

Sticky Colonial Criminal Laws

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Response to Aneke Meerkotter's "Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces."

Across the world, vagrancy offenses criminalize vaguely defined, heterogeneous forms of misconduct loosely associated with idleness.¹ A court attempting to apply such laws has noted that “[t]he punishment . . . is not for doing, but for being.”² Anneke Meerkotter’s article, “Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces,” reviews the history of long-standing vagrancy laws in Africa and their continued use to marginalize the poor in urban spaces through offenses such as loitering, being an idle or disorderly person or a rogue and a vagabond, begging, and solicitation.³ My comments focus on one dimension of Meerkotter’s analysis—her concern about “the continued use of some colonial era criminal laws, and the policing practices that have developed around these laws.”⁴ She challenges the legitimacy of these enduring colonial criminal laws on the ground that “the criminology that underpinned them was itself influenced by the prejudices of the times.”⁵ These laws were fashioned in inequitable forms of colonial governance aimed at controlling and “subduing

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¹ Janeille Matthews & Tracy Robinson, *Modern Vagrancy in the Anglophone Caribbean*, 1 CARIBBEAN J. CRIMINOLOGY 123, 124–25 (2019).

² *People v. Allington*, 229 P.2d 495, 500–01 (Cal. App. Dep’t Super. Ct. 1951).

³ Anneke Meerkotter, *Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces*, 74 U. MIA. L. REV. CAVEAT 1, 4–14 (2019), https://lawreview.law.miami.edu/wp-content/uploads/2020/01/Litigating-to-Protect_Anneke-Meerkotter.pdf.

⁴ *Id.* at 3.

⁵ Meerkotter, *supra* note 3, at 4.

colonized people”⁶ and limiting the full and meaningful political participation of the majority non-white populations.⁷ In sum, the vagrancy laws face a democratic deficit because they were not “made by the same people to whom they apply.”⁸

The colonial-era criminal laws Meerkotter examined have a stickiness or locked-in quality, meaning they “carry significant historical weight”, even when the laws are “suboptimal or anachronistic”⁹ I want to reflect further on the stickiness of colonial criminal laws in the context of the Caribbean states that were once a part of the British Empire (the “Anglo-Caribbean”).¹⁰ Many foundational Anglo-Caribbean criminal statutes dealing with both serious crimes and petty offenses can be traced to the late-nineteenth and early-twentieth century, the decades following the end of slavery in 1838.¹¹ After emancipation in the Anglo-Caribbean, there was an expansion and modernization of penal and criminal justice and a flurry of legislating to govern and control the enlarged free population of blacks and newly arrived indentured workers, mostly from Asia.¹² New criminal statutes sought to clarify, consolidate, and (in

⁶ Sally Engle Merry, *Review Essay: Law and Colonialism*, 25 L. & SOC’Y REV. 889, 909 (1991).

⁷ Meerkotter, *supra* note 3, at 4–5.

⁸ Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 25 (2006).

⁹ Ozan O. Varol, *Constitutional Stickiness*, 49 U.C. DAVIS L. REV. 899, 905 (2016); see Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 631 (2001).

¹⁰ Between 1962 and 1983, twelve Anglo-Caribbean states achieved independence from Britain. GAD HEUMAN, *THE CARIBBEAN: A BRIEF HISTORY* 175 (2014). The twelve, with their dates of independence, are “Antigua and Barbuda (1981), Bahamas (1973), Barbados (1966), Belize (1981), Dominica (1978), Grenada (1974), Guyana (1966), Jamaica (1962), St. Christopher-Nevis (St. Kitts-Nevis) (1983), St. Lucia (1979), St. Vincent and the Grenadines (1979), and Trinidad and Tobago (1962).” TRACY ROBINSON, ARIF BULKAN & ADRIAN SAUNDERS, *FUNDAMENTALS OF CARIBBEAN CONSTITUTIONAL LAW* 1 n.1, 37–43 (2015).

¹¹ See J.S. Kerr, *Criminal Law and Its Administration: A Jamaican View*, in *LAW IN THE WEST INDIES: SOME RECENT TRENDS* 101, 101 (1966); Adolph C. Edwards, *The Development of Criminal Law in Jamaica up to 1900*, at 609 (June 1968) (unpublished Ph.D. thesis, London School of Economics and Political Science) (available at <http://etheses.lse.ac.uk/3314/>).

¹² DIANA PATON, *THE CULTURAL POLITICS OF OBEAH: RELIGION, COLONIALISM AND MODERNITY IN THE CARIBBEAN WORLD* 122 (2015)

a few instances) codify criminal law.¹³ They created new forms of legal coercion to support the plantation labor and race-based political system.¹⁴ Vagrancy laws, in particular, were tools for controlling the labor and conduct of former slaves and indentured immigrants and enforcing moral codes about gender, family, and religion in the broadened free population.¹⁵ Many of the vagrancy laws from this period have endured and are found in statutes more than or nearly a century old.¹⁶ Others have been replaced in more recent criminal codes.¹⁷

Legislatures' strong bias towards maintaining the status quo evident in Anglo-Caribbean criminal laws is not unique to colonial laws and is true of many other statutes.¹⁸ It is not uncommon for laws to become obsolete because, as Professor Guido Calabresi states, "a statute is hard to revise once it is passed."¹⁹ Richard Neely attributes legislative inertia to the fact that the "legislature is an organization designed to do nothing" and is more focused on preventing the enactment of bad laws than passing good ones.²⁰ He adds that the special interests who seek legislative reform are viewed antagonistically as predators who "come to further their own selfish, private interests."²¹ Interest groups' efforts to reduce the scope of criminal law (for example, decriminalization) face especially strong forces of legislative inertia because they disrupt the contemporary legislative tendency to broaden criminal liability, not to abolish

[hereinafter THE CULTURAL POLITICS OF OBEAH]; Lomarsh Roopnarine, *East Indian Indentured Emigration to the Caribbean: Beyond the Push and Pull Model*, 31 CARIBBEAN STUD. 97, 106 (2003).

¹³ THE CULTURAL POLITICS OF OBEAH, *supra* note 12, at 122.

¹⁴ DIANA PATON, NO BOND BUT THE LAW: PUNISHMENT, RACE, AND GENDER IN JAMAICAN STATE FORMATION, 1780–1870, at 54 (2004).

¹⁵ Diana Paton, Elsa Goveia Mem'l Lecture, Small Charges: Law and the Regulation of Conduct in the Post-Slavery Caribbean 6–7 (Apr. 1, 2014).

¹⁶ See, e.g., Small Charges Act 1891, ch. 405 (Antigua and Barbuda).

¹⁷ See, e.g., Criminal Code, Cap 1987, ch. 1, § 137 (Grenada).

¹⁸ See William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 8 (1988).

¹⁹ GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2, 6–7 (1982).

²⁰ Richard Neely, *Obsolete Statutes, Structural Due Process, and the Power of Courts to Demand a Second Legislative Look*, 131 U. PA. L. REV. 271, 273 (1982) (reviewing CALABRESI, *supra* note 19).

²¹ *Id.* at 273–34.

existing crimes.²² Legislative inertia can explain why Anglo-Caribbean counties retain some of their enduring vagrancy laws even though they are now plainly obsolete. For example, some of these laws use outdated nineteenth-century language like carriages, tubs, hoops, casks, and puncheons in defining offenses.²³

Nevertheless, legislative inertia only partially explains the retention of colonial criminal laws in the Anglo-Caribbean because some enduring colonial criminal laws defy categorization as obsolete.²⁴ While such laws may no longer “fit” the current legal landscape, especially in light of global human rights standards, they may still enjoy popular support.²⁵ Many are still seen as relevant criminal laws in popular imagination in the postcolonial world.²⁶

I further explain the stickiness of Anglo-Caribbean colonial criminal laws, first, by looking at law’s prominence in the colonial project and state formation in the Anglo-Caribbean and its availability to be claimed by the colonized as their own. Secondly, I point to ways globalization helps structure the contemporary meanings of colonial criminal laws in geopolitical terms—raising the stakes for both advocates and opponents of legal change. Finally, I discuss how some colonial criminal laws, especially vagrancy laws, escape desuetude because their vagueness and wide enforcement discretion produce an elasticity that makes them a flexible and almost limitless legal resource for policing “undesirables.”²⁷

Law played a fundamental role in the British colonial enterprise.²⁸ With no intention to allow a far-reaching political franchise for non-whites after slavery ended, law became the “preeminent

²² William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 554, 557 (2001).

²³ See, e.g., Summary Jurisdiction (Offences) Act 1893, ch. 8:02, §§ 143, 153 (Guy.).

²⁴ Matthews & Robinson, *supra* note 1, at 131.

²⁵ CALABRESI, *supra* note 19, at 2; see Stuntz, *supra* note 22, at 591; see Paul Sutton, *Politics in the Commonwealth Caribbean: The Post-Colonial Experience*, 51 EUR. REV. LATIN AM. & CARIBBEAN STUD. 51, 53–54 (1991).

²⁶ E.g., Mahalia Jackman, *They called it the “Abominable Crime”*: An Analysis of Heterosexual Support for Anti-Gay Laws in Barbados, Guyana and Trinidad and Tobago, 13 SEXUALITY RSCH. & SOC. POL’Y 130, 137–140 (2016), <https://doi.org/10.1007/s13178-015-0209-6>.

²⁷ Matthews & Robinson, *supra* note 1, at 132, 144.

²⁸ Nasser Hussain, *Towards a Jurisprudence of Emergency: Colonialism and the Rule of Law*, 10 L. & CRITIQUE 93, 100 (1999).

signifier of state legitimacy and of ‘civilization.’”²⁹ The Anglo-Caribbean criminal law statutes forged after emancipation were not discrete bits of statecraft.³⁰ They were an integral dimension of “institutions and social structures that emerged in their ‘modern’ form as part of the emancipation process,” and these remain “central institutions of modern Caribbean state power and practice.”³¹ Decolonizing states in the Anglo-Caribbean in the mid-twentieth century venerated colonial criminal laws.³² The British emphasized the need “to secure an orderly transition to independence,” and decolonization constitutions sought to achieve this through the continuity of law and institutions of colonial governance.³³ As a result, all Anglo-Caribbean decolonization constitutions preserved existing colonial laws and made special provisions for the preservation of colonial punishments like corporal and capital punishment, even if the punishments were inconsistent with the constitutional right not to be subjected to inhuman or degrading punishment.³⁴ Some Anglo-Caribbean constitutions also immunized the colonial laws from a challenge on the ground that they violated the new rights entrenched in the constitutions.³⁵ The commitment to the continuity of law was not a one-sided affair.³⁶ During decolonization, Caribbean-male-nationalist politicians claimed the English common law tradition, British political institutions, and colonial laws as their own to demonstrate their sophistication, readiness to govern, and masculine equality to Englishmen.³⁷

Caribbean elites’ and subalterns’ emotional attachment to and ownership of the colonial legal system and colonial laws as acts of

²⁹ *Id.*

³⁰ Melanie Newton, *Freedom’s Prisons: Incarceration, Emancipation, and Modernity in No Bond but the Law*, 15 SMALL AXE 164, 165 (2011).

³¹ *Id.*

³² *Id.*

³³ SPENCER MAWBY, ORDERING INDEPENDENCE: THE END OF EMPIRE IN THE ANGLOPHONE CARIBBEAN, 1947–69, at 30 (2012).

³⁴ *See, e.g.*, CONSTITUTION OF ST. LUCIA Feb. 22, 1979, sched. 2, sec. 2, paras. 2, 10.

³⁵ *See, e.g.*, THE CONSTITUTION OF THE COMMONWEALTH OF THE BAHAMAS 1973, ch. 1, art. 30.

³⁶ Tracy Robinson, *Gender, Nation and the Common Law Constitution*, 28 OXFORD J. LEGAL STUD. 735, 740 (2008).

³⁷ *See id.*

self-determination and self-definition in specific moments are critical to understanding the stickiness of some colonial criminal laws.³⁸ The status quo bias towards the retention of these laws is likely amplified by the endowment effect, or the tendency to value more highly what one already “owns.”³⁹ Take, for example, the strong bias towards the retention of colonial laws dealing with “unnatural” offenses in the Anglo-Caribbean.⁴⁰ Nine of the twelve Anglo-Caribbean states criminalize consensual same-sex intercourse as “unnatural” crimes, which were all versions of colonial laws introduced in the late nineteenth and early twentieth century.⁴¹ The retention of these laws, especially in the former British empire, is commonly critiqued as an “alien legacy” of colonialism that postcolonial nations now defend as an icon of Global South national identities.⁴² That critique misses how such laws come to be *owned* and indigenized by postcolonial peoples as normative law that reflects the longstanding customs of the people.⁴³ The laws are regarded as the expression of long-held public norms, rather than as reinforcing or constituting those norms.⁴⁴ The “customary” dimension of enduring “unnatural” offenses in the Anglo-Caribbean has similarities with the

³⁸ See Sally Engle Merry, *From Law and Colonialism to Law and Globalization*, 28 L. & SOC. INQUIRY 569, 577 (2003).

³⁹ See Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228 (2003).

⁴⁰ See HUM. RTS. WATCH, THIS ALIEN LEGACY: THE ORIGINS OF “SODOMY” LAWS IN BRITISH COLONIALISM 3–4 (2008), https://www.hrw.org/sites/default/files/reports/lgbt1208_webwcover.pdf.

⁴¹ See, e.g., Sexual Offences Act 1995 § 12 (Act. No. 1/1995) (Ant. & Barb.). Belize and Trinidad and Tobago have recently achieved decriminalization through constitutional review by Caribbean courts. See *Orozco v. Att’y Gen. of Belize*, [2016] 90 WIR 161, para. 67, at 27 (upheld on appeal); *Jones v. Att’y Gen. of Trin. & Tobago*, (2018) 44 BHRC 566, para. 176, at 57 (High Court of Justice Apr. 12, 2018) (this case is on appeal). Only in the Bahamas has there been some decriminalization through legislative reform. See Sexual Offences Act, 1/2006, Statute Law of the Bahamas ch. 99, § 16(2). The Sexual Offences Act does not criminalize same-sex intercourse in private. See *id.*

⁴² See HUM. RTS. WATCH, *supra* note 40, at 10.

⁴³ See Tracy Robinson, *New-old Law in the Postcolony: Regulating Sex in the Anglophone Caribbean* 15 (May 5, 2017) (unpublished manuscript) (on file with author).

⁴⁴ See Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643, 732 (2001).

construction of African customary law.⁴⁵ What is deemed to be custom is “made, not found” and is “continually constructed and reconstructed over time” in response to the changing needs and contexts of states.⁴⁶

Anglo-Caribbean ownership of colonial sex crimes has intensified because laws criminalizing same-sex intercourse have assumed unprecedented salience as a global marker of incivility.⁴⁷ There is a rise in what Jasbir Puar terms “homonationalism,” or “the use of ‘acceptance’ and ‘tolerance’ for gay and lesbian subjects as the barometer by which the legitimacy of, and capacity for national sovereignty is evaluated.”⁴⁸ Some global discourses on sexuality are “calling ‘homophobia’ into place” in parts of the Anglo-Caribbean, like Jamaica, and reproduce geopolitical distinctions between “backward” places in the Global South and progressive queer-friendly ones in the West, distinctions “deeply informed by relations of empire[.]”⁴⁹ But the expressiveness of Caribbean “homophobia” is not limited to attitudes toward homosexuality.⁵⁰ The strong attachment to the colonial buggery laws also functions as resistance to the strong international pressure to decriminalize in the context of anxiety about the Caribbean’s subordinated nation economies and global economic vulnerability.⁵¹ Put another way by Amar Wahab, the Anglo-Caribbean comprises emasculated postcolonial societies fearful of their “own queer condition”⁵² Meerkotter noticed a silence around Africa’s colonial vagrancy laws and that they have not garnered the same critical public debate in Africa as the colonial laws that criminalize consensual same-sex intercourse.⁵³ If it takes very strong, organized interest group pressure to push a case for

⁴⁵ See Merry, *supra* note 38, at 572–73.

⁴⁶ *Id.*

⁴⁷ See Jasbir K. Puar, *Homonationalism as Assemblage: Viral Travels, Affective Sexualities*, 4 JINDAL GLOB. L. REV. 23, 24–25 (2013).

⁴⁸ *Id.*

⁴⁹ Amar Wahab, *Calling “Homophobia” into Place (Jamaica)*, 18 INTERVENTIONS 908, 909 (2016).

⁵⁰ *See id.*

⁵¹ DAVID MURRAY, *FLAMING SOULS: HOMOSEXUALITY, HOMOPHOBIA, AND SOCIAL CHANGE IN BARBADOS 19–20* (2012).

⁵² Amar Wahab, *Homophobia as the State of Reason: The Case of Postcolonial Trinidad and Tobago*, 16 GLQ: J. LESBIAN & GAY STUD. 481, 497 (2012).

⁵³ See Meerkotter, *supra* note 3, at 3–4.

limiting criminal liability over the threshold, then the preeminent place of sexuality in global rights discourses and in classifying the progressiveness of states today helps to explain why the stakes for decriminalization with respect to “unnatural” offenses appear to be considerably higher than those related to decriminalization of vagrancy.⁵⁴

Finally, I attribute the stickiness of some colonial criminal laws in the Anglo-Caribbean to a timelessness born from their vagueness and the wide discretion that they give to the executive, not only to determine who is charged but who is punished. Vague and imprecise colonial offenses amplify enforcement discretion and reinforce the durability of colonial criminal laws as they can be reclaimed and refashioned through layers of professional and lay interpretations and applications over time.⁵⁵ Ambiguities in the definition of British colonial “unnatural crimes” not only caused confusion about the law’s scope, but they also gave rise to varying interpretations of the offenses over time.⁵⁶ Vagrancy offenses are associated with extreme enforcement discretion; they are notorious for giving law enforcement “virtually unlimited discretion” to detain persons deemed to be suspicious and objectionable while only vaguely identifying what they had done.⁵⁷ The fact that legislatures classify most vagrancy offenses as minor ones or misdemeanors adds to their perniciousness.⁵⁸ High standards for evidentiary proof and procedural fairness are less strictly applied to petty offenses than more serious ones, and defendants are often unrepresented and tried in aggregate.⁵⁹ As a result, “convictions are largely a function of being selected for arrest”⁶⁰ Vagrancy laws achieve a suppleness through parataxis as well, putting offenses in lists, one after the other, without

⁵⁴ See Stuntz, *supra* note 22, at 553.

⁵⁵ See Arif Bulkan & Tracy Robinson, *Enduring Sexed and Gendered Criminal Laws in the Anglophone Caribbean*, 11 CARIBBEAN REV. GENDER STUD. 219, 222 (2017).

⁵⁶ See Goodman, *supra* note 44, at 703.

⁵⁷ RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S, at 2 (2016).

⁵⁸ See *id.* at 2–3.

⁵⁹ See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 101, 105 (2012).

⁶⁰ *Id.*

indicating any connection between them.⁶¹ By juxtaposing disparate petty offenses in one list, legislators make it difficult to pin down who is a vagrant or limit the police power, thus allowing vagrancy to “expand to include figures and actions not yet imagined.”⁶² Thus, in the Anglo-Caribbean, aged colonial vagrancy laws assume modern dimensions as a flexible legal structure that can be deployed to police the urban poor who disrupt the prevailing sex/gender order.⁶³ Vagrancy’s paratactic lists of offenses also provide an inestimable resource to law enforcement because, as Meerkotter noted, when a court declares a colonial vagrancy offense unconstitutional—as the Malawi court did in respect of the rogue and vagabond offense—the police can resort to remaining vagrancy offenses for their sweeping practices.⁶⁴ Colonial criminal offenses like vagrancy are not simply creations of history; they are continually remade in the hands of the executive and law enforcement.⁶⁵

⁶¹ See Sarah Nicolazzo, *Vagrant Figures: Law, Labor, and Refusal in the Eighteenth-Century Atlantic World* 17 (Jan. 1, 2014) (unpublished Ph.D. dissertation, University of Pennsylvania), <https://repository.upenn.edu/cgi/viewcontent.cgi?article=3198&context=edissertations>.

⁶² *Id.*

⁶³ See Matthews & Robinson, *supra* note 1, at 126; see also *McEwan v. Att’y Gen. of Guy.*, [2018] CCJ 30 (AJ), 94 WIR 332, para. 83.

⁶⁴ See Meerkotter, *supra* note 3, at 28; see also *Gwanda v. State*, [2015] High Ct. Malawi.

⁶⁵ See Stuntz, *supra* note 22, at 513.