Dispossession and Legal Mentalité in Nineteenth Century South Africa: Grotian and Lockean Theories of Property Acquisition in the Annexations of British Kaffraria and Natalia

British and Afrikaner governments used different types of legal arguments to legitimize their acquisition of African land in the early nineteenth century. Using Pierre Legrand's concept of legal mentalité, I explore the legal mythologies that conditioned Britons' and Afrikaners' methods of land acquisition. I adopt two instances of land acquisition to use as case studies: the British annexation of Kaffraria in 1835 and the Afrikaner annexation of Natalia in 1839. I show that the annexation of British Kaffraria was conditioned by a legal mythology influenced by Lockean ideas of property theory, in which property could be legally obtained through a framework of improvement. Meanwhile, I show that the annexation of the Republic of Natalia was conditioned by a legal mythology influenced by Grotian ideas of property theory, in which property could be legally obtained through a framework of conquest.

Keywords: legal mentalité, dispossession, South Africa, British Kaffraria,

Republic of Natalia, property rights

Introduction

Between 1795, when the Dutch East India Company first handed control of the Cape Colony over to Britain, and 1887, when Zululand became the final annexation to what is now the country of South Africa, the geographic area of land claimed by Europeans grew from around 290,000 square kilometres to just over two million square kilometres.[1] This enormous acquisition of territory took place haphazardly and piecemeal, slowly spreading east and north as frontier wars, Treks, mineral revolutions, and various other motivations brought colonial rule further and further into the interior. [figure 1 here]

The impacts and legacies of these dispossessions continue to reverberate into the present, with historical and racialised dispossession fundamentally linked to ongoing poverty and inequality.[2] From a historian's perspective, of course, addressing the legacies of land dispossession requires some historical perspective: to overcome the dispossession, we must understand how and why dispossession occurred in the first place. Many historians have turned their attention to studying the origins of dispossession in South Africa and various proposals have been forwarded to explain how and why dispossession took place, yet to my mind there is one crucial area that has been overlooked: the semantic area between the factors that *caused* dispossession and the factors that *enabled* it to take place as it did.

In this paper, I offer a new perspective on the origins of South African dispossession by approaching it through the lens of legal mentalité. As defined by Pierre Legrand, legal mentalité is 'the mythology which performs the mediation between the objective conditions in which a legal community lives and the manner in which it tells itself and others about the way it lives.'[3] In other words, it is the array of meanings which a community calls upon to imagine what actions are permissible and how they are permissibly narrated. While previous approaches to dispossession ponder the

ideologies, the material conditions, and the discourses that *caused* dispossession, I use legal mentalité to ponder what mythologies of permissible action *enabled* dispossession to occur. I have chosen two instances of dispossession as case studies: the annexation of British Kaffraria in 1835 by the British, and the annexation of Natalia in 1839 by Afrikaners. Looking at these two events through the lens of the legal mythologies embedded within them, I argue that the two processes of annexation were fundamentally guided by what the different legal mythologies of the British and the Afrikaners determined to be permissible means of acquiring territory. By using the difference between English and Roman-Dutch understandings of legitimate means of property acquisition, I show how law acted discursively to define and limit British and Afrikaner approaches to land annexation according to their own respective legal cultures. This paper is organized into three parts. First, I provide a brief overview of the annexations of British Kaffraria and Natalia, pointing to how immediate material causes have been emphasized without problematizing the embedded meanings enabling those causes to unfold as they did. Second, I explore the differences between English and Roman-Dutch legal mentalités specifically regarding property rights and land acquisition. Third, I analyse British and Afrikaner legitimizing discourses around the annexations of British Kaffraria and Natalia and highlight the English and Roman-Dutch legal mythologies embedded within them.

The annexations of British Kaffraria and Natalia

From the second implementation of British rule in the Cape Colony in 1806 to the mineral revolution in the 1870s, Britain was interested in South Africa primarily for the strategic control of the water route between Europe and Asia. Like the Dutch East India Company before it, the British imperial government aimed to restrict inland expansion so as to limit expenditure on costly frontier warfare. As in many colonial contexts, the Cape expanded regardless of imperial intentions. The rural constituencies

of Cape society steadily moved eastward in search of arable land, and in doing so came into repeated conflict with various Xhosa groups. When frontier tensions erupted into large scale conflicts that endangered the colony, Britain reluctantly defended its settlers and pushed its boundaries ever outwards at the expense of the Xhosa.

[figure 2 here]

British expansion eastward first happened following the Fourth Frontier War of 1811-12,[4] when 20,000 Xhosa were driven out of their territory so that a buffer zone of settlers could be placed on the newly annexed territory known as Albany, theoretically establishing a more secure frontier.[5] It happened again following the Fifth Frontier War of 1818-19, when the Xhosa invaded the Cape in retaliation for a demand to return stolen cattle. The invasion was repelled, the Xhosa were pushed further back, and their land was once again annexed. Referred to as the Neutral/Ceded Territory, the land annexed in 1819 was meant to be kept as an unsettled buffer between the Cape and the Xhosa, but it was less than two years before settlement crept in.[6] Cattle theft continued between the Cape and the Xhosa regardless of the government's attempts to maintain a strong boundary, and in 1834 a Cape patrol tried to punish the Xhosa by executing a high-ranking chief. In response, the Xhosa led another invasion of the Cape, known as the Sixth Frontier War. Following the war, the Cape annexed yet another slice of land and ordered the Xhosa to evacuate. However, this annexation was intensely criticized in Britain by the Select Committee on Aborigines, and the annexation was immediately reversed by the Colonial Office. In place of annexation, the Cape reserved the territory then known as British Kaffraria for Xhosa residence, and implemented a series of treaties with Xhosa chiefs that required each chief to entertain a Cape military outpost in their territory.[7] The reservation of British Kaffraria lasted only until 1847.

In 1846, the Xhosa chief Sandile disputed the authority of one of these military outposts to try a Xhosa man for the murder of a Cape resident, and refused to recognize the authority of the Cape to extradite and punish his own subjects. The Cape sent a military force into British Kaffraria to detain the accused Xhosa man, and Sandile responded by routing the military force and leading a Xhosa force into the Cape in what is called the Seventh Frontier War. The Xhosa were defeated and British Kaffraria was annexed as a new Crown colony, with magistrates and police forces distributed throughout.[8] Under Crown administration half of British Kaffraria was opened up for white settlement, but when it was handed over to Cape administration in 1866 in order to reduce imperial expenditure, the entirety of British Kaffraria was opened to whites.[9] [figure 3 here]

Meanwhile, tensions between Afrikaner settlers and the British administration installed in 1806 steadily increased throughout the first half of the nineteenth century, leading to the large-scale emigration of Afrikaners from the Cape Colony known as the Great Treks, as well as to the creation of three new Afrikaner colonies by mid-century. These tensions first arose from interference the British administration made into Afrikaner society. Interference in land and labour issues were found particularly offensive. First, the Afrikaner loan farm system of land tenure was replaced with a perpetual quitrent system. The loan farm system entailed the payment of a fixed yearly rent regardless of the size or quality of the land. Horrified by the potential revenue that was lost by not accounting for size and quality, the British administration abolished the loan farm system and implemented the perpetual quitrent system in 1812, requiring land surveys to be performed and approved prior to tenure being granted.[10] In 1828, the British administration interfered in the forced labour of the local Khoikhoi peoples. Prior to 1828, Khoikhoi labourers were kept on farms via a combination of debt

bondage, where labourers would be kept in a constant state of indebtedness, and vagrancy legislation, where Khoikhoi individuals required permission from their employer to leave a farm. By the late 1820s Britain was at the height of the anti-slavery movement, and lobbyists (including the Select Committee on Aborigines) succeeded in securing Ordinance 50 to abolish the vagrancy legislation, making Khoikhoi labour much more expensive for Afrikaner farmers.[11] The most offensive interference, often pointed to as the moment that sparked the Great Treks, was the de-annexation of British Kaffraria following the Sixth Frontier War of 1834-35. Around 15,000 Xhosa had invaded the Cape frontier during the war, destroying hundreds of Afrikaner farms and reducing an estimated 7,000 farmers to destitution. The annexation of British Kaffraria was considered by many Afrikaners to be restitution for the loss of their property and a helping hand from the government to rebuild their lives. As such, when Britain de-annexed British Kaffraria, it was interpreted by Afrikaner farmers as a message that Britain and the Cape did not care about them.[12]

Acting upon their outrage and feelings of marginalization, many large groups of Afrikaners began to emigrate from the Cape in the 1830s and 1840s, totalling roughly 10% of the Cape population.[13] These groups established three new Afrikaner republics throughout the interior: the Republic of Natalia in the west, the Orange Free State in the north, and the South African Republic in the north-east. At first, Britain was willing to accept the independence of Natalia, as the cost of forcing its subjugation would have been too high. This changed when intelligence reached Britain that the government of Natalia was planning to forcibly relocate the majority of the Zulu within its borders to the south, where they would share a border with the Xhosa. Concerned that this would cause Xhosa-Zulu hostilities that would spill into the Cape, a British force was sent to annex Natalia as the new British colony of Natal in 1842.[14]

From these overviews, we can observe that there is no want for causes the British Kaffraria and Natalia annexations. Colonial policy desired buffer zones, and buffer zones required annexation. Cattle raiding led to warfare, and warfare led to annexation. Settlers desired land, and land shortage led to annexation. Trekkers desired independence, and independence required annexation. These causes have been studied and debated to great depth, and historians are comfortable in pointing to them as reasons why dispossession happened.[15] Yet when it comes to thinking through the deeper assumptions and perceptions that made these annexations permissible, possible, and reasonable, histories have less to offer. To be sure, there is much scholarship on concepts such as *terra nullius*, the doctrine of discovery, and the improvement of land, especially on British colonies in the Pacific and North America.[16] However, while we might presume that these concepts may have - and as I show, to some extent did - come into play during the annexation of British Kaffraria due to its location within the British common law system, no study has yet asked the question outright. Moreover, a bigger question is whether such concepts had any place in the annexation of Natalia, carried out as it was by Afrikaners and thus outside the British common law system. I would also be remiss to ignore the contributes of historians to discursive understandings of colonization in South Africa. For instance, Clifton Crais points to some of the discourses of power which shaped British and Afrikaner attitudes towards Africans. To Crais, Afrikaner discourses of power revolved around slave-master power structures,[17] while British discourses of power revolved around ideals of equality, justice, and rights.[18] While these discourses of power do partly answer the types of questions I ask about the embedded meanings which enabled Britons and Afrikaners to perceive annexation as possible and permissible, I maintain that discourses of power and discourses of legality are two different beasts, however entangled they become. It is one

thing to perceive oneself as superior to and in domination of another. It is another thing entirely to fit that superiority and domination into pre-existing legal frameworks. This paper, then, is focused on the discourses of legality that encircled British and Afrikaner annexation of land.

Legal mentalité

The premise of this paper starts with the simple recognition that the Afrikaner legal worldview was different from that of the British, deriving from a civil or Roman-Dutch legal tradition rather than a common or English legal tradition.[19] From there, I am interested in how the differences between British and Afrikaner legal mentalités became manifest in South African dispossession. Pierre Legrand defines legal mentalité as 'the discursive structures that organise cognition in a given legal tradition.'[20] Legrand particularly focuses on legal myths as discursive structures: 'it is mythology which performs the mediation between the objective conditions in which a legal community lives and the manner in which it tells itself and others about the way it lives.'[21] My understanding of legal mentalité, building off of Legrand's definition, is also influenced by Gramsci's definition of culture, where culture is all of the available meanings through which a person interprets the world,[22] and Foucault's definition of knowledge systems, where individual and collective perceptions of the world are limited by the signs and statements articulated through discourse.[23] Thus, for the purpose of this paper, a legal mentalité is all of the meanings through which a person imagines what they are allowed and not allowed to do, in which situations such rules apply, and the means by which such rules can be undermined. By applying this approach to the dispossession of British Kaffraria and Natalia, I intend to show how legal discourses influenced nineteenth century dispossession.

A similar framework has been proposed by Martin Chanock in the form of *legal culture.* As Chanock defines it,

> a legal culture consists of a set of assumptions, a way of doing things, a repertoire of language, of legal forms and institutional practices…A legal culture, like other aspects of culture, embodies a narrative, encompassing both past and future, which gives meaning to thought and actions.[24]

While Chanock's *legal culture* and Legrand's *legal mentalité* are therefore similar in their discursive approach to law, they are leveraged for different purposes. Legal mentalité, with its focus on the continuity of mythologies which mediate understandings of the present, is aimed at tracing, for want of a better phrase, the longue durée of legal symbols and meanings from the past into the present. It sees present perceptions of permissibility as linked to past perceptions of permissibility. Legal culture, on the other hand, is more specifically focused on locating understandings of permissibility in the immediate present, of asserting the disconnection between past and present that occurs through adaptation to local environments and interaction with local influences. For Chanock, it is about moving past narratives which place 'the history of South African law in Europe and quite out of the local social context,'[25] as well as about highlighting the multi-vocality of South African law. I entirely agree with Chanock's assertion of the importance of locating legal understandings within local contexts and recognizing the many local influences on South African legal culture, yet I also argue that there is space for both approaches. I see no reason why perceptions of permissibility cannot be understood as containing both longue durée elements and locally and temporally specific elements. This paper is dedicated to exploring the existing of longue durée elements, and so adopts Legrand's legal mentalité as its guiding framework.

Chanock's emphasis on multi-vocality does, however, raise the important question of why I focus only on English and Roman-Dutch legal mythologies, and not

on African mythologies as well. In recent decades there has grown a substantial body of work showing that imperial spaces which historians have previously treated as exclusively British were also decidedly Indigenous.[26] In the specific context of South African legal history, while South African law has typically been treated as a mixed legal system consisting of Roman-Dutch and English law,[27] Africa law has also been recognized as a crucial influence on the modern South African legal system. Zimmerman and Visser, for example, refer to African legal traditions as one of the 'three graces' of South African law.[28] It is important to note, however, that legal historians do not generally treat African legal traditions as influencing South African law until the latter half of the nineteenth century and into the twentieth century. Joan Church, for instance, argues that African legal traditions were largely ignored by both the British and the Afrikaners until around 1853, when Cape Colony administrators gave up on the notion of asserting English law in newly annexed territories and began encouraging African leaders to police their people according to their existing laws.[29] Similarly, Zimmermann and Visser suggest that some level of recognition of Indigenous legal traditions existed 'in each of the *later* provinces of South Africa,' but that an official approach to Indigenous law was not established until 1927.[30] Thus, while I certainly advocate for the importance of understanding the intermingling of African legal traditions with English and Roman-Dutch traditions in the latter half of the nineteenth century, my focus on the 1830s is a touch too early for such an approach. Further research beyond the scope of this paper is perhaps necessary to query the presence of such intermingling prior to 1850.

On English and Roman-Dutch Theories of Property

A comparison of John Locke's (1632-1704) and Hugo Grotius' (1583-1645) writings on property offers a useful starting point for comparing the different

mythologies of English and Roman-Dutch law. I do not mean to imply that Locke's and Grotius's ideas on property are synonymous with the treatment of property by Britons and Afrikaners in South Africa. Indeed, as one commenter pointed out when I presented a conference paper on this subject, it would be absurd to suggest that all or even some Britons and Afrikaners on the ground either knew about Lockean and Grotian theories of property or consciously reflected on the applications of those theories to their everyday lives. I use Locke and Grotius as metersticks of English and Roman-Dutch legal mentalités because both scholars were highly influential within - and highly reflective of - their respective legal traditions. According to Gregory Alexander and Eduardo M. Peñalver, 'no single person has had more of an impact on property thought in the English-speaking world than John Locke.'[31] Meanwhile, Grotius' name appears 144 times throughout Robert Lee's 475 page *An Introduction to Roman-Dutch Law* (an average of one mention every three pages) and 380 times throughout Johannes Wessels' 791 page *History of the Roman-Dutch Law* (an average of one mention every two pages). As such, the different approaches of Locke and Grotius will be taken as indicative of epistemological differences between English and Roman-Dutch understandings of property.

A fundamental difference between Locke's and Grotius' theories of property is their divergent perceptions of human society. Both Lockean and Grotian theories of property assume that property rights exist to ensure the survival of society by providing access to resources. However, Locke's theory of property is based on a perception that society is ultimately co-operative, while Grotius' is based on a perception that society is ultimately antagonistic, and this difference of perception led to vastly different concepts of private property.

Locke's perception of society as co-operative is captured by what James Tully called Locke's 'workmanship model' of society.[32] In this model, individuals who are the most capable of resource/monetary productivity must be enabled to produce as much as they can, and so must be allowed land at the expense of individuals who are less capable of productivity. One individual was to have more land than others, not so that one may be rich and the others poor, but so that all may be richer.

> He who appropriates land to himself by his labour, does not lessen but increase the common stock of mankind. For the provisions serving to the support of humane life, produced by one acre of inclosed and cultivated land, are ten times more, than those…lyeing wast in common.[33]

Co-operation is at the center of this reasoning, for those who cannot produce must depend on those who can, and those who can must provide for those who cannot. This co-operativity led to a Lockean theory of property in which private property rights must powerfully protect private property, for the survival of society depends on the protection of the productive's land rights against those of the unproductive. I call this a fixed theory of property rights, because property rights are fixed to those who can produce and are not negotiable, and this fixity defines what I will refer to as the workmanship model of property rights.

Grotius' perception of society as antagonistic is captured by his development of the right of necessity. The Grotian right of necessity needs to be contextualized by Grotius' theory of the origins of private property. Grotius conceived of private property rights as securing access to human necessities in a society defined by greed, ambition, and rivalry. In the state of nature nothing belonged to anybody, not because everything was common property, but simply because nothing had been claimed yet.

> Each man could take whatever he wished for his own needs….The enjoyment of this universal right [the right to take what you needed] served the purpose of private ownership; for whatever each had thus taken for his own needs another could not take from him.[34]

Thus, private property rights existed to protect the necessities that one person needed from being taken by another person. However, since private property rights were intended to promote survival, they could not be used to inhibit another individual's survival. An individual with plenty of necessities could not use private property rights to withhold those necessities from individuals who had none.[35] The answer to this dilemma is the right of necessity, which Grotius defines as 'the right to use things which have become the property of another.'[36] There are certain limits to this right. For example, the needy must not use the property of those of equal need, the needy cannot use the property of another if their need was of their own design, and the needy must have tried to gain aid by permission before they take it without permission.[37] Yet the main purpose of the right of necessity is to limit the security of private property rights. When an essentially adversarial and antagonistic society inevitably pits individuals against each other, private property rights cannot be so powerful as to prevent one individual from using the belongings of another. I call this a fluid theory of property rights, because property rights are open to negotiation, and this fluidity defines what I will refer to as the societal antagonism model of property rights.

Locke's and Grotius' different perspectives on conquest illustrate how their different models of property rights condition their theories of property acquisition. Locke expressly rejects the idea that conquest can transfer property rights, with certain exceptions. He considers war to be a competition over lives rather than material items, which means that lives and not items are forfeited or gained. 'His [the opponent's] force, and the state of war he put himself in, made him forfeit his life, but gave me no title to his goods.'[38] This separation of life from material items illustrates the workmanship model's fixity of property rights, for even though the owner of an item has died, his property rights remain protected. Grotius' opinion is exactly the opposite.

> Things immoveable [real property] are generally taken by some public act, such as marching an army into the country, or placing garrisons there….The law of nature indeed authorizes our making such acquisitions in a just war….Not only the person, who makes war upon just grounds, but any one whatever engaged in regular and formal war, becomes absolute proprietor of everything which he takes from the enemy.[39]

By asserting that property rights can change through conquest, Grotius illustrates the societal antagonism model's fluid property rights, since property rights are essentially up for the taking.

In this brief overview, I have argued that the difference between Lockean and Grotian theories of property acquisition is between the Lockean workmanship model, based a fixity of property rights, and the Grotian societal antagonism model, based on a fluidity of property rights. The workmanship model has a 'for-the-greater-good' element to it, which requires property rights to be fixed to those who are the most capable of utilization and improvement regardless of the strength of other parties to take it by force. On the other hand, the social antagonism model recognizes the legitimacy of taking property by force, and so requires property rights to be fluid so that those who take property can keep it. As will be seen in the next section, these different models of property rights conditioned how Britons and Afrikaners legitimized their acquisitions of African land in the nineteenth century. Britons engaged in a discourse that invoked the protection of their property rights for-the-greater-good, similar to Locke's workmanship model, and Afrikaners engaged in a discourse that invoked the earning of their property rights due to the spilling of their blood, similar to Grotius' social antagonism model.

Legitimizing Nineteenth Century Land Acquisitions in South Africa

British Kaffraria

A close reading of the legal arguments made to support the acquisition of British Kaffraria in 1835 reveals two dominant themes: that land acquisition was legitimized by the economic benefit to the entire collective, and that land acquisition was legitimized

by the ‘improvement’ of the Indigenous population through paternalist administration. British Kaffraria was claimed as British territory twice in 1835: once by Governor D’Urban and once by Lord Glenelg. In his polemic to the Colonial Office, Governor D’Urban provided two arguments to justify the dispossession of Xhosa territory following the Sixth Frontier War (1834-1836): that the dispossession would prevent the financial ruin of the Cape Colony, and that the dispossession would prevent further bloodshed.[40] Although I differentiate these two arguments into two categories, D’Urban's rhetoric represented them as tightly intertwined and, to some degree, circular. On the one hand, the establishment of British rule of law over the territory would ensure the financial stability of the colony by supporting settler capitalism, ‘since not a farmer will venture to return to the occupation of lands where such certain loss and such frightful perils await him.’[41] On the other hand, the sale and improvement of Xhosa land would fund the paternalistic administration of Xhosa groups within reserved territories ‘in the hope that they may for the future...keep peace and good order within, and abstain from all inroads and robberies without, their allotted boundary.’[42] These first two arguments reflect a Lockean workmanship model of property rights. Instead of the Xhosa being expelled from their territory, the increased profits gained from improving the land were to fund the paternalist administration that would benefit the dispossessed by preventing further warfare through the dissemination of ‘civilization.’ This isn't identical to Locke's theory, which was explicitly about property rights arising from the realization of the monetary value of land. But it certainly adheres to Locke's workmanship model, in which property rights arise when the property is used for the benefit of society as a whole.

D’Urban's annexation of Kaffraria didn't last the year. When Lord Glenelg learned of D’Urban's annexation, he immediately issued a deannexation order. Glenelg

did not claim that the Xhosa territory could not be settled. Rather, he argued that Britain had *not yet* gained property rights over the territory. He gave two reasons. First, he asserted that the Xhosa had been entirely justified in starting the war.

> Driven as they had been from their ancient and lawful possessions…and urged to revenge and desperation by the systematic injustice of which they had been the victims, I am compelled to embrace, however reluctantly, the conclusion, that they had a perfect right to hazard the experiment, however hopeless, of extorting by force that redress which they could not expect otherwise to obtain.[43]

Recognition of their 'ancient and lawful possessions' is an important point, because in order to justify the system of settlement that Glenelg outlines later in his letter, he had to overcome this ancient and lawful possession. The second reason was that Britain had not yet really tried to improve the Xhosa. D'Urban had claimed that the Xhosa were 'irreclaimable savages,' and as such, D'Urban's vision for preventing further bloodshed was based on a simple policing of Xhosa groups rather than improvement per se. On the contrary, Glenelg was convinced that the Xhosa were indeed very reclaimable:

> The Caffres, under the guidance of their Christian ministers, have built places of public worship; have formed various congregations of proselytes, or of learners; have erected school-houses, and sent their children thither for instruction. In the meanwhile no inconsiderable advance has been made in agriculture and in commerce.[44]

Given the reclaimability of the Xhosa, Glenelg affirmed Locke's rejection of acquisition by conquest, for 'the extension of His Majesty's dominions in that quarter of the globe, by conquest or cession, is diligently and anxiously to be avoided.'[45] Unfortunately for the Xhosa, it was Glenelg's perception of them as reclaimable that ultimately allowed him to undermine their 'ancient and lawful possession.' Glenelg suggested a settlement scheme where British property rights would be assured by their improvement of the Xhosa. He called for the creation of a system in which 'a systematic and persevering adherence to justice, conciliation, forbearance, and the honest arts by which civilization may be advanced, and Christianity diffused amongst them.'[46] This system entailed three

aspects. First, each Xhosa group would be assigned a separate reserve of land, 'for the due regulation of the future relations between the Caffre tribes.'[47] Second, an administrative framework would be set up to carry out this paternalist regulation, consisting of a lieutenant-governor of the territory, a civil commissioner to mediate issues between Xhosa groups, and a government agent for each Xhosa group.[48] Third, and most importantly, a select group of settlers would be allowed to settle the territory. 'No European or Hottentot, or any others but Caffres, to be located or allowed to settle east of the Great Fish River...*All Christian teachers are exempted from this rule.* [emphasis mine]'[49] In other words, the territory would be opened to those who could improve the Xhosa, and their efforts would affirm Britain's own property rights over the Xhosa's territory. From these three aspects, Glenelg's justification of Britain's property rights in Xhosa territory is clear: Britain had a right to the land because Britain could improve the Xhosa themselves. Just as with D'Urban's arguments, Glenelg's argument closely adhered to Locke's workmanship model. D'Urban's and Glenelg's arguments show us how they operated within a legal mentalité whose Lockean mythology culturally conditioned what they conceived of as permissible ways to gain land.

Republic of Natalia

A close reading of the legal arguments made to support the acquisition of the Republic of Natalia by Afrikaners in 1839 reveals two dominant themes: that land acquisition was legitimized by the spilling of blood in defence of it, and that land acquisition was legitimized by the prevention of warfare via the expulsion of Indigenous groups. The Republic of Natalia was the first Afrikaner republic to be declared by the Afrikaners and recognized by the British, both in 1839. However, Natalia was constantly at risk of British annexation, and so Afrikaner leaders were actively involved in affirming the Afrikaner right to the land they acquired from the Zulu. The first reference to Afrikaner property rights appeared in Piet Retief manifesto

listing the reasons for the Great Treks. ‘We will not molest any people, nor deprive them of the smallest property; but, if attacked, we shall consider ourselves fully justified in defending our persons and effects, to the utmost of our ability, against every enemy.’[50] Retief was careful to frame any hostility as a Zulu attack upon the Afrikaners, rather than a Zulu defence against the Afrikaners. He continued this narrative of victimhood in a letter to D’Urban: ‘We have learnt with grief that almost all the native tribes, by whom we are now surrounded, have been instigated to attack us.’[51] While it is perhaps unsurprising that Retief would either perceive his own actions or seek to narrate his own actions as self-defence rather than openly admit to being the aggressor, this victim narrative carries a legal argument. The particular argument such a narrative makes is different between Lockean and Grotian theories of property rights. Locke considered violence to be a contest of lives and not property, so that while violence could result in the alienation of life, it could not result in the alienation of property. Grotius considered just violence to be a means of property acquisition. Thus, while under a Lockean theory of property rights the victim narrative's legal argument would be an argument for the legality of violence but not of acquisition, under a Grotian theory of law, the same narrative's legal argument would be an argument for the legality of acquisition. In Retief's claim to property rights, we see none of the financial or civilizational arguments made by the British. Instead, we see a claim based on just violence.

Another reference to Afrikaner property rights was made by Andries Pretorius in February 1839. ‘We have a right to Natalia, which was acquired not only by means of free purchase, but for which we had to pay the price of suffering indescribable cruelty, and not with the blood of men alone.’[52] The ‘means of free purchase’ he refers to is the treaty between Piet Retief and the Zulu chief Dingaan. This treaty was a result of a deal

struck between Retief and Dingaan, where Dingaan promised to cede the lands around Port Natalia in return for Retief's help in recapturing some of his cattle. The treaty's text states in very clear terms:

> I, Dingaan, King of the Zoolas, do hereby certify and declare that I thought fit to resign unto him, Retief, and his countrymen the Place called 'Port Natalia,' together with all the land annexed...Which I did by this, and give unto them for their everlasting property.[53]

I include the text of the treaty in order to draw attention to how, despite the treaty clearly transferring property rights to the Afrikaners by cession, Pretorius insists that the Afrikaner right to Natalia is based on a dualism of the cession *and* the shedding of blood. This same dualism was declared by the Natalia Volksraad (parliament) nine months later:

> An agreement was entered into with [Dingaan] for obtaining a piece of land under certain conditions, which were strictly fulfilled by...Piet Retief, and which was afterwards ratified by his blood and that of seventy more...The gathered, bleached bones of the additional 370, innocently and treacherously murdered relations and friends of Boschjesman's River, will remain a lasting evidence and as a visible beacon of right on that land, until another beacon of similar materials shall overshadow ours.[54]

This passage has two interesting implications. First, the use of the phrase ‘ratified by his blood’ suggests that the Afrikaner right to land was created in two stages: first peaceful agreement, and then violent defence. This dualism mirrors the victimhood narrative that Retief established in his own writing, in that both the narrative and the dualism frame Afrikaner violence as a justified response to Zulu aggression. As such, both are legal arguments for the Afrikaner right to land based on Grotian theory of property alienation through just war. The second interesting implication is the Volksraad's recognition that. while the violent defence against the Zulu was a ‘beacon of right,’ a Zulu defence against Afrikaner aggression could create their own ‘beacon of right’ that would undermine that of the Afrikaners. This recognition is a direct manifestation of Grotian

property theory, in that property rights are fluid and must be perpetuated and continually defended.

In 1842, as Britain was planning their annexation Natalia, the Natalia Volksraad released a last-ditch-effort to prove their property rights over the land. Historians have rightfully established that this proclamation was little more than a rhetorical piece specifically designed to appeal to British concepts of humanitarianism. However, a comparison between the humanitarian arguments of the Natalia Volksraad and the humanitarian arguments of D'Urban and Glenelg reveals a fundamental difference between British and Afrikaner conceptions of the humanitarian elements of property rights. The Volksraad explained that their policy of expelling a large group of Xhosa beyond the boundaries of Natalia was humanitarian action designed to prevent warfare.

> We are able to convince every true philanthropist that our views in making arrangements respecting the removal of the Kafirs...are furnished in a true love of humanity, in as much as we have thereby sought to obviate or to prevent the probability of hostility and bloodshed, which would otherwise inevitably result if we permitted Zoolahs and other Natives to leave their former abodes and settle themselves in thousands amongst us.[55]

Compared with the humanitarian arguments espoused by D'Urban and Glenelg, which emphasized the regulation and improvement of Xhosa society, the Volksraad's humanitarian vision appears exceedingly superficial in that it merely entails segregation. This has led historians to evaluate the Volksraad's humanitarian claims as not truthfully humanitarian, but no historian has taken a step back and considered whether the Volksraad's humanitarian claims were simply rooted in a different legal mentalité. As argued in section one, a Lockean conception of society is based on cooperation and the workmanship model, and this contributes to why British conceptions of humanitarianism involved active interference and improvement. On the contrary, a Grotian conception of society is based on competition and hostility, which helps explain why Afrikaner conceptions of humanitarianism involved segregation, since segregation

reduces contact between inherently competitive groups that would inevitably lead to hostility. We can therefore observe two sources of Afrikaner property rights: the ratification of cession through bloodshed, and the prevention of further bloodshed through segregation.

Concluding remarks

This paper has offered a working definition of English and Roman-Dutch legal mentalités and traced these mentalités through British and Afrikaner territorial annexations. The British mentalité was informed by Lockean notions of fixed property rights for-the-greater-good, which became manifest in legitimizing the acquisition of British Kaffraria based on the greater benefit to the Cape economy and the civilization of the Xhosa. The Afrikaner mentalité was informed by Grotian notions of fluid property rights based on violent acquisition, made manifest by legitimizing the acquisition of Natalia based on the ratification of peaceful cession through bloodshed and the prevention of further bloodshed through segregation. To bring these findings into the present, I would like to connect them to the current situation of land reform in South Africa.

South Africa is currently in the midst of reviewing the project of land reform. The Land Claims Commission that was established in 1995 to facilitate the redistribution of land back to those who were dispossessed has come under sever criticism.[56] As such, there have been calls to move from a redistribution strategy, which is based on a constitutional mechanism to restore land taken due to racial discrimination, to a rights-based strategy based on aboriginal title.[57] The premise of a claim to land based on aboriginal title is, in essence, quite simple. The idea behind aboriginal title is that sovereignty over land and ownership of land are two different things, and that when the British empire declared its own sovereignty over Indigenous

land it did not legally establish ownership of that land. Rather, ownership remained with those who had previously occupied – and who remained in continual occupation of – the land in question.[58] Aboriginal title is thus a claim to land based on a historical and continuing right to land through occupation. This approach has been used to make Indigenous land claims in Canada, Australia, and New Zealand, but one of the problems that arises when seeking to import it into South Africa derives from the very argument I have made in this paper: that dispossession in South Africa was carried out differently according to the different legal mentalités of the British and the Afrikaners. Sovereignty was not asserted in the same way by Britons and Afrikaners, and the legal justifications and frameworks of property rights used to buttress claims to land were different between both groups. As such, aboriginal title claims to land that was historically dispossessed by Afrikaners require different legal arguments and evidence than claims to land that was historically dispossessed by Britons. To date, little scholarly attention has been given to this facet of aboriginal title in South Africa, and claimants risk costly delays and challenges if not properly armed against such legal burdens. For instance, Mogobe Ramose argued back in 2007 that demolishing colonizer sovereignty and reasserting African rights to land was an issue of reclaiming land that was taken by 'right of conquest.'[59] Yet, as this paper has demonstrated, such an argument may apply to Natalia since its acquisition was justified through the discourse of conquest, but the acquisition of British Kaffraria – influenced by the Lockean mythology of English law - was not. By tracing the divergent legal mentalités of property acquisition and divergent mythologies of property rights through dispossessions in nineteenth century South Africa, this paper has made a first attempt at approaching this complicated issue.

[1] Johan Fourie and Jan Luiten van Zanden, "GDP in the Dutch Cape Colony: The National Accounts of a Slave-Based Society," *South African Journal of Economic* 81, no. 4 (2013): 469; A.H. Tatlow, "The Union of South Africa," *Journal of the Royal African Society* 23, no. 92 (1924): 280.

[2] Paul Hebinck and Ben Cousins, eds., *In the Shadow of Policy: Everyday Practices in South Africa's Land and Agrarian Reform* (Johannesburg: Wits University Press, 2013).

[3] Pierre Legrand, 'European Legal Systems are not Converging,' *The International and Comparative Law Quarterly* 45, no. 1 (1996): 61.

[4] Part of a series of nine wars between the Cape Colony and the Xhosa stretching between 1779-1879. The first three frontier wars were fought during Dutch rule, and so histories of the British era typically begin with the Fourth in 1811-12.

[5] Martin Legassick and Robert Ross, "From Slave Economy to Settler Capitalism: The Cape Colony and Its Extensions, 1800-1854," in Carolyn Hamilton, Bernard Mbenga, and Robert Ross, eds., *The Cambridge History of South Africa, Volume 1: From Early Times to 1885* (Cambridge: Cambridge University Press, 2009), 266-267.

[6] Legassick and Ross, "From Slave Economy to Settler Capitalism," 267-269.

[7] Legassick and Ross, "From Slave Economy to Settler Capitalism," 281-285.

[8] Legassick and Ross, "From Slave Economy to Settler Capitalism," 296-301.

[9] Norman Etherington, Patrick Harries, and Bernard Mbenga, "From Colonial Hegemonies to Imperial Conquest," in Hamilton, Mbenga, and Ross, eds., *The Cambridge History of South Africa,* 334.

[10] L.C. Duly, "The Failure of British Land Policy at the Cape, 1812-28," *Journal of African History* 6, no. 3 (1965): 358-361.

[11] *Historical Dictionary of the British Empire*, eds. James Stuart Olson and Robert Shadle (London: Greenwood Publishing Group, 1996), s.v. "Fiftieth Ordinance."

[12] Hermann Giliomee, *The Afrikaners: Biography of a People* (Charlottesville: University of Virginia Press, 2009), 142-3.

[13] Giliomee, *The Afrikaners,* 161.

[14] Giliomee, *The Afrikaners,* 168-9.

[15] Similar narratives can be found in most histories of colonial South Africa. See, for instances, T.R.H. Davenport, *South Africa: A Modern History*, 4th ed. (Toronto: University of Toronto Press, 1991), 77-90, 115-123; Robert Ross, *A Concise History of South Africa,* 2nd ed. (Cambridge: Cambridge University Press, 2008), 40-46.

[16] See John Weaver, *The Great Land Rush and the Making of the Modern World, 1650-1900* (Montreal: McGill-Queen's University Press, 2003); Robert Miller, Jacinta Ruru, Larissa Behrendt, and Tracy Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010).

[17] Clifton Crais, *White Supremacy and Black Resistance in Pre-Industrial South Africa: the Making of the Colonial Order in the Eastern Cape, 1770-1865* (Cambridge: Cambridge University Press, 1992), 87.

[18] Crais, *White Supremacy and Black Resistance in Pre-Industrial South Africa,* 58.

[19] For coverage of the differences between British and Afrikaner law in nineteenth-century South Africa, see Reinhard Zimmermann and Daniel Visser, *Southern Cross: Civil Law and Common Law in South Africa* (Oxford: Clarendon Press, 1996).

[20] Legrand, 'European Legal Systems,' 61.

[21] Ibid, 61.

[22] Jean Comaroff and John Comaroff, *Of Revelation and Revolution: Christianity, Colonialism, and Consciousness in South Africa* (Chicago: University of Chicago Press, 1991), 21.

[23] Callum Brown, *Postmodernism for Historians* (New York: Pearson Education, 2005), 60.

[24] Martin Chanock, *The Making of South African Legal Culture, 1902-1936: Fear, Favour and Prejudice* (Cambridge: Cambridge University Press, 2004), 23.

[25] Chanock, *The Making of South African Legal Culture,* 25.

[26] See Coll Thrush, *Indigenous London* (New Haven: Yale University Press, 2016)*;* Cecilia Morgan, *Travelers Through Empire: Indigenous Voyages from Early Canada* (Montreal: McGill-Queen's University Press, 2017); Fiona Paisley and Kirsty Reid, eds., *Critical*

Perspectives on Colonialism: Writing the Empire from Below (New York: Routledge, 2014)*;* Darren Reid, "The Aborigines' Protection Society as an imperial knowledge network: the writing and representation of black South African letters to the APS, 1879-1888" (MA thesis—University of Victoria, 2020); Benjamin Lawrance, Emily Lynn Osborn, and Richard Roberts, eds., *Intermediaries, Interpreters, and Clerks: African Employees in the Making of Colonial Africa* (Madison: University of Wisconsin Press, 2006).

[27] See, for instance, W.J. Hosten, A.B. Edwards, F. Bosman and J. Church, *Introduction to South African Law and Legal theory* (Durban: Butterworths, 1995): 1268.

[28] Zimmermann and Visser, *Southern Cross*, 12.

[29] Joan Church, "The Place of Indigenous Law in a Mixed Legal System and Society in Transformation: A South African Experience," *Australia & New Zealand Law & History E-Journal* 94 (2005): 96-97.

[30] Zimmermann and Visser, *Southern Cross*, 12.

[31] Gregory Alexander and Eduardo Peñalver, *An Introduction to Property Theory* (Cambridge: Cambridge University Press, 2012), 35

[32] James Tully, *A Discourse on Property: John Locke and his Adversaries* (Cambridge: Cambridge University Press, 1980), 4

[33] John Locke, *The Works of John Locke, Esq; in Three Volumes*, vol. 2 (London: Printed for A. Churchill, and A. Manship, 1722), 169

[34] Hugo Grotius, *On the Law of War and Peace*, book 2, trans. by Francis Kelsey (Washington, D.C.: Carnegie Institution of Washington, 1913), 186

[35] Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Oxford University Press, 1991), 45-48

[36] Grotius, *On the Law of War and Peace*, book 2, 196

[37] John Salter, 'Grotius and Pufendorf on the Right of Necessity,' *History of Political Thought* 26, no. 2 (2005): 285

[38] Locke, *The Works of John Locke, Esq; in Three Volumes*, vol. 2, 210

[39] Grotius, *On the Law of War and Peace*, 663-664

[40] Benjamin D'Urban to Lord Aberdeen, June 19 1835, in *Select Documents on British Colonial Policy,* ed. Kenneth Bell and W.P. Morrell, 455-458 (Oxford: Clarendon Press, 1928), 455

[41] D'Urban to Aberdeen, June 19 1835, in *Select Documents on British Colonial Policy,* 456

[42] Benjamin D'Urban, Treaty of Peace with the Gaika Tribe, in *Select Documents on British Colonial Policy,* ed. Kenneth Bell and W.P. Morrell, 459-463 (Oxford: Clarendon Press, 1928), 461

[43] Lord Glenelg to Benjamin D'Urban, December 26 1835, in *Select Documents on British Colonial Policy,* ed. Kenneth Bell and W.P. Morrell, 463-477 (Oxford: Clarendon Press, 1928), 467

[44] Glenelg to D'Urban, December 26 1835, in *Select Documents on British Colonial Policy,* 468

[45] Ibid, 468

[46] Ibid, 469

[47] Ibid, 473

[48] Ibid, 473-4

[49] Ibid, 475

[50] Piet Retief, Manifesto of Piet Retief, February 2 1837, in *Afrikaner Political Thought: Analysis and Documents, Volume 1: 1780-1850,* ed. Andre Du Toit and Hermann Giliomee, 213-214 (Cape Town: David Philip, 1983), 214

[51] Piet Retief to Benjamin D'Urban, July 21 1837, in *Afrikaner Political Thought: Analysis and Documents, Volume 1: 1780-1850,* ed. Andre Du Toit and Hermann Giliomee, 214-215 (Cape Town: David Philip, 1983), 215

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[57] Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Oxford: Hard Publishing, 2014), 286

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[59] Mogobe Ramose, "In Memoriam: Sovereighty and the 'New' South Africa," *Griffith Law Review* 16, no. 2 (2007): 310-329.