “Defining the Anthropocene” (2015) 519:7542 *Nature* 171.

¹⁹ Charles Lancha, “Las Casas protecteur des Indiens, défenseur des droits de l’homme” (1994) 118:589 *Revue historique* 51.

²⁰ Census of the viceroy Montesclaros.

²¹ Tzvetan Todorov, *The Conquest of America: The Question of the Other* (New York: Harper & Row, 1984).

²² The term “depredation” is used by Philippe Descola in contrast with “predation,” which is defined as “an incorporation of ‘others’ that is indispensable for the definition of the self” Philippe Descola, “Beyond Nature and Culture: The Traffic of Souls” (2012) 2:1 *Journal of Ethnographic Theory* 473 [Descola].

‘This voice,’ he said, ‘declares that you are all in mortal sin, and live and die in it, because of the cruelty and tyranny you practice among these innocent peoples. Tell me, by what right or justice do you hold these Indians in such a cruel and horrible servitude? On what authority have you waged such detestable wars against these people, who dwelt quietly and peacefully on their own land? Wars in which you have destroyed such infinite numbers of them by homicides and slaughters never before heard of? Why do you keep them so oppressed and exhausted, without giving them enough to eat or curing them of the sicknesses they incur of the excessive labour you give them, and they die, or rather, you kill them, in order to extract and acquire gold every day?’²³

Unlike the argument put forward later by Vitoria, the Dominicans’ reflections authorized a radical denunciation of the conquest and, furthermore, were properly understood as such. They resurfaced in another form in the ideas of Las Casas and long afterwards in certain uses of opposition between a natural “law” of reciprocity and the idea of a natural “right” of which property rights were the basic component.²⁴ The fiercest opponents of the unequal social order that results from exclusive modern appropriation like Rousseau²⁵ or like the supporters of the moral economy who rose up against the first attempts to achieve “the power to set a price upon grain”²⁶ continued to revive this theoretical opposition between “natural law” and “natural right” under different forms.

In Iberian America the law institutionalized a founding opposition between the colonists who benefited from commercial profits and the “Indian” population forced into slave labour. It was precisely because the *encomienda* was a legal regime governing the relations between human beings and not a legal regime governing the exclusive use of things that could transform to its extent the social relations that had prevailed in medieval times. This legal deprivation of the ancestral uses of the land, which created a workforce dispossessed of the means of its subsistence, would also determine the future of European societies. Thanks to the delegation of sovereign authority, the *encomienda* thus subverted the medieval customs of dependence and reciprocal obligations through the extortion of market values; it established the conditions of the legal regime between persons which enabled property rights to be transformed into an exclusive right of use over the appropriated resources, land and material possessions. The right to plunder and exploit in other words the

²³ Bartolomé de Las Casas, *A Short Account of the Destruction of the Indies* (London, UK: Penguin Classics, 1992).

²⁴ “Meanwhile, the boldness and the unreason of those who count it as nothing to drench the Americas in human blood and to dispossess the people who are the natural masters and dwellers in those vast and marvellous kingdoms, killing a thousand million of them, and stealing treasures beyond compare, grow by the day, and, masquerading under false colours, they do everything within their power to obtain further licence to continue their conquests (licence that cannot be granted without infringing natural and divine law and thereby conniving at the gravest of mortal sins, worthy of the most terrible and everlasting punishment.” (*Ibid*).

²⁵ John James Rousseau, *A Discourse upon the Origin and Foundation of the Inequality Among Mankind* (London, UK: R and J Dodsley, 1761).

²⁶ E P Thompson, “The Moral Economy of the English Crowd in the Eighteenth Century” (1971) 50 *Past & Present* 76 at 109.

establishment of legal violence against human beings subjugated by arms preceded and determined the idea of an exclusive right to use things including slaves who became part of personal property.

II. The Power of Rights: The Destruction of Indigenous Eco-Social Organizations and the Legal Establishment of Colonial Domination

The profound change in the uses of the land induced by the *encomienda* system should be recontextualized in the general ideological context of destruction of the eco-social organization of the Indigenous collectives. It was essentially driven by the process of “evangelization” delegated to the *encomenderos*. When describing the violence of these forced conversions, two primary approaches have long been dominant: the condemnation of a form of violence and constraint that contradicted the evangelical message, which was heard immediately from Montesinos and Las Casas, and much later the scholarly deploration of the loss of “Indian” customs and indeed the so-called “indigenous folklore”. Between the two lies the Enlightenment critique, particularly that of Diderot and Rousseau²⁷. However, until a fairly recent period – which at least for French works dates from the publications of Robert Jaulin and Pierre Clastres on the notion of ethnocide²⁸ and those of Nathan Wachtel on *The Vision of the Vanquished*²⁹ – the most virtuous academic descriptions of this “evangelization” particularly those of historians remained largely contained within a prism shaped by the categories of the colonizers. For a long time, the anthropological description of the destructive impact of the *encomienda* was concealed by internal tensions within European historiography particularly during the Franco era and more broadly by the discussion of a “black legend” of Spanish history. It is sufficient to read the *Leyes de Burgos* which dates to 1512, however, to see that evangelization was intended to systematically strike at the very heart of the way of life of the subjected peoples, thus their social structures, kinship relations and their relationship with the world around them.

Like most non-naturalistic collectives, including those of medieval Europe³⁰, the relationship of American Indigenous collectives with the entities of the world was inseparable from their location. Philippe Descola described the ancient Nahuas use of their spatial position:

²⁷ Yves Benot, *Diderot, de l'athéisme à l'anticolonialisme* (Paris: Maspéro, 1970); Yves Benot, Roland Desné & Marcel Dorigny, *Les Lumières, l'esclavage et la colonisation* (Paris: La Découverte, 2005). For a relativization of Rousseau's anticolonialism, see Achille Mbembe, *Critique de la raison nègre* (Paris: La Découverte, 2013) at 104.

²⁸ Pierre Clastres, “De l'ethnocide” (1974) 14:3 *L'Homme* 101; Robert Jaulin, *La paix blanche, Introduction à l'ethnocide* (Paris: Seuil, 1970).

²⁹ Nathan Wachtel, *The Vision of the Vanquished: The Spanish Conquest of Peru Through Indian Eyes, 1530-1570* (Brighton, UK: Harvester Press, 1977) [Wachtel].

³⁰ Florent Coste, “Philippe Descola en Brocéliande” (2010) 6 *Atelier du CRH*; See also Florent Coste, “Percevoir la nature au Moyen Âge : quelques réflexions” in Élisabeth Mornet, ed, *Campagnes médiévales : l'homme et son espace. Études offertes à Robert Fossier* (Paris: Publications de la Sorbonne, 1995) at 31-43.

the topographical aspect, as an ontological attribute, [...] follows from the fact that every existing being must occupy a place appropriate to its identity, in both physical space and social space; this tendency is well illustrated by the meaning of the term ‘misfortune’ (*‘aompayotl’*); literally it is ‘the condition of something outside of its place’. [...] In fact, this way of using position in space as an additional means of particularizing each existing thing seems to be a common feature of most analogical systems.³¹

This incorporation of vital human activities within natural cycles both spatial and temporal was lost. In the Andes, for example, dwellings and crops had been spread across different altitudes of between 1500 and 4000 metres. Different ecological practices and specific rhythms, determined by the movement of the stars and seasonal variations, defined the activities at each level.³² Under the *encomienda* system it was the Catholic Church’s bells that marked the daily routine in the reductions, whereas the alimentary and agricultural customs were transformed in an authoritarian way, destroying the ontological foundation of their relationship with the world itself. In Peru, as early as 1550, the Indigenous collectives’ ancient dwellings, whether dispersed or not, were systematically replaced by a group structure. Ancient villages were burned to prevent any attempts to return to the old ways of living. This break with the former social ties was clearly marked materially through a new relationship with the body, every aspect of which was now controlled in minute detail by the *encomenderos*.

When they were not wiped out altogether, the people who fell into the hands of the *encomenderos* were violently attacked, regardless of whether they were citizens of the former empires, stateless people or if they were against the defeated state that the Spanish had conquered. The family or clan structures were dismantled and replaced by nuclear households. Even among the peoples who have allied themselves with the Spaniards in Peru, such as the Huancas who succeeded in maintaining a semblance of community life for a longer period of time, social relations were determined according to the organization imposed by the colonists, particularly the emergence of a new class of Indians in charge of relations between the Spanish and the local communities.³³ This widespread forced evangelization thus shifted the old ways of indigenous peoples out of the law, including those governing relations with non-human entities. They were replaced with coerced labour, and the very nature of peoples *corvées* was determined solely by the profit made from the export of luxury goods or precious metals.

³¹ Descola, *supra* note 22.

³² Jan Szemiński & Mariusz Ziółkowski, *Mythes, rituels et politique des incas dans la tourmente de La Conquista* (Paris: Harmattan, 2015) at 25ff.

³³ Wachtel, *supra* note 29 at 189 ff; For a perspective on the role of these auxiliary figures on the Inca side, see the comment on the illustration featured at the end of Waman Puma’s *Nueva Corónica*: “One observes six animals attacking an Indian to devour him: the dragon-corregidor, the lion-encomendero, etc. The cacique is also present and takes part in the attack: he is the rat, the smallest animal but not the least fierce.” Jean-Philippe Husson, “Permanence de mentalités et de comportements chez les caciques péruviens de Waman Puma à Tupac Amanu” in Marie-Cécile Bénassy & André Saint Lu, eds, *Institutions coloniales et réalités sociales en Amérique espagnole* (Paris: Université de la Sorbonne nouvelle, 1988) at 42.

It seems highly debatable to argue that the possessions of rural communities were preserved,³⁴ or that the *encomienda* in fact protected the “Indians” by highlighting the apparent similarities with Roman patronage. These two statements are based on a projection of feudal realities onto colonial domination, underestimating both the ethnocidal dimension of evangelistic practices and the destructive power of forced labour. In any event, it is certain that after 1550 the demand for manpower in manufacturing destined for the international market (*obrajes*) and in mines had created such intense pressure that it sparked new indigenous uprisings. The Spanish responded with campaigns of murderous repression, which was the basis for a colonial domination centred primarily on the struggle against idolatry, with slave labour becoming legitimized by its moralizing virtues.

III. Projection of the Monetary Economy on the Americas and Colonial Introjections in Europe

An analysis of the misappropriation of Aztec and Inca institutions is especially revealing of the intransigent innovation instituted by the colonizers’ practices.³⁵ The principle of similarity, establishing a certain level of political continuity between the tributary systems of these empires and Spanish tribute,³⁶ has often been put forward. Nathan Wachtel, on the other hand, has clearly shown how Spanish colonization broke completely with previous political relations in Peru:

The Spaniard took the place of the Inca; he had inherited his centralizing role but no longer ensured redistribution of wealth for the benefit of all. In conclusion, whereas Inca tribute had functioned as a balanced and circular economic structure, Spanish tribute was chiefly remarkable for its unbalanced, unilateral structure.³⁷

In Inca society, the *mit’a* was interwoven in a network of reciprocal personal and community obligations. The beneficiary was not only supposed to assist and protect the *corvéables*, the *mitayos*, but also share the workload discerningly by relying on the *allyu*. Inca practices bore some resemblance to the relations of protection and the redistributions that took place in medieval Europe: the lord was meant to provide for the peasants in periods of scarcity and would sometimes become personally indebted in doing so. In contrast with Inca and Aztec rules as well as the rules of reciprocal obligations of medieval law, the *encomenderos* had no qualms

³⁴ As does Jérôme Baschet, for example, with whom I disagree on this point. See Jérôme Baschet, *La civilisation féodale : de l’an Mil à la colonisation de l’Amérique* (Paris: Flammarion, 2006) at 395.

³⁵ This innovation can also be seen in relations with people on the fringes of the state: France-Marie Renard-Casevitz, Thierry Saignes & Anne Christine Taylor, *L’Inca, l’espagnol et les sauvages. Rapports entre les sociétés amazoniennes et andines du XVe au XVIIe siècle* (Paris: Armand Colin, 1986) [Renard Casevitz].

³⁶ For an example of this deceptive continuity, see François Chevalier, *La formation des grands domaines au Mexique : terre et société, XVIe-XVIIe-XVIIIe*, Kartharla, 2006 at 13. The false continuity between the organization of the Inca empire and that of the Spanish empire is not limited to an understanding of taxation. On this point, see Renard-Casevitz, *supra* note 35 at 360ff.

³⁷ Wachtel, *supra* note 29 at 119.

about working the “Indians” to the point of exhaustion for their sole benefit and with no obligation in return, unless “evangelization” is considered as such.

However, the difference between Aztec and Inca tributes and the Spanish tribute did not only lie in the opposition between a structure of redistribution and a structure of extortion. It could also be found in the transformation of relations of labour domination. Whereas the *mit'a* essentially involved work shifts and sharing know-how,³⁸ Spanish tribute demanded a certain quantity of goods to be produced, such as maize, coca, cotton or metal by working force, not taking into account the time involved, climate variability or any particular consideration relating to individual tribute payers. Likewise, the Aztec tributary system had little in common with the Spanish tribute, whether in principle or in practice.³⁹ As often as possible, the Spanish demanded tribute in metal or coca, which was cultivated at the expense of food crops.⁴⁰ In other words, the constraints placed on the colonized tribute payers were determined by a regime which, even before the monetary system *per se* became widespread, was merchant in nature.⁴¹ The evaluation of labour quantity was not determined by the value of the use of the goods produced, and less still by the idea of an exchange of services or a pyramidal approach to redistribution, but by the trade value of the goods on the international market. The tribute demanded by the Spanish and the Portuguese, which was first “paid” in kind, was soon required to be paid as a tax. This obligation was even more brutal given that the exchange systems in pre-Hispanic America were practised without money, in a process of reciprocal debts and not of stiffened dealings through numerical accounting. The original extortion of the Inca treasury served as the new model of domination used by the conquistadors. Thousands of precious, finely crafted objects were removed from temples to be melted and transported to Europe and turned into money. The conquerors, blinded by the illusions of the mercenary system, saw only 6 tons of gold and 12 tons of silver:⁴² “Whence arose the illusions of the monetary system? To it gold and silver, when serving as money, did not represent a social relation between producers, but were

³⁸ It should be remembered that *corvée* labour in medieval Europe caused “mass defections” which led the feudal lords, kings and clergy to substitute labour for monetary payment whenever possible, which in turn resulted in rural exodus, social division of village communities and the proletarianization of the poorest people. Rodney Hilton, *Bond Men Made Free. Medieval Peasant Movements and the English Rising of 1381* (London, UK: Routledge, 1977).

³⁹ Jacques Soustelle, *La vie quotidienne des Aztèques à la veille de la Conquête espagnole* (Paris: Hachette, 1955); Serge Gruzinski, *Le destin brisé de l'empire aztèque* (Paris: Gallimard, 1988).

⁴⁰ In Manhac the coca production increased by 1000% in 10 years between 1540 and 1550. Wachtel, *supra* note 29 at 221.

⁴¹ “Market value makes the law, even if money is only a small part of the circuit of exchange and transaction. However, the opposite was almost true in the Inca system, which levied a fixed number of people to work on a given amount of land or produce, although its expansionist policy had to increase the quotas of men and women supplied by the provinces, particularly for the armies.” Renard-Casevitz, *supra* note 35 at 56.

⁴² For an analysis of the word “gold” in the vocabulary used in accounts of the conquest, see this highly informative study: Bernard Grunberg, “Le vocabulaire de la ‘Conquista’. Essai de linguistique historique appliquée à la conquête du Mexique d’après les chroniques des conquistadores” (1985) 4:1 *Histoire, économie & société* 3. It may be useful to recall that the ultimate destination for these masses of gold was not the coffers of the Spanish crown but China.

natural objects with strange social properties.”⁴³

The practice of melting religious treasures to meet the need for an increased flow of money was common during the Late Middle Ages.⁴⁴ However, the tribute imposed on the Incas was the start of an unprecedented fetishization of gold and silver that caused a decisive tipping point in relations between the conquerors and the conquered peoples towards a commercial regime. In order to gain a deeper understanding of the anthropological scope of this right to collect tribute, both fiscal and fetishized, it is necessary to recall the new economy of the monetary debt that fractured the Western medieval world.⁴⁵ David Graeber has recently shown that what he calls “the greatest act of theft in world history”⁴⁶ can be decisively explained by the particular social situation of the Spanish conquistadors who were snared in the extensive circle of monetary debt. In fact, well before America was colonized the coercion carried out by the debt economy had sparked violent tensions in Europe. To illustrate the spiralling debt, both public and individual, that was prevalent from the mid-15th century, Jacques Le Goff provides the following figures: “in Barcelona, debt absorbed 42% of revenue in 1358 and 61% in 1403; in Valencia, the debt rose from 37.5% in 1365 to 76% in 1485.”⁴⁷

The debt gave rise to widespread movements based on egalitarian demands, which were violently suppressed. In Europe, however, the repression of these movements generally led to a strengthening of the medieval order rather than an anthropological shift towards a capitalist regime. If we look at the example of the peasant war in Germany, which was underway at the same time as the Iberian colonization, we find that the revolt took place on a massive scale, as did the suppression, which resulted in 100,000 deaths.⁴⁸ Whatever their sometimes highly contradictory interpretations of these events, historians agree that it led to a reassertion of feudal rights. German nobles were themselves prisoners of the contradictions created by monetary logic: they yearned to stamp out the peasant revolt and return to the previous order, which they had nevertheless helped destroy by establishing the monetary economy. One particularly enlightening illustration of these contradictions can be seen in a letter that Georges of Brandenburg wrote to his brother Casimir after the terrible suppression the latter organized in response to the 1525 revolt in the Tauber Valley. At the end of the letter, Brandenburg asks his brother if he intends to “take up a trade” since “he could not very well continue to be a feudal overlord if his peasants were all dead.”⁴⁹

⁴³ Marx, *supra* note 4 at 47.

⁴⁴ Jacques Le Goff, *Le Moyen-Âge et l'argent : essai d'anthropologie historique* (Paris: Perrin, 2010) [Le Goff].

⁴⁵ “What really caused the inflation is that those who ended up in control of the bullion – governments, bankers, large-scale – were able to use that control to begin changing the rules, first by insisting that gold and silver were money, and second by introducing new forms of credit-money for their own use while slowly undermining and destroying the local systems of trust that had allowed small-scale communities across Europe to operate largely without the use of metal currency.” David Graeber, *Debt: The First 5000 Years* (New York: Melville House Publishing, 2011) at 313 [Graeber].

⁴⁶ *Ibid* at 318.

⁴⁷ Le Goff, *supra* note 44 at 164.

⁴⁸ Maurice Pianzola, *Thomas Münzer ou la guerre des paysans* (Paris: Ludd, 1997).

⁴⁹ Letter cited by Graeber, *supra* note 45 at 325.

In Spanish America, the *encomienda* established a method of resolving tensions that was the exact opposite of that which prevailed at the end of the peasants' war. The *encomenderos* were new masters, of course, but often had no real assets; they thus became "traders" in order to live off their private income and repay their debts. The strongest ideological contrast therefore lay between their desire for gold and the medieval ideology that is well represented in the tirade launched by the mayor of Fuente Obejuna to the Commander Fernán Gómez de Guzmán years later:

Out here we have no arms
 Or horses' trappings of pure gold for you:
 The only gold is your true vassals' love.
 And speaking now of purity, here's wine –
 Yes, twelve great skins of it – which, if it lined
 Your soldiers' skins inside could hold the line
 Against the foe in January's cold
 Much better than their arms sharp-edged with steel,
 For wine will put an edge on arms and men.
 These are but tokens of esteem, and hence
 I do not list the cheeses and the rest:
 May you and yours with love and health be blessed.⁵⁰

Whereas the *encomenderos* endeavoured to imitate the Grandees of Spain through their subjective aspirations and way of life, these "new merchants" stabilized an exogenous social organization based on the exploitation of the people who were now nothing more than a workforce and their own transformation into "traders." This right to exploit could not have been asserted with the same violence if the collective practices of the suppressed people had not been almost entirely destroyed and delegitimized. In other words, only by delegating the right to receive tribute and, at the same time, legally authorizing the destruction of all customs in the name of evangelization was it possible to determine the establishment of radically new social relations based on the extortion of resources and labour and linked to enrichment in an exogenous market. There is no doubt that the method of payment of the Spanish tithe played an unfavourable role by facilitating the position of the Church throughout this period of history.

David Graeber describes tithe as "the greatest act of theft in world history" which the conquistadors practised on a vast scale and he is emphasizing that "greed raised to mythic proportions".⁵¹ Although this greed cannot be disputed, it cannot

⁵⁰ Félix Lope de Vega, *Fuente Ovejuna* (New York: Barron's Educational Series, 1969) Act I, scene 6, at 39. This is a play dedicated to the glory of the justice of the Kings of Spain.

⁵¹ A little further on, Graeber clarifies this: "We are not dealing with a psychology of cold, calculating greed, but of a much more complicated mix of shame and righteous indignation, and of the frantic

alone explain why these men felt authorized to satisfy it. For this theft to occur, much like the passive and active crimes involved in extorting tribute, the conquistadors' and colonizers' social and moral inhibiting mechanisms must have been significantly weakened. They must have had good reason to believe that their thefts and crimes would go unpunished and that the usual representations that forbade them had been destroyed.

In the midst of the early decades of colonization, and because of its warlike structure, the *encomenderos* constantly suspected that revolts were brewing: most of the "Indians" were their enemies. However, their disinhibition was also a result of the power they had been given. The duty to evangelize was used as an immediate pretext for enslaving the "Indians" from the islands and later during the first systematic formalization of the *encomenderos* obligations for the legal prohibition of a high number of uses that fell outside the law. Even the "Indians" who allied with the Spanish did not escape. For several decades, the law allowed the *encomenderos* to legally amass military and symbolic powers alongside with strong ideological legitimization. The structural role of the *encomienda* institution thus centred mainly on three phenomena: the juridical legitimization of a violent extortion that destroyed uses; the transformation of systems based on personal service to an economy of monetary debt which legalized and generalized slave labour; and the establishment of an unprecedented relationship between the dominant classes and the European Crowns which became the model for a new form of government. This establishment, which presumably was seen by the *encomenderos* and the Iberian powers as a means of rapidly gaining wealth, overturned the hierarchical ordering of the empires of the New World and paved the way for the profound transformations that took place in the Old World.

During the conquest and the early decades of Iberian colonization⁵², rights did not have the after-the-fact function of formalizing and legitimizing that defined it when social relations were mediated by established institutional operations. Establishing command over the "Indians" was symbolic of the introduction of a social order that made productive relations the effective organizer of the new colonial social hierarchy. The *encomienda* therefore marked a profound break with the hierarchical relations of protection which had organized not only the Andean and Mesoamerican empires but also the Western medieval world. This reversal was only made possible through an unprecedented exercise of sovereignty, marked by the delegation of regal powers, and therefore of a punitive royal violence that was disembedded throughout

urgency of debts that would only compound and accumulate (these were, almost certainly, interest-bearing loans), and outrage at the idea that, after all they had gone through, they should be held to owe anything to begin with." Graeber, *supra* note 45 at 318.

⁵² "Tribute was thus an expression of the reality of the Conquest; however, the continued use of this word, once the Spanish administration had been established, was more ambiguous: perhaps custom and an unclear perception of the different state relations played a part? Certainly, it showed a desire for continuity between the new system of control and the old one, and the use that was made of it, and it unconsciously perpetuated the military state and coup de force of Spanish colonization." Renard-Casevitz, *supra* note 35 at 56.

the territory of the *encomienda*.⁵³ This form of government was by no means a foregone conclusion and sparked major tensions with the Spanish Crown. In a sense, although it emulated the relations between the Kings and the Grandees, it in fact prefigured the relationship between the modern states and the large colonial Companies: the delegation of sovereign powers to private individuals for the conquest and exploration of distant territories in exchange for revenue that replenished the Treasury's coffers and allowed it to repay its debts.

The history of the prevarications over the statutes of the *encomienda* and more generally the controversies over the "Indians" are proof enough of the fact that the Spanish Crown was torn between its obligation to treat the colonized peoples as subjects in the full legal and religious sense of the term and its debt obligations.⁵⁴ However, the retrospective illusion of a power limited by its debt and resembling the European kingdoms of the centuries that followed has often made historians forget the novelty of this social and political order that was locally dependent on an exogenous market based on eco-social extraction and exploitation of the land and subjects as means and factors of production. In Spanish America, however, the Crown had in fact replaced a form of government that was defined by its power over the people with a government that was guided by its management of public debt and reliant on taxing the income of owner-exploiters. The disembedding of the sovereign violence that resulted established the disembedding of the market.⁵⁵ A new relationship between sovereignty and territory, a new way of practising violence and a new way of governing through confiscation and/or monopoly over the conditions under which people lived were thus defined. This delegation of sovereignty to the *encomenderos* did not aim to subordinate the subjects of a suzerain but rather to define sovereignty over a territory by changing the eco-social conditions of people's lives and, in this case, by managing and disciplining the local populations in order to put them to work. However, in addition to the strictly disciplinary violence carried out, colonial powers were mostly imposed negatively through the unprecedented power to "leave them to die": the "Indians" were also wiped out by exhaustion, disease and the suffering they experienced from acculturation. Despite some vehement protests and theatrical controversies, the colonists showed an extraordinary indifference to the real living conditions of the "Indians." The colonial confiscation of the eco-social conditions of their lives also gave rise to a new form of power: that of "making people live" by creating the conditions for their forced integration into the market regime. The principle of biopolitical governmentality was thus first experienced in the colonies.⁵⁶

⁵³ As Jérôme Baschet has clearly shown, the King's power cannot be compared with that of the modern sovereign state. In Spanish America, however, the violence practised by the *encomenderos* was authorized through the perception of tribute which, in this case, was a delegation of a sovereign power under conditions that opposed those of the intricate European justices and powers.

⁵⁴ Michèle Escamilla-Colin, "La question des justes titres : repères juridiques. Des Bulles Alexandrines aux Lois de Burgos" in Carmen Val Julian, dir, *La conquête de l'Amérique et la question du droit* (Paris: ENS, 1996) at 20.

⁵⁵ Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 2001).

⁵⁶ I proposed an initial exploration of this theory that reverses the chronology of biopolitical governmentality offered by Foucault in Aliénor Bertrand & David Robitaille, "Une archéologie philosophique des normes environnementales : biopolitique et droit des peuples autochtones"

The gradual withdrawal of the right to tribute and personal service, particularly after 1570, did little to transform the deep-rooted structure established at the outset of the conquest, in which social organization was determined by the debt economy and the pressing need for production. Similarly, the regulations that were introduced to limit abuse of the *mit'a* merely institutionalized the colonized peoples' personal dependence on private debt and failed to eliminate forced labour, which continued until the 18th century in Peru. At the end of the 16th century, *encomiendas* were gradually replaced with *haciendas*. Deprived of any formal delegation of political power, the *hacienda* system continued the colonial exploitation of the land and of workers that had begun under the public authorities through the private ownership of slaves sold in the slave trade and the exclusive use of the land. This new legal form, which left feudal rights behind, was later found across the European empires under different national names, such as "habitation". It established the practices that became the legal and social models not only for all of the subsequent European colonization but also for the modern legitimization of property rights in Europe itself. Consequently, social relations were decisively mediated through exclusive use of the land and the legal capacity to exploit a workforce. However, the shift towards this new regime of domination would not have been possible without the violent appropriation that deprived the colonized people and peasants of the eco-social conditions under which they had lived.

There is, therefore, a very particular relationship between the instituting function of rights and the phenomena described by Marx as "primitive accumulation". Although it is not the intention here to discuss the internal controversies of the Marxist tradition⁵⁷, this study shows at the very least that the relations between the mechanisms of dispossession and those of colonization are not solely the result of "economic" reasons relating to under-consumption and investments of surplus capital as it is asserted in the most common interpretations. The first inventory of the mechanisms of dispossession was drawn up by Marx in chapter 8 of volume 1 of *Capital*. Property rights, in a variety of forms, are mentioned many times. They are particularly referred to in the context of slavery and the colonial appropriation of assets – particularly that of natural resources – and of the analysis of mortgages linked to credit systems. Marx's approach to the history of property rights bears little resemblance to what would be the ideological function of rights under established economic capitalism, that is, the durability of domination practices determined by social power relations. Readers of *Capital* are particularly struck by the transformation of ancient property rights into exclusive property rights during the enclosure movement in England. Unquestionably, given that the land use in question was European, Marx highlighted the establishing dimensions of a new property right he calls "capitalist property." Property rights are not described solely as a technical instrument of dispossession: they sparked a complete transformation of social

(2013) 43 RGD 223; For an entirely different angle on this chronological reversal, see Silvia Federici, *Caliban et la Sorcière. Femmes, corps et accumulation primitive* (Paris: Entremonde, 2014) at 175 [Federici].

⁵⁷ We should nonetheless clarify that this article reflects the analyses of primitive accumulation begun by Rosa Luxemburg and continued in particular by Samir Amin and David Harvey.

relations and of the relationship with the surrounding world, which Marx defines as a transformation of the “mode of production.” In other words, property rights did not only serve to maintain an unequal distribution of goods and a relationship of domination; it also fixed the form of new relations between men and with nature, i.e. an anthropological structure. Property rights subjected people to an unprecedented regime of relations mediated by commodities which Marx describes as the capitalist relations of production, instead of the dependence between people that characterized the feudal world:

The so-called primitive accumulation, therefore, is nothing else than the historical process of divorcing the producer from the means of production. It appears as primitive, because it forms the prehistoric stage of capital and of the mode of production corresponding with it. [...] The expropriation of the agricultural producer, of the peasant, from the soil, is the basis of the whole process.⁵⁸

And again: “The process, therefore, that clears the way for the capitalist system, can be none other than the process which takes away from the labourer the possession of his means of production [...]”⁵⁹

In order to define the mode of capitalist production, and therefore the anthropological structure of capitalism, Marxist historians and historiography have often focused on the “freedom” of the worker who sells his labour power on the market. As a result, slavery and forced labour were seen as belonging to other social mechanisms, the vestiges of lost modes of production. Marx nevertheless established an explicit relation of dependence between European wage labour on one hand and colonial slavery and forced labour on the other. He shows that the new property rights could not have established themselves in Europe in the modern age without the constraint of New World slavery: “In fact, the veiled slavery of the wage workers in Europe needed, for its pedestal, slavery pure and simple in the new world.”⁶⁰

Indeed, the colonial and intra-European dispossessions were not merely a “theft” of the people’s land⁶¹: they redirected social life as a whole through discipline at work. Marx specifically describes the enclosure movement as a decisive step in the capitalist separation between the worker and the means of production. By expropriating and disciplining the peasants who had succeeded in freeing themselves from serfdom, modern property rights were rights imposed through violence. The analysis of that violence is central not only to Marx’s reflections but also to those of his greatest readers and critics Polanyi and Foucault or Thompson who emphasized different aspects of this process.⁶² However, even though colonization is said to have

⁵⁸ Marx, *supra* note 4 at 508.

⁵⁹ *Ibid* at 507-508.

⁶⁰ *Ibid* at 538.

⁶¹ *Ibid* at 513.

⁶² “On the other hand, these men, suddenly dragged from their wonted mode of life, could not as suddenly adapt themselves to the discipline of their new condition. They were turned *en masse* into beggars, robbers, vagabonds [...] Legislation treated them as ‘voluntary’ criminals,” *Ibid* at 522. Throughout his work Michel Foucault described the complexity of this major movement from another angle, focusing on the multiplicity of instruments and micro-powers that forced the expropriated

played a pivotal role in this movement of historical discipline, it has been described very little despite recent studies showing the links between “Indian” manufacture and European factories. For the purposes of this article, there is still a need to explain how the violence with which slavery and colonial forced labour were established was linked to the modern and capitalist redefinition of property rights.

IV. Slavery, Forced Labour, Wage-Earning and Property Rights

Marx shows that the history of property rights, particularly the shift from medieval practices to production capitalism, was marked by a major semantic inversion. Historically, the extension of the new property rights was an expropriation of what he called “simple private property” with capitalist “property,” imposing expropriation through *ad hoc* institutional violence. By giving dispossession a legal form, property rights became a right to dispossess. How was it possible for a right to be inverted into its opposite?

In semantic terms, the inversion of the right to property into the right to dispossess was based on the homonymy of (private) ownership and (capitalist) ownership. Indeed, for Marx, private ownership in the strict sense – based on personal labour – was not the ancestor of capitalist ownership but rather its antithesis. This homonymy of (private) ownership and (capitalist) ownership is congruent with another homonymy, that of simple private accumulation and capitalist accumulation (or accumulation through dispossession). Marx demonstrates that when non-capitalist owners desire accumulation, they do not necessarily engage in a process that will lead them to capitalism: on the contrary, this labour-based private accumulation makes “capitalist accumulation and the accumulation of the capitalistic mode of production impossible.”⁶³ In property that is solely private, each individual limit his own work.

One of the most common misunderstandings about this notion of private (non-capitalist) property lies in the retrospective projection of the notion of exclusivity onto a past that the Marxist tradition calls feudal, as if the free peasant, liberated from serfdom, were a small owner in the sense of exclusive property. And yet, in an elliptical but very clear way, his description of the processes of dispossession involved in the enclosure movement in fact refers to the use of commons as “ownership”, as seen in the chapter of *Capital* entitled “Expropriation of Agricultural Workers from the Land”:

The latter also were practically at the same time peasant farmers, since, besides their wages, they had allotted to them arable land to the extent of 4 or more acres, together with their cottages. Besides they, with the rest of the peasants, enjoyed the usufruct of the common land, which gave pasture to their cattle, furnished them with timber, fire-wood, turf, etc.

farmers to submit to the new conditions of wage labour. However, without underestimating the effects of this multi-faceted violence, in Europe the subjugation of workers remained fairly slow. It was extraordinarily fast and far deadlier in the Americas during the first European expansion.

⁶³ *Ibid* at 544.

We must never forget that even the serf was not only the owner, if but a tribute-paying owner, of the piece of land attached to his house, but also a co-possessor of the common land.⁶⁴

In the feudal period, private property was not seen by Marx as a small landholding (plot or patch) but, in accordance with medieval law, as the right of *usus* and *fructus*, as well as *abusus*. Thus, if capitalist private property was opposed to simple private property it was because it was constituted by depriving the legitimate owners of their right of *usus*⁶⁵ and *fructus* (not necessarily monetary) which were the conditions and consequences of their labour. Naturally, although the new (capitalist) property rights were instituting rights, they did not emerge as the new more authentic meaning of property nor were they simply concealing it. This instituting dimension was not merely the substitution of a certain order of division of goods with another, through a dual movement of appropriation and dispossession. By establishing a legal form for dispossession, it was more a right to appropriate than a right to property *per se*. In other words, it was a right to dispossess. The “new” right to property was therefore established through a legal spoliation just as much as through an institution, and it completely transformed the conditions of collective existence: “great masses of men are suddenly and forcibly torn from their means of subsistence, and hurled as free and “unattached” proletarians on the labour-market.”⁶⁶

The first part of our study on the *encomienda*, *sesmaria* and *repartimiento* systems showed how, under the colonial situation, the conquest of America established for the first time the expropriation of the very conditions under which the colonized peoples existed, and a new type of eco-social power over their lives starting with the separation of the producer and the means of production as the permanent, dominant structure of colonial society.

In the first theoretical justifications of the conquest, some aspects of the projection of the colonial situation onto the European countryside were apparent. In his essay *On the Indians*, Vitoria notes the conditions for this, bringing together the unity founded in nature and in God of the human race as well as an explanatory model of the superiority of the despoilers/conquerors: “Thus even if they seem to us insensate and slow-witted, I put it down mainly to their evil and barbarous education. Even amongst ourselves we see many peasants (*rustici*) who are little different from brute animals.”⁶⁷

⁶⁴ *Ibid* at 510.

⁶⁵ This point was especially well developed by E P Thompson: “It is not that John Clare – nor the commoners for whom he spoke – were primitive communists. Viewed from their standpoint, the communal forms expressed an alternative notion of possession, in the petty and particular rights and usages which were transmitted in custom as the properties of the poor. Common right, which was in tax terms coterminous with settlement, was local right, and hence also a power to exclude strangers. Enclosure, in taking the commons away from the poor, made them strangers in their own land.” E P Thompson, *Customs in Common* (London, UK: Penguin, 1993) at 184 [Thompson]. It may be noted that Thompson here is closer to Marx and actually quite far from the “Marxist” dogmas he condemned.

⁶⁶ Marx, *supra* note 4 at 508.

⁶⁷ Francisco de Vitoria, *Political Writings* (Cambridge: Cambridge University Press, 1991) at 250.

These precursory words were echoed in a statement by John Bellers cited by E. P. Thompson, showing that the forests and large common spaces “make the poor that are upon them too much like the Indians.” However, the analogy did not end there. It continued with a diatribe against the commons, which were considered “a hindrance to industry and [...] nurseries of idleness and insolence.”⁶⁸

Through a complex set of projections and transfers between Europe and its colonies, the legal and political governance of the medieval world organized by the exercise of sovereignty and with respect for the use of places, rights and personal duties, gradually gave way to a government that inherited a colonial administration whose aim was maximizing wealth. Exclusive property as a source of monetary income then replaced the complex collective and personal uses that had forced vassals into personal service, particularly with a view to the suzerains’ military plans. This substitution gave rise to a new relationship with the land, which had become a “means of production” and could, as such, be appropriated and traded. However, that substitution was not, or was not only, a result of the increasing influence of “market values.” Colonial violence played a vital role in this, giving rights a symbolic instituting power. Between these two types of power, the control of dispossessed workers devoted to mercantile production in favour of owners and the treasury of the Crowns became a norm, first instituted in colonial America, then transported – not without some changes – to rural Europe. It was only then that the former collective uses of the land and all common rural practices in Europe became vestiges that gradually fell outside the scope of rights.

Nevertheless, it was a long time before the modern right to property became the dominant rule regulating social uses in Europe. During the colonization of the Americas, new relations of domination were brutally and unequivocally asserted. At the time of the conquest, the conquistadors made an immediate discovery that was continually re-experienced by all the colonizers throughout the following four centuries of European capitalist expansion: dispossession, whether of the land or of any other means of production, meant nothing without the labour of those forced to work:

First of all, Wakefield discovered that in the Colonies, property in money, means of subsistence, machines, and other means of production, does not as yet stamp a man as a capitalist if there be wanting the correlative – the wage-worker, the other man who is compelled to sell himself of his own free will. He discovered that capital is not a thing, but a social relation between persons, established by the instrumentality of things.⁶⁹

And:

To this ready-made world of capital, the political economist applies the notions of law and of property inherited from a pre-capitalistic world with all the more anxious zeal and all the greater unction, the more loudly the facts cry out in the face of his ideology. It is otherwise in the colonies.⁷⁰

⁶⁸ Thompson, *supra* note 65 at 165.

⁶⁹ Marx, *supra* note 4 at 543.

⁷⁰ *Ibid* at 568.

As a counterpoint to the brutality of the colonization of the Americas, in Western Europe two things were needed: the class relations of the late Middle Ages, from which the peasants had emerged somewhat victorious, had to be overturned; and justifications had to be provided for the extortionary relations that characterized the new production relations. The reinvention of the legitimization for the colonization of the Americas thus played a decisive role in the creation of the theoretical tools that enabled the modern redefinition of the right to property. It was initially anchored in the second scholasticism that “laicized” the theological foundations of colonization for the first time. It then found support on several points in the political philosophy of Grotius and Hobbes, and in the 18th-century economic philosophy, particularly that of the physiocrats and Adam Smith. The theoretical foundation of modern property rights nonetheless refers more specifically to Locke, due to an *ad hoc* rewriting of colonial history, which made the right to property a natural right and legitimized the unequal appropriation of the land by theorizing the legitimacy of colonial capitalism. If the scope of this analysis is limited to Locke, there is thus a need to demonstrate how the falsification of American colonial dispossession became the founding theoretical myth for the legitimization of the right to property as an exclusive right.

V. Theoretical Foundation of the Modern Right to Property and the Falsification of the Colonial Spoliation

The relationship between modern European political philosophy and colonial history has been the subject of recent studies influenced by subalterns and post-colonial studies. Twentieth-century decolonization brought changes if not to the real empire of property at least to the way in which the history of European expansion has been viewed. However, for strange reasons that cannot be detailed here, these works have mostly been caught in a retroactive interpretation of Western history that is highly influenced by Carl Schmitt.⁷¹ This article offers an entirely different approach: it highlights the profoundly contentious nature of European social structures rather than crediting a legal fiction that essentializes the West and thereby increases the masquerade of colonial history, culminating in negationism, in which Carl Schmitt engages.⁷²

It should be noted at the outset that Locke, when defining private property, is careful not to refer to historical rights of use as belonging to the distinction between mine and yours, which was nevertheless a self-evident fact. However, he gives a decisive theoretical function to an original fiction in which “America” played a decisive role. When he bases exclusive property on the principle of an indivisible

⁷¹ There is no doubt that Jacques Derrida played a major role in the belated success of Carl Schmitt in France: Jacques Derrida, *Politiques de l'amitié: suivi de l'oreille de Heidegger* (Paris: Galilée, 1994); The interpretation of Locke proposed by Matthieu Renault is part of this heritage: Matthieu Renault, *L'Amérique de John Locke* (Paris: Éditions Amsterdam, 2014) [Renault].

⁷² “Genocide, the murder of populations, a moving concept; I have experienced an example of it with my own eyes: the extermination of the Prusso-German class of civil servants in 1945. They were driven to suicide. But on me, the most shameful of ideocides was carried out (Ideocitium).” Denis Trierweiler “Glossarium” (2004) 1:17 Cités 181.

property granted to all men by God, he is actually endeavouring to reinterpret the various forms of anthropological knowledge that accompanied Spanish colonization. He uses a falsified image of an America that was considered similar to the “beginnings of the world”, thereby obscuring the complex notions of mine and yours that had regulated and still regulated rights of use in Europe. This rhetorical device is used recurrently in the *Second Treatise*. Many of those who have read and interpreted the work have noted the extent to which some of his statements contradict the travel accounts to which he explicitly refers.⁷³ The work usually tries to demonstrate, against the facts presented in these accounts, that American Indigenous peoples’ forms of collective life could not be considered political institutions in the strict sense. However, the falsification of knowledge regarding the Americas also covered up several conceptual shifts that converged to form the fiction of the “state of nature.”⁷⁴

Rather than specifically discussing the historical forms of political institutions and the rights of various American and European peoples, Locke invites his readers to engage in an abstraction that aims to define what the “savage Indian” could legitimately be said to own. The objection that there was, strictly speaking, no falsification of knowledge regarding the Americas, because the state of nature was not the historical state in which the Indigenous collectives had been living before the conquest, is not convincing. In a sentence that tends to be over-quoted, Locke maintains a discourse that is explicitly in opposition to this objection: “In the beginning, all the world was America.”⁷⁵ This covering-up of the reflection on the “state of nature” through a falsified image of knowledge of the Americas allowed for the complete concealment of the effective institutions that enabled the spread of “yours and mine” both among the “Indian” populations and rural Europe. Instead of giving a historical description of the forms of social fixing of the uses, whether legal or otherwise, that effectively presided over the division into “yours and mine”, Locke establishes the principle of a universal individual right that is indifferent to any local social rule: “the right of each individual over his own person.” The “state of nature” supported by the falsification of knowledge of the Americas thus enabled the usual notion of the “rights of persons” to shift to the “right over one’s person.” This resulted in the pronouncement of an abstract principle stating that any object modified by the actions of the fictitious “Indian” could legitimately be subtracted from the indivisible ownership of land. Through his “labour,” he became the legal owner:

The fruit, or venison, which nourishes the wild Indian, who knows no enclosure, and is still a tenant in common, must be his, and so his, i.e. a part of him, that another can no longer have any right to it, before it can do him any good for the support of his life.⁷⁶

⁷³ Mathieu Renault has recently highlighted the distortions between Locke’s assertions and the chronicles of Garcilaso de la Vega, Renault, *supra* note 71; see also Richard H Cox, *Locke on War and Peace* (London, UK: Oxford University Press, 1960); Daniel Carey, “Locke, Travel Literature and the Natural History of Man” (1996) 11:2 *Seventeenth Century* 259; Peter R Anstey, ed, *John Locke: Critical Assessments of Leading Philosophers*, vol IV (London, UK: Routledge, 2006) at 327-349.

⁷⁴ On this point we agree with Mathieu Renault, who renders some elements of the opposite argument in chapter 2 of his book: Renault, *supra* note 71.

⁷⁵ John Locke, *Second Treatise of Government*, Thomas P Peardon, ed (New York: New York Liberal Arts Press, 1952) at 49 [Locke].

⁷⁶ *Ibid* at 26.

In the following paragraphs, Locke develops the same idea with further examples, bringing fish and ambergris and even water drawn into the same category as game and fruits. In historical terms, however, it is actually the legitimization of a deprivation of the rights of uses attached to persons within the communities and collectives to which they belong that is presented as a legitimization of a simple subtraction to the original communal land ownership. It is tantamount to say that “labour” is the single legitimizing rule that enables what is self-evidently to be recognized as mine, rather than the regulated relationship between prerogatives and obligations, which, under widely varying terms of principle and negotiation, defines the rights of persons distributing the legitimate uses of the commons. The fiction of the state of nature supported by the falsification of knowledge about the Americas thus enabled Locke to avoid any discussion of the legitimacy of the rights of persons to socially defined uses, as well as to assert the principle of the destruction of the commons, since it establishes the legitimacy of its division.⁷⁷ He thus confuses the commons with the rights of persons governing the uses of those commons. The dominance of an economic principle – that of utility – over politics, and that of an unequal and implicit distribution of rights over property are thus posited at the same time. Labour then becomes a meta-principle that the individual can put forward against the social rules governing the use of the commons and which does not require political consent:

And the taking of this or that part, does not depend on the express consent of all the commoners. Thus the grass my horse has bit; the turfs my servant has cut; and the ore I have digged in any place, where I have a right to them in common with others, become my property, without the assignation or consent of any body. The labour that was mine, removing them out of that common state they were in, hath fixed my property in them.⁷⁸

Whether one is a child, an adult, a male, a female, sick or healthy, an orphan or from a large family, considering here only categories that have meaning in a supposed state of nature, each human being is legitimately entitled only to the fruits of his “labour.” However, if he has a servant’s labour at his disposal, he has the right to appropriate the fruits of that labour. It is therefore clear that Locke substitutes the consent that defines the rules governing the use of the commons with a *de facto* social principle of appropriation through the availability of a dominated labour force. He then supports, through a similar conceptual and rhetorical device, the naturalness of the appropriation of the land: “And hence subduing or cultivating the earth, and having dominion, we see are joined together. The one gave title to the other.”⁷⁹

The notion of land appropriation was based on the substitution of land use with domination. It was supported by further falsifications of knowledge regarding the people of the Americas: the assertion that “Indians” considered themselves to be the owners of the fruits of their labour and, by extension, of the land they cultivated, contradicted the witness accounts available to Locke at the time. This first

⁷⁷ “The labour of his body, and the work of his hands, we may say, are properly his.” *Ibid* at 27.

⁷⁸ *Ibid* at 28.

⁷⁹ *Ibid* at 35.

falsification paved the way for a second to rise: the lifestyles and representations of pre-conquest Indigenous collectives were not only reinvented but, in addition, the methods used in the historical appropriation of the colonization of American lands were concealed and legitimized by a new fiction.

The strongest assertion of the identity of both “the beginnings” and “America” occurred at a time that was strategically decisive for Locke’s argument. In pre-conquest America, it would have been “useless, as well as dishonest, to carve himself too much, or take more than he needed.”⁸⁰ When the conquest began, a form of appropriation and accumulation that drastically exceeded a single human being’s labour capacity and went beyond his needs became legitimate. This appropriation was justified by a further falsification that Locke puts forward as proof:

There cannot be a clearer demonstration of any thing, than several nations of the Americans are of this, who are rich in land, and poor in all the comforts of life; whom nature having furnished as liberally as any other people, with the materials of plenty, i.e. a fruitful soil, apt to produce in abundance, what might serve for food, raiment, and delight; yet for want of improving it by labour, have not one hundredth part of the conveniencies we enjoy; and a king of a large and fruitful territory there, feeds, lodges, and is clad worse than a day-labourer in England.⁸¹

Although travel accounts generally described the regime of abundance and the variety of uses that originated with the Indigenous peoples of the Americas, Locke states that the “Indians” were poor and suggestively links their imaginary poverty to their presumed negligence. The legendary riches of the Incas and of Moctezuma did not deter him from comparing the poverty of “a king in America” with the wealth of a European day labourer. This exaggerated falsification of the history of “America” was the foundation for the *a posteriori* legitimization of colonial appropriation and the discipline of labour imposed on the “Indians” by substituting the regime of use value with that of exchange value. Locke therefore gives a limited meaning to the improvement of the land. Thus, even though the discovery of America proved that a large population lived in abundance without money and without property under a wide variety of political regimes, Locke used counterfactual reasoning to show that the absence of the market explained why land in America was left “in the common state of nature”:

For I ask, what would a man value ten thousand, or an hundred thousand acres of excellent land, ready cultivated, and well stocked too with cattle, in the middle of the inland parts of America, where he had no hopes of commerce with other parts of the world, to draw money to him by the sale of the product? It would not be worth the enclosing, and we should see him give up again to the wild common of nature, whatever was more than would supply the conveniencies of life to be had there for him and his family.⁸²

⁸⁰ *Ibid* at 51.

⁸¹ *Ibid* at 41.

⁸² *Ibid* at 48.

Locke states that the “Indian” did not draw from one acre of land even one hundredth of what an acre of wheat grown in England would yield, which, incidentally, implied that “bread is more worth than acorns”⁸³, and above all supported the idea that the exact measure of production was found in market evaluations. The falsification of the Indigenous collectives’ living conditions helped him establish a market theory⁸⁴ that ensured that the discontinuity between two modes of exchange and labour, depending on whether metallic money was in circulation, could be demonstrated, which authorized a new mode of accumulation that Marx later qualified as “capitalist.” The notion of “improving” the land was thus the object of profound conceptual ambivalence between what the land produced or could produce and what it could produce for the market, in other words the revenue it could generate. The measure of production was not the quantity and multiplicity of materials produced for various uses⁸⁵, and less still the material in relation to the durability of agricultural practices; rather, it came down to the potential revenue that owners could draw from it. “Improvement” meant a change of use and of users, in other words a shift towards exploitation by owners capable of generating high income.⁸⁶

The idea that Locke established his theory of property based on labour is the result of an acritical and anthropologically blind interpretation of the *Second Treatise*. What he shows instead is that improvement – which, in his agricultural philosophy, in fact boils down to financial profitability measured in “acres/sou” (in other words, in m²/currency) – implies a new use of the land by a new kind of user, who declares himself the exclusive owner at the same time as he becomes able to take advantage of a labour capacity that is not his own. However, when Locke establishes the notion of land “improvement” as the theoretical foundation of property, he specifically recovers the ordinary meaning of the term used in the courts of justice to put an end to the commons. Historically, the modern right to property was established in England as the land owners’ right to exclusively use land at the expense of collective rights of use. Exclusive appropriation legitimized by the economic principle of utility prevailed over the political consent of the communities of users.

However, Locke does not settle for merely stating this prevalence. He sanctions the principle of separation between the owners of the land and the workers who sell their labour force, and bases it on reason by drawing a dividing line between human beings who are capable of self-governing and those who need to be “under the tuition and government of others”⁸⁷, or in other words to work for them. It is

⁸³ *Ibid* at 42. This was not a random example, since several peoples in Mesoamerica and the Southwest coast of North America were known to follow a diet based on acorns.

⁸⁴ “Thus in the beginning all the world was America, and more so than that is now; for no such thing as money was any where known. Find out something that hath the use and value of money amongst his neighbours, you shall see the same man will begin presently to enlarge his possessions.” *Ibid* at 49.

⁸⁵ As, for example, the Spanish observed on their arrival in America.

⁸⁶ It is interesting to note that until recently many works on rural history took the Lockean argument regarding improvement at face value, as if enclosure had actually boosted agricultural production, as if colonization had actually enabled the development of conquered lands, and as if contemporary appropriation of agricultural lands were the only means of guaranteeing food security in the world.

⁸⁷ Locke, *supra* note 75 at 60.

sufficient to provide for the preservation of these individuals' bodies, be they slaves, forced workers, contracted workers or children living in a remand home. The theoretical foundation of the exclusive right to property was thus consolidated by the legitimacy of the management relationship between those who work for others and those who employ others for their own profit. Hence, the basic aim of political power can be limited to regulating and preserving property, rather than directly controlling the relationship between people. Conflicts arising from appropriation cannot be the subject of legitimate legal or political discussions: they are purely disciplinary. With regard to the right of persons, which was no longer governed primarily by the definition of uses specifying the prerogatives and obligations of people, it was singularly limited by the disciplinary principle of subordination to labour.

Although, as liberal philosophy asserts, Locke theoretically based property on labour, he mostly removed the regimes of uses, obligations and personal rights from legitimate legal discussion. He thus concealed all the violent conflicts that were sparked by the destruction of collective land use behind the veil of discipline, in the service of a politico-economic fiction that describes a peaceful movement in which the market leads to general prosperity. While his political philosophy was organized entirely around the notion of consent, it legitimized in law the violence practised against the colonized peoples, poor people and disobedient children in the name of utility. In any case, the violent struggle against “superstitions” was an essential component of the destruction of collective uses.⁸⁸ Luciano Parinetto even supported the idea that “principles” were exported to America, such as accusations of Satanism, whereas “techniques of mass extermination developed in America” were in turn imported back to Europe where they became a “political strategy.”⁸⁹ Many recent historical studies have highlighted the links between the destruction of European peasant land use and the violent acculturation suffered by the colonized people subjected to forced labour and slavery. The destruction of the commons in Europe also resulted in the loss of many festivals that had previously taken place, especially propitiatory agrarian rituals and gatherings that had enabled people to regulate and collectively discuss the use of forests⁹⁰ and the commons. However, only the colonial situation with its open or underlying belligerent violence enabled that destruction and, for the first time ever, made it possible to impose labour and land extortion on such a vast scale.⁹¹ For the purposes of this study, I shall not focus so much on the theoretical devices behind the reasons that enabled the destruction of uses, but on the fact that rights had the capacity to legitimize and establish violence in the name of such reasons. Locke's legitimization of this violence formed the basis for the

⁸⁸ Pierre Duviols, *La lutte contre les religions autochtones dans le Pérou colonial : L'extirpation de l'idolâtrie entre 1532 et 1660* (Toulouse: Presses Universitaires du Mirail, 2008).

⁸⁹ This is the theory of Luciano Parinetto discussed by Silvia Federici: Luciano Parinetto, *Streghe e Potere. Il Capitale e la Persecuzione dei Diversi*, (Milan: Rusconi, 1998); Federici, *supra* note 56 at 408ff.

⁹⁰ With regard to France: Antoine Follain, *Le village sous l'Ancien régime* (Paris: Fayard, 2008).

⁹¹ This is a point that Nestor Capdevila highlighted particularly well in his study of Las Casas: Nestor Capdevila, *Las Casas, une politique de l'humanité : l'homme de l'empire de la foi* (Paris: Cerf, 1998) at 75-76.

justification of colonial policies in the following centuries.⁹² It continues to form the core of today's aboriginal⁹³ legal battles in Australia.⁹⁴ In this very powerful theoretical device, "America" played a decisive role. It served as a paradigm for a three-way historical falsification: supporting the principle of the universality of the right to property, which was, however, previously unknown in the Americas; stating that the colonized were "poor" because they were incapable of governing themselves; and transforming the violent destruction of their collective uses into land "improvement."

Nevertheless, Locke intended to promote forms of colonization other than those used by the Spaniards: he rejected Spanish "tribute and conquest" in favour of English "agricultural labour and development."⁹⁵ It was in this capacity that he defended the colonization of Carolina. He thus followed in the wake of Vitoria, Grotius⁹⁶ and Pufendorf, replacing a purely imperialistic theory of colonization with a theologico-juridical foundation of despoilment based on natural law.⁹⁷ However, in Locke's theory, this was founded on the legitimization of appropriation through rights, particularly land ownership, and not – as in Vitoria's theory – by impeding trade. Locke thus used the same arguments to legitimize the violence used against the defenders of the commons in Europe and that used by Europeans against the colonized peoples. In doing so, natural law whose foundations lay in God also served to justify *in fine* the establishment of new relations of class subordination marked by discipline in labour and the appropriation of land.

The falsification of the American experience was destined to a bright future. The bridge between utilitarianism and the legal edifice of human rights constructed in Locke's text was supported by the physiocrats and economists of the 18th century. Adam Smith developed Lockean fiction by making currency the transparent means of expanding the barter system, shifting his demonstration onto the side of economic science. The individualist fictions of utilitarianism and natural law thus played a role in legitimizing exclusive appropriation. However, as Locke and Smith both knew, the fiction of barter being gradually transformed into a market was historically and anthropologically false: the inclusion of America in the European trade market was carried out only through arms, spoliation, forced labour to extract payment of tribute or other debts, widespread commodification of human beings sold as slaves and, of

⁹² Unlike Matthieu Renault's surprising claims after Partha Chatterjee, who certainly focuses too much on the colonization of India: "The justification for the appropriation-expropriation (without consent) of American lands only played a marginal role in colonial policy in the following centuries." Renault, *supra* note 71 at 161.

⁹³ For a recent clarification (in French) on the role of these justifications in the legal embroilments that perpetuate the appropriation of aboriginal lands in Australia, see "Territorialité à l'épreuve : reconnaissance étatique d'une géographie humanisée en Australie", presentation by Laurent Dousset on April 7th, 2016 in Philippe Descola's seminar at the Collège de France, Paris.

⁹⁴ *Ibid.*

⁹⁵ John Locke, *Further Considerations Concerning Raising the Value of Money* (London, UK: A and J Churchill, 1695).

⁹⁶ Hugo Grotius, *The Freedom of the Seas* (New York: Oxford University Press, 1916).

⁹⁷ Nestor Capdevila, "Impérialisme, empire et destruction" in Bartolomé de Las Casas, *La controverse entre Las Casas et Sepulveda* (Paris: Vrin, 2007).

course, “evangelization.” The tactical opposition between the English and Spanish colonies served to conceal the great uniformity of the colonial and intra-European practices of spoliation: the payment of Spanish tribute was not only a means of obtaining gold but, above all, as studies of the *encomienda* show, it was an extremely effective device for disciplining the colonized people through labour. History reminds us that the universality of the right to property and freedom of trade were effectively imposed on the world only through the delegation of armed forces, beginning with those who received the “Indians” from their king *en commende*. Law played a decisive role in this period of history: it established forced labour among the colonized and the slaves prior to the modern appropriation of the land.