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Title Indigenous Land Rights in the Commonwealth Caribbean: Coloniality in Legal Thinking and Decision-Making as an Obstacle to Recognition

Direitos territoriais indígenas no Commonwealth Caribenho: a colonialidade no pensamento jurídico e na tomada de decisões como obstáculo ao reconhecimento

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Abstract

This article proposes a decolonial approach to Indigenous property law in the Commonwealth Caribbean. The author presents three case-studies – Jamaican Maroons, Toledo Maya in Belize, and Amerindians in Guyana – highlighting how these communities' claims to ancestral land transcend conventional property law categories and reveal the limitations of Western legal paradigms. The analysis demonstrates that Indigenous land rights are not adequately addressed within the private-law framework but instead require engagement with constitutional law, human rights law, international law, and Indigenous legal traditions themselves. The article explores how coloniality persists in judicial reasoning and state governance, even in post-independence contexts. Postcolonial states with Indigenous populations must reassess their views on these groups' property rights and embrace innovative judicial and doctrinal methodologies. Only through such a decolonial shift can the region secure justice for Indigenous communities and transform property law into a vehicle of cultural survival and legal innovation.

Keywords: Indigenous title to land; Ownership of ancestral lands; Commonwealth Caribbean.

Resumo

Este estudo contribui para o desenvolvimento do direito de propriedade indígena decolonial, com foco no Commonwealth Caribenho. São usados três exemplos de não reconhecimento de títulos indígenas à terra: quanto aos Marrons jamaicanos, aos Maias de Toledo em Belize e aos Ameríndios na Guiana. Embora as três comunidades sejam muito distintas, a pesquisa comparativa decolonial demonstra que as questões que envolvem o título indígena são conceitualmente similares, transcendem as fronteiras do direito positivo e devem ser abordadas a partir de diversas abordagens metodológicas. O reconhecimento dos direitos territoriais indígenas transcende o domínio do direito de propriedade como um componente do direito privado e requer o envolvimento do direito constitucional, das normas de direitos humanos e do direito internacional. Essas disputas incluem temas de dinâmica de poder, legados coloniais, discriminação, luta social e resistência cultural. Incorporar as tradições jurídicas indígenas é central na jornada rumo à descolonização do direito de propriedade nessas sociedades.

Palavras-chave: Título indígena de terra; Commonwealth Caribenho; Propriedade de terras ancestrais.

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1. Introduction

This article aims to advance the development of decolonial Indigenous property law, with a particular focus on the Commonwealth Caribbean. This region, often overlooked and under-represented in mainstream comparative law, has seldom been the focus of comprehensive legal research (OSTROUKH, 2016, p. 1230), especially regarding Indigenous land claims. Studies of the problem of Indigenous claims to land from a comparative-law perspective are exceptional, while reflections on the possible decolonization of this area of property law are virtually non-existent.

The Commonwealth Caribbean region boasts an unmatched variety of legal traditions, comprising legal systems of independent countries and British Overseas Territories. It includes specimens of Common-law and mixed (Common-Civil law) jurisdictions. The mixture is due to a change of sovereignty from France to Great Britain, as in the case of Saint Lucia, or from the Netherlands to Great Britain, as in the case of Guyana, mirroring experiences in Quebec, Louisiana, and South Africa. Additionally, certain countries in this region acknowledge the religious traditions of specific communities, notably Muslims and Hindus (OSTROUKH, 2016, p. 1220).

However, an exclusive focus on Common law and Civil law in the Commonwealth Caribbean neglects and marginalizes Indigenous legal traditions. Such neglect is due to colonialism. British colonizers, driven by economic interests, appropriated resources in Caribbean colonies, severely oppressing Indigenous populations and denying recognition of their legal history, legal traditions, and claims to ancestral land. Although the colonial power and post-independence governments later recognized, to a certain degree, the customary law of Indigenous populations and their rights to ancestral lands, this legal tradition remains at the periphery of legal systems and legal studies in the region.

In the Commonwealth Caribbean, as in other jurisdictions that have Indigenous populations, the area in which the Indigenous legal tradition is most recognized (or rejected) as well as most discussed is land law. In various Caribbean countries, Indigenous communities claim proprietary rights over their communal land, and governments both colonial and post-colonial face the issue of the recognition of such rights.

This article examines the (non)recognition of Indigenous land rights in three Commonwealth Caribbean jurisdictions – Jamaica, Belize, and Guyana – through a decolonial comparative law lens. It is not solely a study of state laws or their responses to

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Indigenous legal traditions; rather, it focuses on the interplay between Indigenous claims, colonial legal legacies, judicial reasoning, and broader political struggles over land and identity. The study is comparative and contextual, attentive both to legal doctrine and to lived experiences. It explores how colonial legacies and inherited Western legal traditions continue to shape, distort, or obstruct Indigenous claims to ancestral lands, even in formally independent postcolonial states.

The author's central objective is to criticize and reconceptualize some notions and principles of property law from a decolonial perspective by exposing the limitations of Western legal frameworks in addressing Indigenous land claims. Through a detailed study of the struggles of the Jamaican Maroons, the Toledo Maya, and the Amerindians of Guyana for recognition of their land rights, the article demonstrates the inadequacy of both Common-law and Civil-law rules, principles, and paradigms in accommodating Indigenous legal traditions, which predate colonial impositions of Western laws and operate according to distinct communal, spiritual, and political understandings of land.

The decolonial dimension of the article is threefold. First, it exposes the persistence of coloniality in legal thinking and governance, even within ostensibly independent Caribbean states. Second, it calls for the formal recognition of Indigenous legal traditions as equal components of national legal systems, thus challenging the conventional binary of Common and Civil law in comparative law scholarship. Third, the article critiques the Western conception of ownership as inherently individualistic, arguing that this paradigm fails to accommodate Indigenous collective relationships to land as central to identity and survival.

2. Land Rights of Jamaican Maroons

Compared to other jurisdictions, the problem of Indigenous claims to land in the Commonwealth Caribbean has substantial regional specifics. An in-depth study of these specifics reveals that international legal studies of indigeneity and research from other countries are inapplicable in this area. Specifically, the presence in the Commonwealth Caribbean of Jamaican Maroons – a group considering themselves to be an Indigenous people – does not fit the classical understanding of what Indigenous peoples are.

Originally, Maroons were runaway slaves who sometimes mixed with Indigenous

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populations such as, in Jamaica, Tainos. During the late Spanish and early British colonization periods, they formed their own communities, which survived by planting and hunting (for the history of the Jamaican Maroons, see MAVIS, 1988). Their identity is rooted in resistance to slavery and to the official colonial and post-colonial governments, as well as in communal land holding. However, racially, linguistically, and culturally, they were not significantly different from the general Black population of Jamaica. Referring to the Jamaican Maroons as "Indigenous" and as a "people" – can be criticized under traditional approaches to indigeneity. Their history and identity may not align with the widespread definition of Indigenous people as "the living descendants of pre-invasion inhabitants of lands now dominated by others" (ANAYA, 2004, p.3), as "peoples in independent countries who are regarded as Indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries…" (Art. 1, 1. b) of ILO C169 - *Indigenous and Tribal Peoples Convention*, 1989), or as groups that have "historical continuity with pre-colonial societies" (COBO, 1986). However, Jamaican Maroons exhibit a strong sense of identity and distinctiveness that does not allow us to dismiss their recognition as Indigenous people. Such recognition necessitates a reconceptualization of traditional definitions of indigeneity, which for a long time have reflected the colonial vision of what it means to be Indigenous. As for challenging the traditional international-law definition of indigeneity, Jamaican Maroons can be compared, for example, to the Negev Bedouin people in Israel,[1] who recently have been pressing a claim for recognition as an Indigenous nation (FRANTZMAN, KARK & YAHEL, 2012a). Even though scholars have challenged whether Bedouins may be considered Indigenous (FRANTZMAN, KARK & YAHEL, 2012b), the very attempt to extend the notion of indigeneity makes their claim similar to the Jamaican Maroons' struggle for recognition of their distinctive community.

While a strong sense of identity and distinctiveness may not on its own be sufficient for indigeneity, it is an increasingly well-recognized component of indigeneity, particularly in contemporary international human rights discourse. The modern understanding of indigeneity has shifted significantly from rigid, essentialist criteria (uninterrupted occupation since "time immemorial" (for more about these older criteria,

[1] For the suggestion to discuss the definition of indigeneity with respect to Negev Bedouin, I am indebted to Dr. Ahmad Amara.

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see GILBERT, 2016, pp. 17-22)) to more inclusive frameworks that give serious weight to self-identification. This shift is reflected, for example, in the 2005 "Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities", which emphasizes that Indigenous identity should not be externally imposed, but rather it should be recognized in terms defined by the people themselves. The report states, "We should put much less emphasis on the early definitions focusing on aboriginality ... The focus should be more on the more recent approaches focusing on self-definition as Indigenous and distinctly different from other groups within a state" (*Report of the African Commission Working Group*, 2005, pp. 92–93). This approach was endorsed on the global level by Victoria Tauli-Corpuz, the UN Special Rapporteur on the Rights of Indigenous Peoples, in her 2014 commentary on recognition standards (UN SPECIAL RAPPORTEUR, 2014, para. 16). In the Latin American context, the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) published, also in 2014, "Guaranteeing Indigenous Peoples's Rights in Latin America: Progress in the Past Decade and Remaining Challenges", a report that underscores the importance of self-identification in census data collection. The report notes that most countries in the region now ask individuals to self-identify as Indigenous, reflecting a shift from earlier practices that relied primarily on linguistic or ancestral criteria (ECLAC, 2014, p. 36). From a decolonial perspective, self-identification represents a form of epistemic resistance to colonial categorizations, making it a politically and ethically significant basis for recognition.

Thus, when Jamaican Maroons assert an Indigenous identity – grounded in distinct communal institutions, land attachment, cultural continuity, and resistance to colonial and postcolonial power (See, e.g., PERKINS, 2024, p. 259, SHEPHERD, 2022 & WYNTER, 1970, p. 36)[2] – this self-identification must be taken seriously, particularly when it is consistent and embedded in their collective consciousness and daily practices.

The legal and political recognition of indigeneity is not merely symbolic. It carries implications for land rights, cultural protection, and participation in governance. For Jamaican Maroons, being recognized as Indigenous could provide stronger grounds on which to assert communal land rights, demand cultural autonomy, and resist assimilationist pressures under Jamaican state structures. More importantly, in

[2] Bilby does not explicitly categorize the Maroons as an indigenous people in the conventional legal or political sense. However, his work *True-Born Maroons* underscores their distinct cultural, spiritual, and territorial identity, which aligns with many characteristics of indigenous peoples (BILBY, 2005).

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comparative terms, the Maroons' struggle for recognition reflects the limitations of current frameworks and underscores the need to reconceptualize indigeneity beyond Eurocentric and settler-colonial logics. Their case serves not just as a plea for inclusion but as a challenge to the definitional gatekeeping that has excluded similarly marginalized and self-identifying communities. Thus, while self-identification alone may not automatically confer indigeneity, it is a critical starting point, particularly when coupled with other factors, such as historical marginalization, distinct institutions, and cultural resilience, which are present in the Maroon's case. The importance of recognition here lies in its transformative potential, in enabling a more just, context-sensitive approach to indigeneity in postcolonial societies like Jamaica.

Even though Jamaican Maroons do not satisfy some of the characteristics the literature requires for recognition of indigeneity – they are not original inhabitants, have not lived on their land since time immemorial, and did not possess precolonial sovereignty – they do however satisfy other important requirements: the experience of oppression by a foreign culture and legal regime and group attachment to the land. They are also a distinct, marginalized population that self-identifies as Indigenous, with separate customary, cultural, economic, social and political institutions. This is an example of the failure to create a universal definition of indigeneity, which demonstrates how decolonial theory "rejects coloniality's construction of national, racial, ethnic, religious, and gender classifications as universal categories" (SALAYMEH & MICHAELS, 2022, p. 179).

The Maroons' have preserved their cultural identity even after the emancipation of slaves and the acquisition of independence by Jamaica. They have never been submitted to any of the governments nor assimilated into the general population. There are currently four Maroon communities in Jamaica. The largest, Accompong, is located in the Cockpit Mountains and has 600 inhabitants (THOMPSON, 2012, p. 1).

As a free, independent, self-governing community possessing and exploiting natural resources, the Maroons initially posed a constant threat to the government and the institution of slavery. Thus, the British fought the Maroon community for over eighty years (from 1655 to 1739) in an enormous effort to destroy it (THOMPSON, 2012, p. 1). However, these efforts were not successful, and in 1739, the warring parties concluded a peace treaty according to which the Maroons would remain free and could continue living in their traditional areas. Their freedom was conditioned on an obligation to help suppress slave rebellions and on returning runaway slaves. Thus, according to an apt expression by

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Michelle Thompson, “the treaty converted the Maroons into a quasi-military force designed to maintain the institution of slavery” (THOMPSON, 2012, p. 3).

In the aftermath of emancipation of slaves in the British Empire in 1833, the role of Maroon communities under the peace treaty had to be substantially revised, as the entire Black population of the country had become formally free. Consequently, the colonial administration decided to integrate the Maroon communities into Jamaican society. And the tool it chose was the conversion of Maroon communal lands into individual holdings under British Common-law rules and subject to individual property taxes, to which end the Land Allotment Act was promulgated in 1842. It stipulated that Maroons would no longer own the lands granted in the 1739 treaty collectively; instead, each individual received the right to hold five acres of land for personal use subject to individual property taxes (An Act to Repeal the Several Laws of This Island Relating to Maroons, 1842). Thomson suggests that another hidden objective behind the act was the colonial administration’s expectation that the Maroons would fail to pay taxes. The government would then be able to evict them, and, being landless, they would have to work on plantations (THOMPSON, 2012, p. 4). But apart from this apparent economic objective, another plausible hidden objective of the act could have been the cultural assimilation of the Maroons, threatening their collective identity by means of dismantling their collective lifestyle and depriving them of the economic basis for the group’s survival.

Whatever the direct or indirect objectives of the Land Allotment Act may have been, it is an illustrative example, replicated in many colonial societies, of the imposition of a Western, colonial understanding of ownership as an individual continuum of rights and duties related to private exploitation of land and its resources. This colonial notion of ownership was intended to undermine the Maroons’ understanding of ownership as a communal institution contributing to the prosperity of the whole group, its resistance to the colonial government, and their development of a common identity. The Maroons instead developed a distinct and enduring relationship with their lands, grounded in resistance, treaty rights, and customary communal tenure. For the Maroons, land is not a commodity but a collective inheritance. As with many Indigenous nations, land holds a profound cultural and spiritual significance and is a core element of Maroon identity. Zips draws connections between Maroon land-based practices – such as rituals, burial customs, and sacred sites – and African traditions, particularly those of the Asante (ZIPS, 2011, pp. 86–88, 127–128).

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Maroon customary law rejects individual land ownership; instead, land is held communally for the benefit of the entire community. The principle, encapsulated in the saying, “The land is for the born and the unborn” (ZIPS, 2011, p. 201), remains central in places like Accompong, where land cannot be sold or used as collateral and is managed under the authority of councils and traditional leadership structures. Land is not subdivided into alienable plots with private titles, reflecting the foundational belief that land must not be commodified. Rather, it belongs collectively to the ancestors, the living, and future generations.

This system of communal tenure not only preserves cultural identity but also constitutes a form of resistance against external encroachments, particularly those associated with mining, real estate development, or state-driven privatization. The Maroon relationship to land thus diverges fundamentally from Western notions of property ownership and is defined by a deep historical, spiritual, and political commitment to communal stewardship and self-determination. Naturally, the Maroons vehemently resisted incursions against their community rights and their identity by refusing to obtain individual parcels of land and by ignoring the new provisions of Jamaican law that contradicted the 1739 treaty (THOMPSON, 2012, p. 4). They also succeeded in not paying land taxes, arguing that “one sovereign had no obligation to pay another one,” while the British government labelled them “child-like non-tax paying thieves” (THOMPSON, 2012, p. 4).

The contradictory perceptions of the same process by a colonial government and an Indigenous community clearly demonstrate that land disputes involving Indigenous nations cannot be confined to the domain of the private law that typically governs proprietary disputes in Western legal systems, in which title to property is generally adjudicated through private-law frameworks that focus on individual ownership rights. In contrast, the problem of Indigenous title implicates broader issues such as sovereignty, independence, collective identity, political autonomy, and group survival that are beyond the scope of conventional private property law. As Glen Coulthard has convincingly argued, the politics of recognition within colonial legal and political structures often serves to reproduce colonial relations of power rather than to resolve them, since indigenous claims are reframed through Western categories (COULTHARD, 2014).

The Maroons understood their common ownership of land to be crucial for their sovereignty and identity. This is why, even now, they view the 1739 treaty as the founding

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document of their nation, as the "sacred charter" of their "state" (ZIPS, 2011, p. 200; KOPYTOFF, 1979, p. 45). Thus, the colonial government never succeeded in collecting any land taxes from the Maroons, a failure that created a provision of customary law according to which the Maroons could not be taxed, which has been effective regardless of any officially promulgated law (THOMPSON, 2012, p. 240). This custom easily satisfies the three requirements for a valid customary rule under the common law: that the custom has been practiced "peaceably and continuously from time immemorial;" that it is reasonable, certain, and obligatory; and that it is limited to a specific locality (CUSTOM: ENGLISH LAW, 2024). Indeed, it has not been challenged so far: There has been no single precedent of successful land tax collection from the Maroons (THOMPSON, 2012, p. 240).

So, despite the promulgation of the Land Allotment Act, the government failed to convert the Maroons' communal land into individual land holdings that would reflect the individualistic colonial understanding of ownership. This example demonstrates how Indigenous resistance to enforcement of colonial law may efficiently undermine colonial concepts of property and the legal framework within which they operate.

Such resistance had consequences not just for private law. According to Thompson, by resisting the governmental law reform, the Maroons added their own vision to the definition of freedom in Jamaica. For them, "freedom included being landowners without the influence of the colonial state beyond that expressed in the treaty." Equally, the Maroons created "a different definition of what it meant to be Black in post-emancipation Jamaica" and effectively resisted the colonial government's efforts "to impose a monolithic vision of Blacks," while the Maroons did not feel any kinship with former slaves (THOMPSON, 2012, p. 9). This again proves that land disputes involving Indigenous communities transcend the space of private-law debates and involve fundamental discussions of identity and coloniality.

One might have expected that after the acquisition of independence by Jamaica in 1962, the Maroons would obtain more autonomy and security with respect to their land rights. However, the post-independence government has created the greatest challenge to Maroons' land rights by reinforcing a colonial vision of the state, society, and land ownership even in the absence of the colonizing government. The country's independence constitution of 1962 failed to address the legal status of the Maroon communities and their landholdings (BILBY, 2010). According to Bilby, the independence government probably assumed that the 1739 treaty and the legal or political autonomy

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resulting from it would be automatically invalidated by the creation of a new, independent state (BILBY, 2010). However, the Maroons continued to insist on the validity of the treaty, the only text of the colonial government's positive law that they recognized. In the 1960s and -70s, the new Jamaican government attempted to force persons living on Maroon lands to pay taxes on the individual plots they occupied (BILBY, 2010). This means that the postcolonial government continued to enforce a colonial vision of the Maroons by requiring just what the British colonial administration had required: compliance with the 1842 Land Allotment Act. Maroons, however, have resisted any subdivision and taxation of their communal "treaty" lands (BILBY, 2010). This example proves another major principle of decolonial comparative law: that "the formal end of colonial states did not end coloniality" and that "coloniality is a mode of thought that legitimizes colonialism and neo-colonialism" (SALAYMEH & MICHAELS, 2022, p. 177). Apart from the force of tradition and the colonial mentality, there seems to be no major obstacles to the recognition of the Maroons' distinctive rights to their land. But like the colonial British administration, the post-independence Jamaican government also did not attempt to enforce the formal legislation in the face of effective resistance to the policy, and the Maroons have never paid taxes on their collectively held lands (BILBY, 2010). But such de facto tolerance does not amount to formal legal recognition of some group's rights, which is something that Jamaican Maroons definitely need.

From a comparative law perspective, the Jamaican Maroons' struggle for identity, lifestyle, and communal landholding is not an isolated case. In Brazil, a group of people, called Quilombolas, have gone through similar challenges with mixed results.[3] Despite formal, constitutional recognition of the Quilombolas' land rights, the process of acquiring title has been at the center of a fierce political struggle. However, even though the process has been correctly described as full of "undue delay, unfulfilled promises, and the creation of new barriers to title" (*Between the Law and their Land*, 2008, p. 4), the very fact of at least formal legal recognition of a land title in their favor is a positive sign.

Property law is traditionally considered a branch of private law. However, in the case of the Jamaican Maroons, we can see that their communal land rights have never been subject to private-law rules; instead, they have been, and still are, regulated by

[3] For the suggestion of discussing the land claims of Brazilian Quilombolas, I am indebted to Elionice Conceição Sacramento, a fisherwoman from the Quilombola community of Conceição (Bahia) from the Raça de Filomena and a cofounder of the National Network of Fisherwomen.

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public law (by treaty with the government). The right to Maroon lands has remained a collective right exempt from government taxes. All attempts by colonial and postcolonial administrations to assimilate Maroon lands to other, individually owned lands, and subject them to the rules of private ownership have failed. So at least with respect to relations between the Indigenous community and the official state government, we may thus conclude that this practice has created Indigenous public, not private, law.

Moreover, when we look more closely, we might see that it is hardly a matter of formal law at all, at least not in the positivistic sense. The Treaty of 1739, to which the Maroons have been referring ever since it was concluded, was subjected to an attempted nullification in the Land Allotment Act of 1842. Similarly, with the adoption of the independence constitution, the postcolonial government attempted to abrogate the treaty by implication. But due to the Maroons' resistance to subdivision and taxation of their lands, all the governments have de facto recognized (or at least not challenged) their Indigenous title to the land and have not enforced the official law. Thus, we can say that the whole situation has resulted in the emergence of rules of customary law concerning the Indigenous title of the Maroons. De facto status, however, is not as certain nor as secure as de jure recognition. As an absolute minority within the Jamaican state, the Maroons have no alternative but to use formal rules and structures to ensure the security of their landholding, which is not the subject of any formal, legally binding authority (case law or executive enactments). For this reason, the process of decolonization of legal thinking in Jamaica would need to start with formal recognition of the Maroons' Indigenous land rights in positive law, similar to the recognition of the Quilombolas' rights in Brazil but considering all the pitfalls of the process of entitlement in Jamaica.

3. Land Rights of Belize Toledo Mayas

The Q'eqchi' and Mopan Maya communities of southern Belize are similar to the Jamaican Maroons in that they have a longstanding, collective, spiritual relationship with their ancestral lands and view land not as a commodity but as the foundation of identity and livelihood whose preservation is considered a sacred duty (ANAYA, 1998, pp. 18–19; (*The Maya Leaders Alliance*, 2015, [10]). Land is regarded as a communal heritage passed down through generations and is closely tied to Maya cosmology and the collective principle of

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se' komonil, the ethos of collective dignity, cooperation, and responsibility (GAHMAN, PENADOS & GREENIDGE, 2020, p. 243).

Although individual or family units are granted usufructuary rights over plots for housing and agriculture, customary land tenure among the Maya is managed collectively. The usufructuary rights are not alienable and do not confer exclusive ownership, and the land may not be sold or mortgaged, and is returned to the community if abandoned. The right to use land is conditioned on continuous occupation and contribution to the community. Respect for the land and others' rights is a fundamental obligation. Violations, such as overuse, fencing, or unsanctioned sale, can result in the revocation of land access (*Cal and Others v Attorney General of Belize*, 2007, [59] – [71]).

Maya customary land tenure is governed through unwritten rules and sustained by a traditional form of Indigenous governance known as the Alcalde system. Within this system, each village elects two alcaldes, who act as both civic leaders and custodians of customary law. These leaders oversee land distribution, resolve disputes, and ensure that community members comply with local norms (COC, 2015). These customary practices constitute a legal system that functions independently of state recognition. They represent an original Indigenous jurisprudence wherein land is seen as a living entity, indispensable for cultural survival, social structure, and the moral order of Maya life (SIOUI, 2021, pp. 81–114). The customary regime thus provides not only a functional legal order but also a counter-narrative to capitalist land commodification, asserting an Indigenous vision of land as life, identity, and communal responsibility.

Whereas the Jamaican Maroons resisted any encroachments upon their Indigenous land rights from the government through riots and threats of warfare, the Maya people of the Toledo district in Belize took a different approach. From the outset, they insisted on official recognition of their title by the government and endured years of litigation in Belize's national courts as well as proceedings before international human rights organizations, which all ruled in their favor. The United Nations Human Rights Committee and the Inter-American Commission on Human Rights recommended that the government of Belize recognize Maya land rights and abstain from issuing resource extraction concessions that could compromise this community's interests (*Maya Indigenous Community of the Toledo District v Belize*, 2004, [727]). However, getting judicial recognition of one's rights is one thing, while securing the enforcement of judicial decisions by the government of the country is far more challenging.

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For decades, the government of Belize contested that the Maya had customary land rights, while the Maya insisted on their entitlement to their ancestral lands (for more on the ethnographic and legal-political context for the Mayas' interaction with the government and their struggle for Indigenous rights, see KROSHUS MEDINA, 2024). In 1997, the government decided to convert several Maya villages into a national park without the consent of the Indigenous communities (DELUCA, 2015). The Maya insisted on the existence of their communal land rights, albeit in the absence of any governmental grant or recognition, seeking confirmation that they "hold rights to occupy, hunt, fish and otherwise use" the lands in question and that such rights "in accordance with the common law and relevant international law, arise from and are commensurate with the customary land tenure patterns of the Toledo Maya" (DELUCA, 2015). The judiciary sided with the Maya, upholding their claims to ancestral land in the Supreme Court twice, in 2009 and in 2010, and once more at the appellate level in 2013 (DELUCA, 2015). Nonetheless, the Belizean government, attempted to avoid implementing these decisions by appealing the Supreme Court's rulings and by granting oil concessions in Sarstoon-Temash National Park to a US oil company. This example from Belize as well as the case of the Jamaican Maroons demonstrates how a postcolonial government of an independent country can engage into neo-colonialist practices by denying rights to Indigenous communities, exploiting their natural resources, and encroaching upon their identity.

The Maya thus turned to the Caribbean Court of Justice … for justice.

The Caribbean Court of Justice (the CCJ), a judicial body unique to the Caribbean region. The CCJ is the final court of appeal for certain former British colonies (currently Belize, Barbados, Guyana, St Lucia, and Dominica), which replaced the Judicial Committee of the Privy Council. It also serves as the court of original jurisdiction for interpreting and applying the Revised Treaty of Chaguaramas, the treaty that established the Caribbean Community. It is this dual jurisdiction (appellate and interpretational) that makes this court unique (OSTROUKH, 2016, p. 1218).

The Maya appealed to the Caribbean Court of Justice as the highest appellate court of their country, hoping its judgement hoping the government of Belize would recognize at least this court's judgment as binding. In 2015, in *The Maya Leaders Alliance v the Attorney General of Belize*, the Caribbean Court of Justice reaffirmed the Belize national Supreme Court's decisions that the Maya Indigenous communities of southern Belize have rights to the lands they customarily used and occupied. Having admitted that

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the current system of Belizean land law did not extend protection to the individual and collective land rights which had arisen under the Maya system of customary land tenure, the CCJ emphasized that the state's obligation necessarily follows from the recognition that "Maya customary land tenure, a species of property rights not provided for in the current legal system of Belize, is protected under sections 3(d) and 17 of the Constitution" (*The Maya Leaders Alliance*, 2015, [57],[60]). Relying on cases from Canada, the USA, the EU, Indonesia, Suriname, and Guyana as well as international authorities, the court thus affirmed that Maya traditional land rights constituted property equal in legitimacy to any other form of property under Belizean law.

The judgment also required the Belizean government to demarcate and register Maya village lands and to "cease and desist" from any further interference, destruction, or land use that would interfere with the Maya peoples' enjoyment of their property (*The Maya Leaders Alliance*, 2015, [60]). Finally, this judgement confirmed the view in international law that Indigenous peoples have collective property rights based on their own customary land tenure systems, even without formal titles or other official recognition of those rights, and that states must recognize and protect these rights. The court made references specifically to the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, and the American Declaration on the Rights and Duties of Man.

The CCJ decision is extremely important not just for the protection of these people's interests in land but for reinforcing their identity in general. As Pablo Mis, program coordinator for the Maya Leaders Alliance, so colorfully and passionately stated,

> We have been dragged through the courts, we have been placed against each other, and we have been called immigrants to the lands where the sacred bones of our ancestors rest. Like the trees of our land we swayed under pressure but kept reaching out to the sunlight. Our spirit was never broken (DELUCA, 2015).

This statement displays the Indigenous community's remarkable resistance to colonial and postcolonial exploitation of their lands, and it also explains why disputes about Indigenous land rights involve not just property law, but also communal identity, international law, and constitutionally recognized human rights.

While discussing this case, we must acknowledge the commendable efforts of the

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CCJ to supervise the Belizean government's implementation of its decision. The most recent hearing, in November 2022, emphasized the necessity for the government to engage in a reconciliation process with Indigenous communities. This case as well as the CCJ's approach confirms this court's growing status as an independent postcolonial court that represents a better alternative to the colonial Judicial Committee of the Privy Council, which most Commonwealth Caribbean countries still recognize as their final court. Not only does the CCJ foster legal *mixité* and acknowledge Indigenous legal traditions, but it also plays an instrumental role in the decolonization and indigenization of Caribbean law (For more about the growing importance of the CCJ and its role in the development of legal traditions in the Commonwealth Caribbean, see OSTROUKH, 2024, pp. 666–669).

Despite the Maya ultimately prevailing in litigation, we may ask the same question of their Indigenous title as we did of the Jamaican Maroons' title: How much property law, as rooted in private (civil) law, is present in this recognition? All judicial decisions were based on the argument that the government of Belize was violating Maya human rights recognized in constitutional and international law. This demonstrates that Indigenous property law transcends the traditional Western private–public law dichotomy (which is at the heart of traditional comparative-law classifications of legal systems) and is developing into a distinctive legal entity that combines elements of various traditional branches of law (civil, constitutional, and international) as well as customary Indigenous law.

Another similarity with the Maroons' case is that one of the parties to the land dispute refused to comply with the official law of the country. However, in the Maya's case, it was the government that refused to comply with its own courts' decisions, whereas the Indigenous community demonstrated a strong attachment to the official law of the country and used all formal channels to protect their interests. Even though this is the reverse of the Maroon's situation, it still demonstrates that de facto and de jure recognition of Indigenous rights to land must go hand in hand; in other words, de facto recognition (the Maroons' case) or de jure recognition (the Maya's case) alone is insufficient to ensure the security of Indigenous communities' land tenure in postcolonial societies. This is especially true for communities who are absolute minorities in their countries and have no other option but to rely on formal state recognition to ensure the security of their land rights.

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4. Land Rights of Amerindians in Guyana

Of the three jurisdictions in question, Guyana is the only one in which the issue of Indigenous title to land has been both de jure and de facto recognized by the government and has become subject of academic discussion. This positively distinguishes this country from Jamaica and Belize. As will be demonstrated below, the state of Guyana does provide some legal recognition to Indigenous claims to land (albeit not to the full satisfaction of Amerindian communities), whereas Jamaica provides none to the Maroons. The Guyanese government also does not so blatantly ignore Indigenous property entitlements as the Belizean government. However, this already-established practice of addressing Indigenous land claims also has a cost: it perpetuates a colonial approach to such claims and a reluctance in government and the legal profession to decolonize it.

There are nine distinct Indigenous Amerindian groups in Guyana. They constitute less than 10 percent of the national population, but this is still a significantly larger proportion compared to other Caribbean nations. Indigenous peoples constitute most of the population in the tropical forests and savannahs and occupy lands that are rich in forest and mineral resources (TOPPIN-ALLAHAR, 2014, p. 45).

Much like the Jamaican Maroons and the Belizean Maya, the Akawaio and Arekuna peoples of the Upper Mazaruni in Guyana maintain a deeply spiritual, communal, and intergenerational relationship with their ancestral lands. Land is not conceived of as an alienable commodity but rather as a sacred trust rooted in collective memory, cosmology, and subsistence practices. Customary law, largely oral and never formally recorded, provides the normative framework that governs access, responsibilities, and obligations within the community.

No formal system of land tenure or inheritance exists among the Akawaio and Arekuna peoples. The right to occupy or use land arises from being a member of the community rather than through individual ownership. More broadly, many communities believe that land belongs to God alone, making personal claims to ownership inappropriate. This perspective aligns with their traditionally mobile way of life, in which relocation for settlement or livelihood is common (EDWARDS, 1977, p. 12). Land was, and continues to be, regarded as communally owned, with individual families or groups occupying particular areas, often used by the same families over multiple generations. This reflects long-standing land-use patterns that may be seasonal or cyclical but not

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nomadic (*Mendason v Attorney General of Guyana*, 2022, [64], [66]). Land rights are based on kinship, long-term residence, and ancestral links and do not confer alienable title.

Villages manage their territories through traditional leadership, typically a captain and a village council. Within the communities, elders play an important role in guiding and regulating land use by granting permission or offering advice regarding settlement, hunting, or fishing activities. There is also evidence of traditional environmental stewardship, including practices aimed at conserving wildlife and aquatic resources to ensure their natural regeneration (*Mendason*, 2022 [64], [66]).

This system of community-based regulation fosters social cohesion and sustainability, functioning effectively without written law or reliance on external institutions. Although the constitution of independent Guyana recognizes that "Indigenous people have the right to the protection, preservation and promulgation of their languages, cultural heritage and way of life" (art. 149G), it fails to expressly address the land rights of Indigenous communities.

Nonetheless, unlike Jamaica and Belize, the government of Guyana did, albeit outside the constitution, accord recognition to the land rights of Amerindians. While customary Indigenous land tenure was not recognized in positive law during the British colonial period, the Amerindians also did not face wholesale legal dispossession (BULKAN, 2008, p. iv). After the acquisition of independence in 1966, the Amerindian Lands Commission was established to grant legal ownership or occupancy rights to areas in which Amerindian communities ordinarily resided or settled, as well as other legal rights, such as rights-of-way, over any other lands where they de facto enjoyed freedoms and permissions (Ordinance 23 of 1966, 2002). However, the language of the Amerindian Act of 1951, amended in 1961 and 1976, was about *granting* rights, which means that the government at the time did not regard the Amerindians as having any formal claims to the lands they used and occupied. As a result of this approach, the Amerindian communities received only half of the lands they had claimed.

In resolving disputes over Indigenous title to land, Guyanese courts and legal scholars, apart from making constitutional and international-law arguments, have also borrowed from Canadian and Australian cases on native (aboriginal) title, notwithstanding that scholars have rightly criticized the Canadian and Australian courts' approaches (See, e.g., MCNEIL, 2009, p. 257). Given the rich experience of adjudicating Indigenous title in Canada and Australia, these efforts by Guyanese courts would have been commendable

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were Guyana not a mixed Common-Civil law jurisdiction: Hardly a judge or academic has questioned whether modern authorities on "native" (or "aboriginal") title from Common-law jurisdictions even apply to Guyana, even though Roman-Dutch land law remains in force in the context of land disputes there.

Thus, in *Thomas & Arau Village Council v Attorney General of Guyana & Guyana Geology and Mines Commission* (2009), the court, after extensive discussion of the Common-law case law, eventually rejected the claim to Indigenous title due to a lack of evidence about the Arau community's occupation of the area from time immemorial or its customary laws and practices in relation to land tenure (TOPPIN-ALLAHAR, 2014, p. 48). However, the court did recognize the community's usufructuary rights to the forests, rivers, and creeks on the territory as sui generis property rights existing as a burden on the state's legal and beneficial title to the land. The court also stated that "in so far as the English common law gives recognition to native rights and interests in and over land, the courts must view such rights as de jure and not de facto" (*Thomas*, GY 2009 HC 7).

In the latest case, *Mendason and Others v Attorney General of Guyana* ([2022] GY Action 1114-W1998, HC), which was decided in 2022 after pending for more than twenty years, the plaintiffs, Amerindian communities of Akawaio and Arekuna, claimed rights to their ancestral land at common law and in equity or, alternatively, under Roman-Dutch law. The Chief Justice of Guyana, Roxane George, who decided the case, declared that the aboriginal communities "have communal aboriginal title[4] to the subject land" but not "to the exclusion of all others". Such a declaration would definitely fail the test of the constitutive elements of ownership in the Civil-law tradition that, since the abolition of feudalism, has emphasized that ownership is an absolute, real right that its holder enjoys exclusively and that cannot be split.[5] Additionally, Toppin-Allhar is right in stating that, in accordance with Roman-Dutch law, "Indigenous 'title' per se cannot co-exist with the State's absolute beneficial title, other than as a dismemberment of ownership; hence, occupation from time immemorial could at best confer on Amerindians only a lesser real right in the land (TOPPIN-ALLAHAR, 2014, p. 51)". The decision in *Mendason* looks rather

[4] "Aboriginal title" is the notion developed in the Common law tradition in such jurisdictions as the USA, Canada, and Australia.

[5] Sylvio Normand offers a compelling reflection on why it is so difficult to categorize the common law notion of aboriginal title, which is akin to fee simple, within the framework of traditional real property rights in the Civil-law tradition, such as ownership or usufruct. This challenge leads him to conclude that, within the civilian tradition, aboriginal title should be understood as an innominate real right, whether as a modality or a dismemberment of ownership (NORMAND, 2019).

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"Common law-ish" and fits well the relativist understanding of ownership so characteristic of this legal tradition. To arrive to such a declaration, the Chief Justice referred to cases from Canada and other Common-law jurisdictions (Australia, Nigeria, and Malaysia) but relied mostly on the reasoning in *Delgamuukw v British Columbia* ([1997] 3 S.C.R. 1010), which confirms her inclination to follow the growing practice of resolving disputes over Indigenous claims to land under Common-law principles and authorities.

From the standpoint of traditional comparative law, the choice of a pure Common-law approach to aboriginal title is another factor contributing to "commonisation", the erosion of the Roman-Dutch ramifications of the Civil-law tradition in Guyana, especially considering that the Civil Law of British Guiana Ordinance, No. 15 of 1916 (now the Civil Law of Guyana Act) specifically excluded real property from the application of Common-law principles (Cap.6:01 (Revised Laws 2010).

This is different from South Africa, another postcolonial mixed jurisdiction that must reconcile British Common law with Roman-Dutch Civil law, where there has been extensive discussion on the applicability of Common law authorities and on how to introduce the doctrine of aboriginal title into a mixed legal system (See, e.g., BENNETT & POWELL, 1999). The South African case of *Alexcor Limited v Richtersveld Community* ((2004) (5) SA 469 (CC)). transcended the dichotomy between Common law and Civil law and made important steps towards the recognition of the Indigenous legal tradition with respect to land rights. The Constitutional Court ruled that "[…] the real character of the title that the Richtersveld community possessed in the subject land was a right of communal ownership under Indigenous law" and "[w]hile in the past Indigenous law was seen through the common law lens, it must now be seen as an integral part of our law" (*Richtersveld*, [62], [51]).

So far, Guyanese judges seem not to have taken advantage of South Africa's vast experience dealing with Indigenous land claims. Thomas B. Smith, one of the authors of the concept of mixed jurisdictions, rightly observed that lawyers in mixed systems have tended to work in isolation, forgetting that "neighbours in law" were not necessarily closest geographically (PALMER, 2012, p. 23). In the case of Guyana, the most relevant "neighbour in law" is South Africa. Its extensive experience adjudicating Indigenous land claims in a mixed legal system could offer more valuable guidance than Common-law jurisdictions like Canada, whose decisions Guyanese judges frequently cite. Most cases refer to *Richtersveld* only to reject it, even as persuasive authority (*Mendason*, 2022). In

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Mendason, the judge refused to recognize an aboriginal title under Roman-Dutch law, reasoning that the plaintiffs had failed to submit texts and materials supporting their claim (*Mendason*, 2022, [85]). It would be desirable if Guyanese judges, practicing lawyers, and legal scholars gave more thorough consideration to the South African experience and its potential application to local circumstances for help in determining how Indigenous rights to land could be incorporated into Guyana's mixed legal system.

Although Toppin-Allahar looks at the property law of neighbouring Suriname, a jurisdiction governed by the Dutch Civil law, for inspiration on the recognition of Indigenous land rights in Guyana, I find Suriname less helpful, given that so far it is "the only country in the Americas that has not legally recognized the collective rights of Indigenous and tribal peoples to the lands and resources they have occupied and used for centuries" (KAMBEL, 2007, p. 69). But the Guyanese courts' "Common law-ish" approach to native title has been justly criticized by Toppin-Allahar and Bulkan. They argue that Dutch land grants in Guyana conveyed full ownership, and that the feudal split of title that characterizes the Common law was never introduced. With Roman-Dutch land law in force, there could be no question of the state holding ultimate or radical title to private land in Guyana, and thus such Common-law notions should not apply to Indigenous title claims there (TOPPIN-ALLAHAR, 2014, pp. 49-52; BULKAN, 2008, pp. 92-94).

However, the applicability of Common-law principles in Guyana was confirmed legislatively by the Amerindian Act of 2006 (Act No.6 of 2006), which introduced a new mechanism to govern Indigenous peoples' applications for grants of communal land titles and specifies a detailed procedure for land claims. The act does not preclude Common-law claims for recognition of an aboriginal title (BULKAN, 2008, p.140).

The reception of the act among Amerindian communities was negative, but not because of the Common-Civil law divide. As the Councillor of Warawatta Village explained, his community's view on the act was that, "When it comes to asking for lands – that is a concept that gets me annoyed. All the names of the mountains, creeks and so on are our names – Arekuna names, Akawaio names. They are asking us to apply for lands that we already own" (as quoted by BULKAN, 2008, p.440). This indicates that the Indigenous communities in Guyana consider their Indigenous customary legal tradition, which predated both European legal traditions, as the only legitimate source of their native title, even though it has not been officially recognized by the government.

And although this consideration is very important for decolonizing property law

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in Guyana, it is missing from judicial decisions. Reflection on the autonomous Indigenous legal tradition that predates both colonial traditions is missing, for instance, from the most recent *Mendason* case. Arguments from this perspective as well as reflections on the South African experience could have contributed to the decolonization of the Guyanese legal system in general and its property law in particular. When I interviewed Chief Justice Roxane George, who decided the Mendason case, she indicated that she would have considered any arguments stemming from the Indigenous legal tradition, but they were simply not present in the plaintiffs' submissions. This suggests that the plaintiffs' legal team, in advocating for the right and just cause of obtaining recognition for plaintiffs' rights to ancestral lands, got stuck between two colonial legal traditions and did not dare go beyond them. Consequently, one can see that decolonization of Guyanese property law cannot be achieved without decolonizing the mindset of legal professionals.

Neglect of the Indigenous legal tradition moreover goes beyond private-law debates over land rights. It also manifests in political and international law disputes. For instance, the abnegation of the Indigenous legal tradition is evident in the most recent territorial dispute between Guyana and Venezuela over the Essequibo region. From the very beginning, the Akawaio and Arekuna communities were not involved in the geographical survey that established the so-called Schomburgk[6] Line, which demarcates the borders of Guyana, Brazil, and Venezuela (*Mendason*, 2022 [69]). During the outbreak of the Guyana-Venezuela dispute in 2023, both countries' arguments still rotated around which colonial power (Britain or Spain) had a better claim to the land to prove whether independent Guyana's or Venezuela's claim was more legitimate (For more about the dispute, see BETHELL, 2024). Either state, prevailing, could exploit this region's rich oil resources. The voices of the Indigenous communities have once again not been considered and would most likely not be heard before the International Court of Justice, in perpetuation of the first-world approach to both international law and property law.

Thus, persistent coloniality in the approach to Indigenous land claims in Guyana transcends the boundaries of the Common versus Civil law divide in Guyana and creates another challenge to Guyana's mixed legal system. The result invites a revision of the concept of *mixité* in traditional comparative law. On one side, Common-law principles of recognition of Indigenous title are not compatible with the Roman-Dutch law of property

[6] Sir Robert Hermann Schomburgk (1804 – 1865) was a Prussian explorer of South America and the West Indies.

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that, according to legal academics, should govern cases concerning Indigenous claims to land. On the other side, Indigenous communities strongly insist on recognition of sui generis customary property rights. Recognizing the Indigenous legal tradition in Guyana could add another layer of *mixité* to the national legal system, and it is probably the right thing to do to decolonize Guyanese property law.

5. Analysis and Conclusions

This article is about three different countries, three different Indigenous communities, and three different cases of Indigenous claims to land. However, despite such apparent differences, there is one obvious similarity in all the three cases: Each is a story of a postcolonial country attempting to overcome its colonial legacy, both in property law and in the relationship between the respective dominate majority and Indigenous minorities in the society. Even though the cases and solutions are different, they are unified in raising the necessity for reconsideration of traditional approaches to native title to land.

This case study demonstrates that the recognition of native title as well as the definition of the scope of Indigenous nations' property rights is not solely a matter of property law, as in a private (civil) law dispute between neighbors. The discussion and recognition of such rights also involve constitutional law, human rights law, and international law. Moreover, we can clearly see that resolving Indigenous property claims is not just a matter of positive law, no matter how many branches of it are involved, but instead involves broader questions of power, colonization, discrimination, social struggle, resistance, and cultural survival. Without transcending the boundaries of positive law, it is impossible to fully discuss the problem of Indigenous title to land.

The case of the Jamaican Maroons may be instrumental in revising the predominant, traditional notion of indigeneity in international law. Such an exception clearly demonstrates the extent to which international law remains a first-world area of law that needs to be complemented by a growing third-world approach.

The case of the Maya in Belize invites us to reflect on two important things. The first is the problem of a government not enforcing a judicial decision against it. A government, that is formally independent but still engages in all sorts of colonial practices, such as allowing natural resources that belong to an Indigenous community and that are

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extremely important to its physical and cultural survival to be exploited by others. The second is the growing role of the Caribbean Court of Justice as an independent court. This court has a very good chance of becoming a decolonial court and an excellent alternative to the Judicial Committee of the Privy Council, the appellate court many Common-law countries inherited as a result of their colonial history. Not only did the Caribbean Court of Justice side with the Maya community in its initial decision, but in the following years it made important efforts to enforce the decision against the Belizean government, which demonstrates the court's commitment to protecting Indigenous minorities in the region.

The case of the Amerindians in Guyana should be part of any discussion on the need to decolonize the traditional understanding of mixed legal systems that has dominated mainstream comparative law for decades. It seems that in many postcolonial countries, the traditional approach to *mixité*, the mixture of Common-law and Civil-law traditions, is discriminatory towards Indigenous populations. Courts and legal scholars in Guyana have been debating whether Roman-Dutch Civil law or British Common law should apply to native title to land and have ignored the Indigenous legal tradition that predates both. Recognizing this element of the Guyanese legal system, and possibly considering the South African experience, would contribute to the originality of Guyana's legal landscape, to the new type of *mixité* emerging there, and to reducing practices that discriminate against Indigenous communities. From a comparative perspective, recognizing the Indigenous legal tradition as a new element of *mixité* might also be of interest in other Civil-Common law mixed jurisdictions with Indigenous populations.

Legal scholars have suggested that Indigenous land claims in Guyana should be addressed on the basis of Roman-Dutch law, as it is the law that applies to immoveable property under the Civil Law of Guyana Act. In Belize, however, the applicability of Common law to Indigenous land claims has never been challenged. If in the future Guyana and Belize were to rely only on Roman-Dutch or Common law, respectively, this would create a separation between their legal professions regarding Indigenous land claims, which, given the close interaction of Commonwealth Caribbean societies and legal systems, is not a desirable result. But if the Indigenous legal tradition were recognized as governing claims to land, it would furnish common ground. Belize and Guyana both recognize the CCJ as the final court of appeal and are the only two Commonwealth Caribbean countries in which Indigenous claims to land have been litigated. Such a shift, from the Civil-Common law dichotomy to the inclusion of a third element, would be one

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more step towards the decolonization of Caribbean legal systems and legal thinking.

So far, all three postcolonial governments have been caught in the trap of reproducing coloniality in their approach to Indigenous claims to land. They have focused mostly on legal-formalistic and individualistic understandings of ownership and the accompanying rights. However, when it comes to ancestral lands of Indigenous communities, the relationship between man and land is no longer a kind of Hegelian personification of individual freedom, the so-called "first step of externalization of free will at the stage of abstract right" (HEGEL, 1896, p. 48). That approach may characterize the Western legal tradition, but the recognition of Indigenous communities' rights to their ancestral land, and more so of the Indigenous *understanding* of such rights, is a matter of physical and cultural survival, of collective personhood and identity.

Independent, postcolonial Commonwealth Caribbean states with Indigenous populations must change their understanding of such groups' proprietary interests as well as their judicial and doctrinal approaches to the problem of Indigenous title. Full recognition of the customary Indigenous legal tradition as an equal to both the Civil-law and the Common-law traditions may be helpful in decolonizing property law in postcolonial societies.

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