Property Rights, Land and Territory in the European Overseas Empires

Direitos de Propriedade, Terra e Território nos Impérios Ultramarinos Europeus

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Contents | Índice

Introduction

Property, land and territory in the making of overseas empires 7
José Vicente Serrão

Part I Organisation and perceptions of territory
Organização e representação do território

1. Ownership and indigenous territories in New France (1603-1760) 21
Michel Morin
2. Brazilian landscape perception through literary sources (16th-18th centuries) 31
Ana Duarte Rodrigues
3. Apropriação econômica da natureza em uma fronteira do império atlântico português: o Rio de Janeiro (século XVII) 43
Maria Sarita Mota
4. A manutenção do território na América portuguesa frente à invasão espanhola da ilha de Santa Catarina em 1777 55
Jeferson Mendes
5. Urbanística e ordenamento do território na ocupação do Atlântico: as ilhas como laboratório 67
Antonieta Reis Leite
6. Do mar à serra: a apropriação do solo na ilha da Madeira 81
Nelson Veríssimo
7. Cartografia de uma propriedade na ilha de São Miguel: as Furnas de José do Canto (século XIX) 89
Pedro Maurício Borges

Part II European institutions in colonial contexts
Instituições europeias em contextos coloniais

8. Bens, direitos e rendimentos no reino e na América portuguesa: o morgado e a capitania (século XVI) 99
Maria Leonor García da Cruz
9. Capelas e terras de ónus de missa na ilha do Fogo, Cabo Verde (séculos XVI-XVIII) 115
Maria João Soares
10. Valorização e exploração do património vinculado em São Miguel (séculos XVII-XVIII) 123
José Damião Rodrigues
11. História da propriedade eclesiástica nos Açores: o património do convento de São João de Ponta Delgada (século XVII) 135
Graça Delfim
12. A exploração da terra sob o regime da *colonia* no arquipélago da Madeira 145
João Palla Lizardo
13. A persistência dos sistemas tradicionais de propriedade fundiária em Damão e Baçaim (século XVI) 155
Luís Frederico Dias Antunes
14. Property rights and social uses of land in Portuguese India: the Province of the North (1534-1739) 169
Susana Münch Miranda

Part III **Colonial land policies**
Políticas de terras coloniais

15. The Portuguese land policies in Ceylon: on the possibilities and limits of a process of territorial occupation 183
José Vicente Serrão

16. Influência política, ocupação territorial e administração (in)direta em Timor (1702-1914) 197
Manuel Lobato

17. A expulsão dos jesuítas e a secularização da propriedade da terra no Pará do Setecentos 211
José Alves de Souza Junior

18. Conquest, occupation, colonialism and exclusion: land disputes in Angola 223
Mariana Pinho Candido

19. Labour exploitation and the question of land rights in colonial Malawi (Nyasaland) 235
Davemonie Sawasawa

20. Regime de terras e cultivo de algodão em dois contextos coloniais: Uganda e Moçambique (1895-1930) 245
Albert Farré

21. African access to land in early 20th century Portuguese colonial thought 255
Bárbara Direito

Part IV **Property, society and conflict**
Propriedade, sociedade e conflito

22. Traders, middlemen, smugglers: the Chinese and the formation of colonial Timor (18th-19th centuries) 267
Paulo Jorge de Sousa Pinto

23. As repercussões do elitismo colonial português na exploração da terra em Moçambique (século XX) 279
Martinho Pedro

24. Direito à terra e ao território em Moçambique no período colonial e após a independência 291
José Gil Vicente

25. Land law and polygamy in the Bamiléké tribe in Cameroon 305
Mathurin Clovis Tadonkeng

26. As dívidas do açúcar na capitania de Pernambuco (século XVIII) 313
Teresa Cristina de Novaes Marques

27. Territorialidade e sentidos da posse da terra na Zona da Mata de Pernambuco 325
Ana Luísa Micaelo

28. The transformation of the property regime in 19th century Argentina 335
Federico Benninghoff Prados

1

Ownership and indigenous territories in New France (1603-1760)

Michel Morin[1]

Abstract: In accordance with international law principles the French generally considered indigenous peoples to be independent allies in North Eastern America, unless they converted to Catholicism – in which case they fell into a special category. Colonial authorities never negotiated land cessions, since the French kings gave them the power to unilaterally grant lands located in indigenous territories. Hence, the pre-Columbian origin of family territories has been hotly debated in the 20th century, as has been the possibility that Algonquian peoples have themselves devised conservation measures. French observers, however, experienced no difficulties in identifying territories controlled by indigenous nations. Colonial officials worked hard to convince peoples that they should consider each other "brothers" and accord one another a reciprocal hunting right over their lands. In addition, one or more chiefs acting in a concerted fashion managed hunting "districts". Normally members from a different band needed permission to hunt outside their own district, though occasional forays were accepted without protest. While conservation measures had been reported in the Great Lakes and Lake Champlain area as early as 1660, they appear to have been unknown to the north shore of the Saint Lawrence River in the 18th century. Overall, it seems highly unlikely that indigenous peoples would not have had sufficient knowledge to devise such measures by themselves.

Resumo: De acordo com os princípios do direito internacional, os franceses consideravam que os povos indígenas eram aliados independentes no Nordeste da América, a menos que se convertessem ao catolicismo – caso em que pertenceriam a uma categoria especial. As autoridades coloniais nunca negociaram concessões de terras localizadas em territórios indígenas, uma vez que os reis franceses lhes davam poderes de decisão unilateral. Por essa razão, tanto uma possível origem pré-colombiana de territórios familiares como a possibilidade de os povos Algonquinos terem concebido medidas de conservação, foram objecto de intensa discussão no século XX. Contudo, observadores franceses coevos não tiveram dificuldade em identificar os territórios controlados pelas nações indígenas. Os funcionários coloniais esforçaram-se por convencer os povos indígenas a considerarem-se "irmãos" entre si e a acordarem direitos de caça recíprocos nas respectivas terras. Além disso, alguns chefes agiram de forma concertada para administrar "distritos" de caça em comum. Normalmente, os membros de um grupo necessitavam de autorização para caçar fora do seu próprio distrito, ainda que incursões ocasionais fossem aceites sem protestos. Apesar de haver registos de medidas de conservação nos Grandes Lagos e na área do Lago Champlain já em 1660, estas pareciam ser desconhecidas na margem norte do rio de São Lourenço ainda no século XVIII. Mas, de uma forma geral, parece bastante improvável que os povos indígenas não tivessem conhecimentos suficientes para conceberem tais medidas sozinhos.

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The legal framework and the concepts used to describe the relationship between French colonizers and Indigenous Peoples in North America has been a controversial subject in Quebec because of contemporary land claims. Until at least 1996, the Quebec Government argued that New France's legal regime had totally extinguished Indigenous Peoples' rights; in 1996, the Supreme Court of Canada rejected this position (Supreme Court of Canada 1996), although the viewpoint persists in similar versions to this day (Lavoie 2010). Many historians and jurists have challenged this assertion (for instance, Slattery 1979; Eccles 1984; Lajoie *et al.* 1996; Morin 1997; Grammond 2013; Beaulieu 2015).

The purpose of this text is to shed some light on the assumptions held by the French concerning Indigenous Peoples' lands and to ascertain if they contemplated or even assumed the extinguishment of Indigenous Peoples' territorial rights. I will argue that, in general, the French held no such assumption and had little difficulty recognizing native patterns of land occupation. Legally, this could have amounted to collective ownership, although this theory was accepted implicitly and not fully developed at the time. The research substantiating my argument was effected in 17th and 18th century sources, relying as much as possible on quotations or description of native customs or ways of life. I have not attempted to ascertain if Indigenous Peoples would have considered these printed reports an accurate version of their reality or if their descendants' conceptions would provide a better lens through which to analyse the situation in the past[2].

The text is divided in two parts. First, I will review changes in the principles of International Law pertaining to the status of 16th to 18th century Indigenous Peoples. In my view, their recognition as Nations allowed them to enter into treaties with colonial powers and to hold collective rights. As a general rule, the latter did not dispute the binding character of such agreements. Second, I will focus on the recognition by the French of the occupation of lands by Indigenous Peoples. This will debunk the myth that Indigenous Peoples had no conception of territories prior to the arrival of the Europeans whose demand for furs provoked the establishment of boundaries between hunting bands or nations.

1. The status of indigenous peoples in international law from the 16th to the 18th century

In Quebec and in North America in general, legal historians have during the last 25 years established important points that are not always well understood in other disciplines (for an excellent presentation, see Grammond 2013). First, until the 19th century, Indigenous Peoples were considered to be independent at the international level, even by Spanish scholars. Unless they had truly subjected themselves to a colonizing power or had been conquered, they were powerful nations with whom relations of war and peace could be maintained. International legal literature and official documents recognized this. Even Jean Bodin explained that in the Americas and in Northern Africa independent families were governed by a chief who "*held nothing but by the sword, except for God's will*" ("*sans rien tenir après Dieu que de l'épée"*, Bodin 1986, vol. 1: 27). I emphasize, it is only in the 19th century that nomadic and stateless

[2] Where no reference is cited, the reader should consult Morin 2013a, 2013b and 2014. The author gratefully acknowledges the expert editorial assistance of Ms. Elizabeth Steyn, PhD candidate at the Faculté de droit de l'Université de Montréal.

peoples were considered too primitive to enter the circle of so-called civilized nations (Morin 1997: 163-182).

The French accepted these ideas. They considered that Indigenous Peoples enjoyed rights of self-government (Morin 1997: 63-84; Morin 2010; see also Belmessous 2013: 13-58). In practice, they needed hunters who would provide furs; there were too few settlers to create conflicts about lands. Furthermore, the status of French subject was initially reserved to new converts to the Catholic faith (art. 17 of the *Establishment of the Canada Company, 1627 & 1628*, in Fréchette 1852: 5). From 1664 to 1674, only their children would be granted this privilege (art. 34 of the *Establishment of the West India Company* [1664], in Fréchette 1851: 14). Afterwards, the situation became less clear (Havard 2009; Morin 2010).

To return to the Law of Nations, we should note that the famous expression *terra nullius* did not appear in legal documents during the New France era. Until the 19th century, one rarely reads that lands in North America were without owner, except in diplomatic proceedings – and then only if this was useful for French negotiators (Morin 2010; Beaulieu 2014). Yet all colonial powers assumed that they could grant lands overseas without first obtaining the consent of Indigenous Peoples. In practice this may equate to reliance on the *terra nullius* doctrine (Cavanagh 2014). Legally, however, this was far from being the case. There was no widely accepted concept denying the legal existence of Indigenous Peoples and their right to hold lands. Instead, the question was whether there existed a just cause of war against them (Morin 1997: 31-62; for a similar point concerning the English colonies, see Tomlins 2010). But an attack against settlers that was deemed "unprovoked" by colonial powers always served as a valid reason for retaliation. This was considered a form of self-defence rather than an aggression.

It is true some authors were of the view that Indigenous Peoples could not occupy lands without having cultivated them first. This line of thinking goes back to the Roman era myth of the Golden Age. Supposedly, there was a total absence of restrictions among human beings; fruits, plants or animals could accordingly be consumed at will (Morin 2013b: 60-61). John Locke and Emer de Vattel espoused this view, while Samuel Pufendorf and Christian Wolff recognized that hunters and gatherers owned their territories collectively (Morin 1997: 31-62; Cavalar 2009). So the obligations of colonial powers towards Indigenous Peoples, if any, were very controversial. After the British Conquest of 1760 and a period of initial hesitation, however, the colonial government of Quebec resurrected the French arguments denying the occupation of lands by Indigenous Peoples and refused to negotiate land cessions (Beaulieu 2013).

As is well known, British and Dutch colonial authorities negotiated land cessions with Indigenous Peoples in the 17th and 18th centuries; the French never did. But if one performs a close reading of the documents that granted powers to the French colonial officials (whether Charters or letters of provisions for governors), a distinction can be observed: foreign Nations could be expelled at will to make way for the French, but not so allies of the king. Thus, in 1664, a royal edict purports to grant gigantic and ill-defined territories to the (French) West India Company "*whether the said countries belongs to us as being or having been heretofore established by french* [*sic*] *subjects, or whether the said company do establish itself therein, by expelling or subjugating the indians* [*sic*] *or aboriginal inhabitants thereof, or those nations of Europe who are not our allies*" (Fréchette 1852: 14). Throughout the French Regime, the King insisted that trading partners and friendly warriors had to be treated kindly, unless they injured the French or their interests (Morin 2010: 23-27). It is true that writers expounding the law

of nations produced an almost limitless list of motives to wage war on them, to reduce them into slavery and to occupy their villages or cleared fields. Nevertheless, the French were in no position to do that in the Saint Lawrence Valley, as opposed to the Indies or Louisiana where such massacres did occur (Morin 1997: 31-62; Morin 2010: 47-48 and 59-60).

If we examine descriptions of Indigenous Peoples' interaction with the French, we observe that the latter were quite comfortable calling a local chief "brother" or using that word to describe their relationship with another nation. For that matter, European kings would call themselves brothers in diplomatic letters even when they were mortal enemies. Furthermore, treaties of brotherhood were discussed in the legal literature, though it was more common to read about treaties of friendship. As for rights of self-government, Champlain and his successors, as well as the missionaries, generally respected the traditional rules governing the selection of chiefs in New France. Although they sometimes tried to impose their candidate, they never assumed that they had the power to select chiefs. Peter Cook has also shown that within the Haudenosaunee confederation from 1645 some nations were considered to be the children of a more powerful one; when the French entered into peace treaties with the Haudenosaunees, they also became their "Father" (Cook 2008). Slowly, the word came to be associated with the French Governor. At this point, the French understood perfectly the distinction between children (who were independent allies) and nephews (who fought under the command of their chief). This change in vocabulary entailed an economic dependency and a military alliance under the leadership of the French.

Allies who had converted to Christianity were in a special category. They accepted military subordination to French interests, though not outright submission. These were small communities who had moved to New France after converting to Catholicism, often to escape brutal wars in their ancestral lands. Moreover, when the French settled in the St. Lawrence Valley at the dawn of the 17th century they found no permanent villages, since the Iroquoians who lived there in the 16th century had disappeared. The new converts were granted tracts of lands where they settled under the supervision of missionaries, but they continued to hunt and fish elsewhere during a large part of the year. Furthermore, the occasional imposition of French legal rules was almost always negotiated with the local chiefs. There was no assumption that they were *ipso facto* subject to the rules governing the French colonists. Hence, Father Jerôme Lalemant explained in 1648:

> "*From the beginning of the world to the coming of the French, the Savages have never known what it was so solemnly to forbid anything to their people, under any penalty, however slight. They are free people, each of whom considers himself of as much consequence as the others; and they submit to their chiefs only in so far as it pleases them. Nevertheless, [156] the Captain delivered a powerful harangue; and, inasmuch as he well knew that the Savages would not recognize the prohibition enacted by a Frenchman, he repeated these words several times: 'It is not only the Captain of the French who speaks to you but also such and such Captains,' whose names he mentioned. 'I also assure you with them that, if any one should be guilty of the prohibited offenses, we will give him up to the laws and the usages of the French'*" (Thwaites 1898, vol. 35: 51).

More generally, as they assumed the position of Father, the French insisted that their allies and the Haudenosaunees consider themselves brothers, which meant that each could hunt in the territory of the other. This was accepted in the 1665-67 Peace Treaty and, after almost twenty years of intense warfare, in the Great Peace Treaty of 1701 (Morin 2003; Morin 2013b: 71-72).

2. The recognition of indigenous territories in New France

In New France, the word "nation" generally referred to a group of hunting bands occupying a large area, often the hydrographical basin of a river; we frequently read about "the people of such a river" or "the people of such a place" (Morin 2013b: 64-67). While it is true that in the case of the Haudenosaunee or Five Nations the word "nation" referred to a wider grouping, I am currently focusing on the territories of Algonquian peoples in contemporary Canada. Using French legal concepts that were recognized at the time and are still in use today, we may say that each nation enjoyed the collective ownership of a regional territory, since an independent people could hold rights and occupy lands from time immemorial. Hunting districts were occupied by smaller bands of hunters whose members were related to one another, under the control of a chief. In this regard, it is useful to distinguish between the act of traveling through a "national" – we would say regional – territory, and the deployment of hunting bands within it.

French sources sometimes mention regional captains who controlled a large area, though their precise authority over the local chiefs of hunting bands is not clear (Morin 2013a: 550-561). Generally, this position passed to the eldest son, although another successor would be selected if the presumptive heir appeared unfit, through a process that is not explained to us. Like Indigenous Peoples, the French respected the custom of paying gifts to captains when they travelled through their territories, for fear of being pillaged or having their canoes destroyed (Morin 2013b: 67-71). They had to go to great lengths to have a right to travel afforded to them. Too often, the problem was solved over time because of the tragic consequences of epidemics, at least in the Saint Lawrence Valley. But elsewhere, as a general rule, the French obtained the consent of the local chief to access an area or to settle within it.

As for the smaller hunting districts, there are unmistakable references to their existence in the early 17th century, as well as in the 16th. Precise limits and average sizes were mentioned. These were utilized so as to deploy hunters efficiently within the larger national territory during the very harsh winter months, when killing large game such as moose became indispensable if the group hoped to survive. The chiefs, under the supervision or control of the captain, determined in which district each band would go. But neighbouring bands or allies were free to intrude if they needed food. These districts took form well before beavers became rare or extinct. A hunting band would generally return to the same districts over the years, but I do not believe that they owned them. They were granted a right of use following a collective decision made at the national level or a coordination measure of some sort.

This sheds light on the famous anthropological debate between Frank Speck and Eleanor Leacock (Morin 2013b: 61-62). In a 1942 text co-written with Loren Eiseley, Frank Speck presented the outcome of research and reflections spanning close to half a century in attempting to respond to certain criticisms that had been formulated by historians (Speck and Eiseley 1942). In his view, all of the Algonquian people who lived between 55th and 52nd degrees of latitude, from the Atlantic shore to Winnipeg Lake in Manitoba, recognized the existence of family hunting territories in the paternal line, particularly in respect of fur-bearing animals, which are sedentary. Further North, leaving behind the thick forests for the tundra, the hunt for caribou – that mobilized a large number of individuals – was practiced in a communal manner on the whole of the territory, thus remaining collective in nature.

Speck's Montagnais and Naskapi sources describe the boundaries of their family territory with precision, well before the region had been mapped out by the

governmental authorities (Speck and Eiseley 1942: 215-218). They confirm that an intrusion onto their lands would bring misfortune to the intruder but they do not envisage acts of reprisal (Speck and Eiseley 1942: 231). We should emphasize that at this stage of his reflection Speck in no way confuses individual ownership of the Western type with family hunting territories. Moreover, Speck and Eiseley concede that initially, in the context of a territory where there are few people or where animals are abundant, an aboriginal people has no reason to divide the territory into zones attributed to families or that would be exploited by different hunters on a seasonal basis. When resources become scarcer, such an allocation is made. For instance, communal hunting of certain species such as the caribou can co-exist with a division into small groups that practice trapping. From 1926 onwards, Speck asserts that this evolution is inevitable, taking into account the environmental conditions, the hunting practices and the need to allow the animals to reproduce (Speck 1926: 327-328). Speck and Eiseley are inclined to believe that the modern-day intensive exploitation of fur-bearing animals has stimulated the arrival of "true family ownership" but they remain convinced of the fact that this has a pre-Columbian origin (Speck and Eiseley 1942: 238-240).

In 1937 Alfred G. Bailey held that the 17th century commercial exchanges with the French had provoked the beaver hunts to intensify so that this resource became rare. This activity therefore required expeditions by groups that were smaller in size than had previously been the case and such expeditions also had a significantly longer duration. As it was recognized that a hunter is the owner of the animal that he has killed, property rights to the areas where the fur-bearing animals lived became recognized by extension; what is more, the French contributed to the acceptance of the idea of a family territory, notably those who had married aboriginal women (Bailey 1969: 87-88). In short, the transformation can be explained by the arrival of the Europeans and by the gradual adoption of an individualistic mentality by the aboriginal peoples (Bailey 1969: xx-xxi).

In 1954 Eleanor Leacock defended a similar point of view in her doctoral thesis. She emphasizes that in Speck's terms, the family territories as analysed do not have a permanent character, are not alienable and remain subject to control of the band. For Leacock it is a question of a form of usufruct rather than a property right. Moreover, at the beginning of the 17th century small game were of a minor importance, for the survival of the group depended on the quantity of moose or caribou killed; small game could therefore not by itself have served as incitement for aboriginal people to divide up their hunting zones. Most of all, Speck's theory presupposes that these peoples felt the need to adopt conservation measures before the arrival of the Europeans. Contrary to Speck's statements, she indicates that the Naskapi themselves also divided their territory into family zones on a seasonal basis, even if they hunted in the tundra in large groups (Leacock 1974: 1-7).

In respect of the 17th century historical sources, Leacock indicates that they reveal nothing similar to the family territories observed by Speck three centuries later, even if there were certainly band territories in existence, the boundaries of which were in any case ill defined and unstable. Indeed, the references to boundaries of hunting zones frequented by a group were not known to be comparable to a form of ownership. It is only towards the end of the 17th century that we can see a clear reference appearing to ownership of beaver huts and to a seasonal allocation of hunting zones (Leacock 1974: 15). In parallel, winter season saw the size of hunting bands diminishing in order to augment their radius of activity, which facilitated this transformation (Leacock 1974: 22). In this regard, more recent research has established that the hunt for small game had been practiced in small groups for a long time and that the size of these groups did

not diminish significantly during the course of this period (Morantz 1986: 65, 86). I believe Speck was right to point out that hunting districts predated the arrival of the French, but he mistakenly, perhaps inadvertently, gave the impression he considered this to be a form a family property, which is going too far. On the other hand, Leacock minimized the importance of exclusive rights of use that were not the result of the beaver trade with the Europeans. I believe that Indigenous Nations had a strong sense of collective ownership. Hunting districts were reserved for a specific group. Access to these resources required the authorization of the hunting band's chief, unless that was impractical. Later, familial or individual rights to beaver lodges may have developed independently of hunting districts; in my opinion, they were included within them for a long time.

A final point remains to be discussed. It rests on similar assumptions, namely, the idea that Indigenous Peoples needed to be taught conservation measures. According to this point of view, they allocated among themselves hunting districts or rights that had not existed prior to the arrival of Europeans because there had not been any need for them. Thus, Shepard Krech III has argued in a controversial book that in North Eastern America, Indigenous Peoples needed to be taught how to implement conservation measures to protect wildlife (Krech III 1999). For their part, economists have assumed that in the absence of property limits, hunters would inexorably exhaust resources (Demsetz 1967; but see Demsetz 2002). Therefore, to provide an incentive for individuals wishing to limit the number of animals killed, ownership of territories by families was agreed to.

It must be recognized that for complex reasons, some of them spiritual, hunters could feel compelled to kill all the game they could catch, because they believed that the spirit of the animal offered itself to them. There are references to game being killed when the surplus of available food made it impossible for them to eat the meat. I would emphasize that this reaction is probably natural for people who regularly risked dying from starvation in the winter. There are, however, descriptions of conservation measures being put in place spontaneously in the James Bay area, on the Prairies and in the Great Lakes area, both for large game and for beavers. None has been found for the Laurentian Valley. This shows that in many parts of North America, Indigenous Peoples had recourse to this strategy without prompting by Europeans. It also seems clear that overhunting of beavers became a problem from the 1680's; prior to that this animal was quite abundant in New France.

Conclusion

The French had little interest in destroying the traditional governance structures of their Indigenous allies, whom they considered to be independent peoples. They were able to settle in the Saint Lawrence Valley without much opposition from Algonquian Peoples, whom they considered to be allies. On the other hand, they had to enter into war against the Haudenoshaunees and make peace with them before the colony could be considered secure. They understood that under the leadership of captains and chiefs Indigenous Nations occupied large areas such as hydrographical basins. They also recognized that substantial gifts had to be offered if one wanted to travel through a territory. This type of control amounted to a form of collective ownership held by a nation. Hunting districts for large game were mentioned soon after the arrival of the French. They had well defined boundaries and were allocated to a band through the collective decision-making process of a nation, but they were not the former's property. Overhunting did

occur in some areas. In general, some Indigenous Peoples adopted conservation measures, though not all of them. At the very least, this shows that they could devise these measures by themselves. Thus, I have endeavoured to demonstrate that the terminology used by the French could be translated into legal concepts. Far from invoking *terra nullius*, the French hoped to transform their allies into subjects. But as long as they needed furs they saw no need to speed up this process, which remained a distant and elusive goal.

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