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# Slow Violence, Law, and History

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Slow violence, law, and history

Doug Hay

I read Rob Nixon's engrossing and appalling book from the perspective of an historian who works on law. It opened to me an immense range of scholarship and activism of which I was only tangentially aware. But it also has themes that resonated, on almost every page, with things I study. Law certainly appears in the book. Here I want here to emphasize its importance to his argument, and to widen the discussion of chronologies.

### Time

Nixon discusses the destruction and activism and literature of recent decades, and at the other extreme, the deep environmental time of climate change, fossil fuel creation, the 4.5 billion year half life of depleted uranium. The disjunction of temporal orders, of chronologies or chronotypes, is a main theme of his book (61 and passim). In these remarks I want to look at the mid-range: the early modern/modern period of the 16<sup>th</sup> to early 20<sup>th</sup> centuries. Humanity lacked the capacity for purely technological destruction at the beginning of this period (suffering rather the biological destruction of the Black Death spread by human commerce—the plague destroyed one-third to one-half the population of England in the 14<sup>th</sup> century, and returned repeatedly into the 1600s). But by the 18<sup>th</sup> century the groundwork of modernity was being surely laid. Today's neoliberalism is a reprise of classical 18<sup>th</sup>-century liberalism in markets—and globalization is a reprise of 19<sup>th</sup> century globalization in the century before 1914. (After the world wars and depression, world trade only recovered to 1914 levels again in the 1980s ). It was in the 18<sup>th</sup> and 19<sup>th</sup> centuries that law, in particular, prepared the way for destruction of lands and peoples by the powerful. Because law is the rhetorical and instrumental mode by which the powerful both justify and enact their predations. Because law is the principal creation of the state, and the mode of state power—they are coeval—his emphasis on the importance of the state (p.141) is amply justified.

### State Law

Over the last two centuries, state law in England and America radically redefined human beings' relationship to their landscapes, removed all legal recourse against the employer for industrial injury in order to ensure corporate profitability, degraded legal rights to water and air quality in order to accommodate and foster industrial development, and created empires of law as well as of capital to export all these legal inventions to their colonized subjects. What we see in the last thirty years is what can be traced over the last 200; intensified, no doubt, as technological danger

and military force have become greater, but facilitated and obscured by legal inventions well over a century old. Common law, the law of the great British and American empires of the nineteenth and twentieth centuries, rests on past authority. And a century, in law, is easily long enough to count as tradition, precedent, the authoritative past.

Nixon's emphasis on the occult characteristics of slow violence resonates very strongly for me as a social historian of law, because the common law has been an elite jargon, an immensely complicated social and intellectual structure, from its beginnings. Revolutionaries in every century, including levelers and fifth monarchy millenarians in the 17<sup>th</sup> century, called for a single, simple law book and the elimination of the lawyers: justice should be clear and open, not hidden by tortuous language and intricate procedures navigable only by the legal priests who served the upper classes. (Veall; cf Nixon 125) Those who demanded popular justice were right. The common law, the forum within which the most wealthy increasingly conducted their quarrels rather than through directed violence, was also, from its beginnings, the instrument by which the great and powerful obfuscated and legitimated the extraction of wealth from the rest of the community.

On a wider scale, the early-modern period of early imperial expansion generated even more raw expressions of legal power. State law in the special form of the law of states—international law--legitimated destruction of 'savage' and 'uncivilized' populations, and the rejection of their claims to rights against harm, rights slowly being built up, under wider voting franchises, in the metropolises of the empires in the nineteenth century.

I return to empire below. But first I want to signal an important development in England: a century or more of legal destruction of older rights that had characterized ancient agriculture and social practice.

### Local law and environmentalism

It was a fiction of the common law, the law of the judges, that it was a summary of popular legal custom from pre-medieval times. The common law was in fact the custom of the judges, who created a common set of doctrines for England suited to litigation among a tiny upper class. But some custom remained important until about 1800 in the form of special divergent local customs, which regulated the use of land by the owners and occupiers of individual manors, usually several hundred people. Manorial custom (and there were perhaps 10,000 manors in England) differed from manor to manor in terms of inheritance rights, occupancy rights, and especially (my point here) the regulation of use rights over others' lands: common of pasture, common of turbary, common of estover, gleaning, and others. The right to pasture one's cattle on others' land after harvest or on a common waste; to take turves for fuel; to take fallen wood for fuel or building; and the right of the poor inhabitants to glean the land for fallen grain after the harvest—all were regulated by juries of local small and medium owners, enforced by local

officials. So too was what was planted and harvested; how ditches were to be cleaned and when; and a host of other communal concerns in the great open fields. This intimacy with land and its regulation created the rhythms of peasant life—the traditions of the dead, passed on by custom rather than literacy (Nixon 94-5, 162)—celebrated by John Berger: knowledge of land, landscape, living from the land, replenishing and preserving the land. These were the great historical commons of early-modern England and Europe (Neeson). They disappeared with enclosure—first, by agreement of larger landowners in the 1600s; massively in the later 1700s and early 1800s by coercive legislation, laws enacted by a parliament of great landlords who counted agreement by acres rather than voices. Their argument was that enclosure would lead to higher yields (and higher rents to them). Many historians think of enclosure in terms of the changes in land use, the disappearance of open fields in which several property was combined with communal common uses. But for legal historians, enclosure is no more and no less than the legislative elimination of local custom that formerly had had the force of law, both for the local community, and even in the courts of the state.

After more than a century of complacent scholarly agreement with the enclosers' claims for increased productivity, the productivity of open-field agriculture has been shown by recent research to be as high as enclosed property in severalty (Allen). Only one manor remains unenclosed in England, as a museum, although Margaret Thatcher tried to enclose it as an affront to 'freedom'. But students of modern commons of various kinds in other countries and in the world's seas, led by Elinor Ostrom, who unexpectedly received a Nobel Prize in economics for her findings—have showed that community regulation of commons works, preserving the resources, preserving livelihoods and communities. State control and regulation does not. (Ostrom et al.) Partly that is because state bureaucrats are ignorant of how commons work; more often it is because the state is where kleptocracy is organized and legalized—where the rich, as in Kenya, try to seize community resources for their private use.

### Corporations

The corporation in common law countries is a legal invention of the 1600s, specifically designed to exploit colonial possessions (the East India Company, the Africa Company, the Hudson Bay Company...) In the colonies where it operated (and created—cf India) the superprofits were immense, the spoliation of communities often devastating. By the mid-19<sup>th</sup> century rights of incorporation, hitherto jealously opposed as an invitation to fraud in England and America themselves, were granted to all applicants in those countries. Ever since then, the perpetrators of environmental catastrophes, whether sudden and dramatic, or slow and insidious, have hidden behind the corporate form. The corporate oppressors of labour (see below) did so also. They still do (Glasbeek). Their predations among poor peoples world wide is one more turn in a cycle of globalization (more accurately imperialism) that was perfected by lawyers, administrators and statesmen of the west in the seventeenth to nineteenth centuries.

### Empire

The transnational corporation (Dutch and English East India Companies, and all their successors) is entwined in the purposes of empire, and the dominant organizing American empire of the 20<sup>th</sup>-century bears many resemblances to the British empire-- in its covert legal means and its overt legal justifications. Because law is essential to empire, to resource wars, to expropriation of land, to the creation of exploited labour.

Legal justification of empire:

The epithet 'rule of law' has been often used to epitomize all the cultural/material justifications offered by the apologists of both empires: bringing civilization and Christianity and economic progress to British imperial subjects; bringing honesty, transparency and economic progress to American imperial subjects. 'Rule of law', whatever it might mean in London, in the case of the British Empire was an empty shibboleth. Englishmen in India could not be subject to Indian courts and judges; Irish parliamentarians could not enact laws in Dublin that had not been pre-approved in London; in Crown colonies, no local legislature would be tolerated; often where such legislatures existed, as in the West Indies, only European settlers and planters, not the indigenous peoples or the imported African and Indian labour, had representation; many British colonies, including the largest, India, were under almost continuous emergency legislation that suspended or prohibited entirely recourse to habeas corpus until independence (and, unfortunately, afterwards); everywhere (including conquered white colonies like Quebec) resistance was met by detention without trial, deportation, censorship of the press, execution of indigenous or ex-slave leaders (Ireland 1798, Guyana 1823, Jamaica 1824, Jamaica 1833, Canada 1837, Ceylon 1848, India 1857, Jamaica 1865, south Africa 1901, India 1919—there have been many eloquent although illiterate Saro-Wiwas) and (when necessary) the extremities of martial law. In the 20<sup>th</sup> century whole areas were carved out, exempt from any pretence of law: the aerial bombing of Afghani tribes in the 1920s, for example, approved by enthusiastic imperialists like Churchill. (Simpson; cf Nixon ) As scholars of international law have argued, the very notion of law for distant peoples was not part of the European state system of international law: the 'uncivilized' could not be considered part of civilized humanity, and the law of nation states (Bowden). For particularly troublesome resistant populations in India the British enacted the Criminal Tribes Acts (the first was written by James Fitzjames Stephen, who wrote much of our Canadian Criminal Code, as well as the Indian Penal Code.) The Criminal Tribes Acts allowed the state not only to displace whole populations but to use them as forced labour on public works, and the continued coercion of such peoples did not end with independence, as Nixon notes (163-4).

From the seventeenth century to the mid-twentieth, when British suppression of mau mau in Kenya (1952-56 ) used terror, mass execution, and vast concentration camps to maintain the colonial regime that had seized land and reduced peoples to coerced labourers, British imperialism scorned 'rule of law' for subject peoples of colour. But they maintained its façade through rhetoric and guile, and here Nixon's emphasis on the occult is particularly apt: the facts of the mau mau repression have only recently come to light (Anderson, Elkins; Blacker; cf Nixon

137ff). Information about the Kenyan atrocities the British public might not have ignored were deliberately suppressed by the state. As Nixon puts it, memory loss is often memory repression. Thus 'writing as scripted obliteration' (p.95) aptly characterizes Niall Ferguson's celebration of the glories of the British Empire. The historian Bernard Porter notes that Ferguson also celebrates his idyllic childhood memories of Kenya, a few years after the British atrocities committed against the Kikuyu. He says nothing about it. Empires demand amnesia.

Legal facilitation of empire:

Behind the façade of 'rule of law' lay the coercive, facilitative machinery of legal form, legislative terms, judicial interpretation and punitive enforcement. We could examine the role of the corporate form, the deliberate absence of environmental regulation, or the huge legislative corpus and police forces that constructed taxation schemes and land appropriation schemes, new enclosures, to 'free' landscapes of people and to construct the inputs of land and labour (South Africa enacted more laws than any other historical regime, bar Nazi Germany). All this recapitulated on a world scale the early-modern history of English capitalism, and the laws used in colonial settings were copies of English law, but often far more punitive.

One example: the contract of employment, arguably the single most important (certainly most numerous) kind of contract. Slavery, the form labour took in the British Caribbean, in Mauritius, in Assam, and other spectacularly profitable British plantation colonies of the 18<sup>th</sup> century, was of course a matter of law: its quotidian lawful punishments draconian, its denial of equality before the law absolute, even when emergency martial law was not being used to suppress slave revolts, and even after London began enacting ameliorative legislation (inspectors of slaves, limits on flogging) in the 1820s. After the abolition of slavery in 1834, throughout the empire local versions of employment contracts, master and servant law, enforced by new prisons and police forces, replaced the legal structures of slavery. Police, vagrancy, passes (cf Nixon 95-96 on the Bedouin) while most notorious in South Africa (Nixon 190), were invented in early-modern English vagrancy and master and servant law, and most fully developed in the West Indies and many other colonial jurisdictions, first under slavery, then with 'free' labour.

English master and servant law was coercive from its beginnings in 1349. It only ceased to be enforced by penal (criminal) sanctions in Britain in 1867/1875 (imprisonment of the worker for breach of contract abolished, followed by the end of penal fines.) Meanwhile, in the growing Empire, a vast legal/administrative apparatus of coerced 'free' labour replaced slavery. It was created, disciplined, and oppressed for profit through the state enforcement of highly exploitative contracts of employment. Under indenture, vast numbers of workers, both willing and coerced, signed contracts to labour in unknown conditions at the other side of the world—they came primarily from India, and went primarily to the British Caribbean, to Africa, to Mauritius. But also from Pacific Islands to Queensland, and many other local variants, including within India itself. Peasants were remade into labourers. Law constructed their working conditions as highly coercive, with employers often given rights to discipline and punish that only magistrates could

exercise in England, and with a huge recourse to flogging, deduction of wages, mandatory increased lengths of contracts to punish absenteeism, and the deliberate creation of perpetual debt. (referred to in Nixon, 71, 83; cf Hay and Craven)

Imperial master and servant law was thus similar to, and based on, English employment contract law, but far more punitive, with a massive advantage granted to employers. Ex-slave colonies were particularly notable in this regard, but the terms of this mass of legislation (over 2,000 enactments in over 100 colonies) was approved by London (which had the power of disallowance). Indeed, as 'scientific racism' increasingly informed the bureaucrats of an ever-widening empire in the later 19<sup>th</sup> century, the minimal protections for workers (such as limits on the legal length of contracts) were progressively removed. Only the collapse of world trade in the early 20<sup>th</sup> century, and pressure from the ILO, persuaded London to repeal the most egregiously exploitative elements of master and servant law in their colonial possessions.

Now

But that was at the end of one period of imperial expansion. A new one was well underway by the 1930s. The ILO campaign against British imperial master and servant law was in part an American-inspired attempt to undermine British imperial power. The new world empire was being created. Since the second world war, renewed globalization, renewed neoclassical economics, vastly increased weaponry, deeper environmental degradation, accelerating global inequality among ever-larger populations, and selfish complacency among elites and governments, have a terrible urgency. Nixon's book is a wonderful response, a hopeful sign of the power of intelligence, of writing, of activism.

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