



European colonisation, law, and Indigenous marine dispossession: historical perspectives on the construction and entrenchment of unequal marine governance

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Abstract

European colonisation played a fundamental role in Indigenous marine dispossession and the entrenchment of unequal and state-dominated marine governance regimes across diverse bodies of water. This article charts this process, utilising examples from waters and communities across the globe that experienced disparate forms of European colonisation and marine dispossession. These examples span between the sixteenth and twenty-first centuries and traverse waters from the Caribbean to Oceania. This long historical context is necessary to interrogating how colonisation has produced unequal access to marine space, resources, and decision-making in different ways through different methods across time and space, which continues to this day. One of the article's main contentions is that marine dispossession played out vastly differently across each locale and that it is only with deep and highly localised historical study that the heterogeneous impacts and ongoing legacies of colonisation on the marine rights, governance, and access of specific Indigenous Peoples and local communities can begin to be grappled with. While the rights of Indigenous Peoples and local communities to marine spaces and resources have received some affirmation within recent international legal instruments, including the protection of customary marine tenure and access to aquatic resources, there continues to be key constraints surrounding the definitions, representations, and jurisdictions of Indigenous or 'customary' marine rights as they have been codified or 'recognised' within national and

The author (white, male, Scottish) wishes to make it explicit that he is not Indigenous and neither does he represent the perspectives of or claim to speak for Indigenous Peoples, local communities, or representative groups. Instead, the author is speaking from Glasgow, Scotland, as an historian undertaking historical research into British colonisation and its impact on coastal communities, marine space, and ocean governance. Scottish individuals played central roles in European (and not exclusively 'British') colonisation, and Scottish populations and institutions derived multifaceted (and enduring) benefits directly and indirectly through the violent exploitation and dispossession of colonised peoples and spaces. Although not focused on Scottish participation, this discussion is nevertheless a crucial part of understanding that history. In writing this historical overview, the author is standing on the shoulders of numerous researchers—Indigenous and non-Indigenous—who have examined colonial law and marine dispossession across time and space. He wishes to express his gratitude for this work as well as his hope that bringing this work together in this particular forum and in this particular way will encourage new readers to follow the author in exploring the innovative work of these authors while undertaking their own examination of these heterogeneous colonial impacts and legacies. Thank you to the anonymous peer reviewer and to Max Liboiron (2021) for stressing the importance of this type of explicit identification, especially when presenting research on colonisation and its multifaceted impacts and consequences.

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interstate frameworks. This has led to fundamental challenges that need to be navigated time and time again in order to attain, claim, or protect Indigenous and ‘customary’ marine jurisdictions. As this article outlines, the emergence of these issues is intrinsically tied to the colonisation of terrestrial and marine spaces. To understand these ongoing struggles, we need to pay close attention to the deep entanglements of law, colonialism, and marine rights in the past and present.

Keywords Colonisation · Indigenous marine rights · Customary law · Colonial law · Marine tenure · Ocean governance

Early in the morning on 17 October 2020, a lobster pound in southwest Nova Scotia burned to the ground after a suspected act of arson (Levinson-King 2020). Stored in the pound were lobsters caught by Mi’kmaq fishers from the Sipekne’katik First Nation following the launch of their self-regulated lobster fishery on 17 September 2020 during the federally mandated off-season. This had been met with weeks of threats, sabotage, and harassment towards Mi’kmaq fishers and authorities by non-Indigenous commercial fishers—who are not permitted to operate during the off-season—before the suspected arson forced a government response and propelled the conflict into the international media (Aljazeera 2020). It is important to note that while commercial fishers have argued that they are concerned about the impact of Mi’kmaq fisheries on the health of lobster stocks during the off-season, these claims have been refuted by fisheries scientists due to the small-scale nature of the Sipekne’katik fishery (Bailey 2020). Central to this conflict are the treaty obligations of the federal government which secures Mi’kmaq rights to fish and sell the products of their fisheries, including during the off-season. These rights were confirmed in 1999 by the Supreme Court of Canada, which ruled that Mi’kmaq people had rights to utilise fishing to obtain a ‘moderate livelihood.’ Although a landmark ruling, the meaning of a ‘moderate livelihood’ remains undefined and this has obstructed Mi’kmaq abilities to practice their fishing rights (The Eastern Door 2020). After waiting 21 years for government action, the Sipekne’katik First Nation instead exercised their rights to self-government—as protected by Sect. 35 of Canada’s Constitution—and their rights to harvest and sell lobsters—as enshrined in the 1760–1761 treaty and the Marshall ruling—to launch a self-regulated lobster fishery.

These recent events are just one example of the widespread and ongoing struggles of Indigenous Peoples and local communities¹ to secure and practice their rights

to access, manage, and benefit from marine spaces and resources. These are issues that are intrinsically tied to the long history of colonisation of terrestrial and marine spaces, which erected and entrenched nation-state and interstate ocean governance structures that Indigenous Peoples and local communities continue to contend with to this day. Through the violent imposition of diverse rules, regulations, and agreements, colonial powers attempted to advance sovereignty over marine spaces and resources while undermining Indigenous sovereignty over the same spaces and resources. This article charts this process, utilising examples from waters and communities across the globe that experienced disparate forms of European colonisation and marine dispossession, drawing from examples spanning between the sixteenth and twenty-first centuries and traversing waters from the Caribbean to Oceania, from Bequia to Fiji (see Fig. 1). Many of these examples focus on areas colonised by the British, although the issues discussed were produced as part of the broader globalisation and imposition of shared (but not homogenous) European concepts of oceanic jurisdiction and use across colonised waters. These legal concepts imagined the ocean as a predominantly depopulated and unownable space, where jurisdiction extended over subjects voyaging across that empty realm but, unlike terrestrial space, jurisdiction could not also be claimed over that space or the resources in that space which were viewed as a ‘commons’ (Steinberg 2001). As shall be discussed, there were also European assertions of territorial-style sovereignty over marine space and resources that extended from land to foreshore waters (‘territorial seas’), but these were ambiguous and undefined delineations that were claimed exclusively by sovereigns and not by different communities, groups, or authorities under their dominion.

This article explores the issues that arose when colonial jurisdictions based on these European imaginations of marine space were imposed on and conflicted with

¹ I use the term ‘Indigenous’ as an imperfect catch all to describe the diverse groups, populations, and authorities that inhabited dissimilar regions prior to European arrival and who experienced various different forms of colonisation. When discussing contemporary issues and the legacies of colonisation, I use the terms ‘Indigenous Peoples’ and ‘local communities’. In referring to Indigenous Peoples, this relates specifically to self-identified groups who practice unique traditions and who retain social, cultural, economic, and political characteristics that are distinct from those of the dominant societies in which they live. I use ‘local communities’ as a means to incorporate those groups who do not self-identify as ‘Indigenous Peoples’ but who practice

Footnote 1 (continued)

‘customary’ forms of spatial jurisdiction that are distinguished from the dominant systems of law practiced by the state. When Europeans arrived in Indigenous spaces, the peoples, communities, kingdoms, and empires that they encountered controlled the legal constructions of space and peoples within that space. It was through the processes of colonisation and decolonisation that these peoples came to be represented as ‘Indigenous Peoples’ or as ‘local communities’ within settler and national governments as well as interstate orders.



Fig. 1 Map of regions of specific examples discussed. Projection based on Athelstan F. Spilhaus' ocean map. Map drawn by author using ArcGIS Pro

pre-existing and often incompatible Indigenous and non-European constructions of ocean space, especially where these did not distinguish between marine, foreshore, and dry lands in the same way that European law did. That is not to claim, however, that the case studies discussed here are representative of all issues and regions that experienced colonisation. Instead, one of the article's main contentions is that these issues played out vastly differently across each locale

and that it is only with deep and highly localised historical study that the heterogenous impacts and ongoing legacies of colonisation on the marine rights, governance, and access of specific Indigenous Peoples and local communities across disparate regions can begin to be grappled with. Similar ideas surrounding the scope and nature of ocean jurisdiction may have emerged as part of a shared legal understanding in Europe, but the regimes that were constructed on the

ground (and at sea) as a result of colonisation were directly and indirectly shaped by disparate and dissimilar contexts, communities, and marine practices.

If we are to better recognise the human dimension within marine decision-making—as has been recently advocated by Bavinck and Verrips (2020) in their manifesto for the marine social sciences—and the ongoing struggles of coastal communities, we need to pay close attention to this deep entanglement of law, colonialism, and marine rights. Rather than simply recognising that these injustices and exclusions occurred, there needs to be a much deeper understanding of how Indigenous and customary marine rights have been obstructed by the structures and dominant ideologies of colonialism that existed and continue to exist across local, national, regional, and international levels. These structures have produced inequalities and legal uncertainties across time and space that have worked to dispossess and obstruct marine rights in the past and present.

This understanding is crucial when considering that a number of international legal instruments have emerged over the past decade that have provided some affirmation of the rights of Indigenous Peoples and local communities to marine spaces and resources. This includes the UN Declaration on Peasants Rights (UNDROP), the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and the UN Food and Agriculture Organization (FAO)'s Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the context of food security and poverty eradication (SSF Guidelines). These instruments incorporate provisions that protect or provide preferential marine rights: to any person who is engaged in 'artisanal or small-scale' fishing who relies primarily on family labour and has a special dependency on and attachment to the land (UN Human Rights Council 2018), to Indigenous Peoples in order to 'maintain and strengthen their distinctive spiritual relationship with their traditionally occupied' waters and coastal seas (UN General Assembly 2007), and to 'small-scale' fishing communities including their 'legitimate tenure rights' and 'customary rights to aquatic resources and land and small-scale fishing areas' (UN Food and Agriculture Organization 2015; Morgera and Nakamura, *Forthcoming*). These instruments sit alongside the United Nations adoption of a Sustainable Development Goal focused on oceans (UN General Assembly 2015) and the announcement that 2021–2030 will be the Decade of Ocean Science for Sustainable Development (UN Decade of Ocean Science for Sustainable Development 2020).²

These instruments demonstrate that the support and maintenance of 'customary' marine tenure and governance

is being increasingly acknowledged as an international concern, although these rights continue to receive significantly less consideration within national frameworks than terrestrial-focused rights (Allen and Banks, 2019; Bavinck et al. 2018). As the situation in Nova Scotia makes clear, even in contexts where the legal rulings of state courts have acknowledged the rights and jurisdictions of Indigenous Peoples and local communities after decades (and centuries) of marine dispossession, this does not then lead directly to the peaceful and unobstructed practice of these rights. As is the case with the terrestrial rights of Indigenous Peoples and local communities, there continues to be key constraints surrounding the definitions, representations, and jurisdictions of Indigenous or 'customary' marine rights as they have been codified or 'recognised' within national and interstate frameworks. This has led to fundamental challenges that need to be navigated time and time again in order to attain, claim, or protect Indigenous and 'customary' marine jurisdictions. To support these developments, there is a need to understand the manifold struggles and lived realities of coastal communities across economic, legal, political, and social spheres to ensure that the needed transformations of ocean governance do not further marginalise and reproduce injustices for coastal peoples (Bavinck et al. 2018; Scholtens and Bennett 2020). With this in mind, greater focus needs to be devoted in historical studies to interrogating how colonisation produced unequal access to marine space, resources, and decision-making.

It is important to stress that the many different faces of colonialism and imperialism led to disparate projections of sovereignty over space and peoples. These different contexts and uneven histories have resulted in a variety of heterogeneous issues facing the marine rights of distinctive coastal communities and groups. Fortunately, there is a growing field of historical enquiry into marine dispossession under colonialism, which can be called on alongside the more numerous historical studies of terrestrial dispossession, in order to highlight some of the predominant and ongoing issues surrounding law, colonialism, and marine rights. By drawing from these diverse histories, this article brings together the key themes of inter-societal legal pluralism, coastal and maritime sovereignty, and the construction of 'customary' law, 'Indigeneity', and 'traditional' usage rights. These are issues that must be comprehended and analysed within their distinctive local contexts if the livelihoods and customs of coastal communities are to be meaningfully supported and secured, especially within national frameworks that emerged from colonial contexts. In doing so, the article stresses that it is simply not enough to be *aware* of this colonial history within contemporary discussions of marine rights. Instead, there needs to be a highly localised and nuanced understanding of the very real impact that colonialism had and continues to have on the laws, recognition, and

² Sustainable Development Goal 14 reads "conserve and sustainably use the oceans, seas and marine resources for sustainable development" (UN General Assembly 2015).

practices of coastal communities in diverse regions across the globe. This is a complex process that has developed over centuries, embedding layer upon layer of Indigenous dispossession and non-Indigenous presumption of rights within highly specific contexts across modern governance frameworks. As this occurred differently across distinctive times and spaces, deep and comprehensive historical interrogation is needed to grapple with how this process played out in specific waters and how this has given rise to disparate perspectives and ambiguities on the ground and at sea that exist in tension and often in contradiction, predominantly to the detriment of Indigenous Peoples and local communities.

Before delving into this examination, we must remember that while the mobilisation of law was a fundamental component of colonisation and the extension of colonial authority over Indigenous lands and bodies, it was only one element of the multifaceted structures of oppression and dispossession that facilitated European colonisation. This was a process rooted in intense violence that aimed at social, cultural, and bodily elimination, all of which had genocidal consequences for Indigenous peoples (Crook et al. 2018; Wolfe 2006). Although this article does not focus specifically on this violence, it is important to keep in mind that inter-societal legal agreements and assimilations were occurring within this broader context of societal upheaval (whether preceding, ongoing, or impending). Unequal recourse to law was one method utilised by colonisers and Indigenous groups to advance or maintain their authority, but this occurred as part of (and not separate from) violent attempts to impose colonial rule over Indigenous bodies and spaces during times of cataclysm that were enmeshed in the exploitation of terrestrial and marine spaces.

European empires, oceanic jurisdiction, and Indigenous marine spaces

As competing European interests expanded overseas from the fourteenth century onwards, discourse surrounding oceanic jurisdiction intensified in Europe at the same time that relationships between Indigenous and European groups were being forged in coastal and marine areas. In Europe, natural law arguments surrounding the ‘high seas’ as the common property of all mankind (*res communis*) sat alongside imperial claims to the exclusive rights to navigate and conduct maritime activities within specific ocean regions. Such claims did not attempt to assert possession of the high seas but instead claimed imperfect and competing claims over the rights to police bodies and vessels at sea, whether to advance or contest restrictions hindering the navigation rights of subjects and non-subjects or to police maritime crimes, particularly smuggling and piracy (Bederman 2012; Benton 2010; Benton and Straumann 2010; Fitzmaurice 2012, 2014;

Steinberg 2001). In the early seventeenth century, European lawyers contesting Iberian monopolistic claims over European seafaring activities in non-European waters were careful to note the difference between the right of ownership over the high seas—which no one could claim—and the right to protection and jurisdiction at sea. Subjects remained under the jurisdiction and sovereignty of their governments and, therefore, government legislation and regulations could manage their own subjects (Benton 2010). As Hugo Grotius famously argued in 1609 in *Mare Liberum*, such regulations could not extend to the subjects of other empires by claiming exclusive jurisdiction over all traffic voyaging within delineated boundaries on the high seas (Berreto 2017; Steinberg 2001). Essentially, the high seas could not be possessed but jurisdiction was extended from land to the activities of legal subjects voyaging on the high seas; ships were moving vessels of sovereign jurisdiction.

In extending jurisdiction over the maritime activities of their subjects, colonial administrations also attempted to regulate, police, and protect the maritime traffic and commercial networks connecting their overseas possessions (Lipman 2015; Ross and Stern 2015; Steinberg 2001). To do so, imperial governments had to be able to restrict foreign maritime traffic that intended to illegally trade with closed markets or plunder their subjects. This led to the gradual development of parallel regulatory frameworks within European empires surrounding ‘prize’ courts by the early eighteenth century. These courts judged whether seized vessels—known as prizes—had been apprehended on just grounds. Usually this related to the interconnected issues of piracy, smuggling, and warfare. This system then led to numerous conflicts between Europeans, as claims that rival shipping was involved in smuggling or piracy could be exploited to extend influence over the regulation and policing of regional maritime traffic. Yet, these contests focused predominantly on overlapping and conflicting rules that were rooted in dominant (but not universal) European legal conceptions of the high seas. These shared legal principles were then adapted by competing European powers to facilitate and justify the construction of imperial authority over specific marine regions and shipping lanes, whether in the name of ‘open’ or ‘closed’ imperial maritime networks (Benton 2005, 2010; Chadwick 2019; Coakley et al., 2020; Musa 2015; Sicking 2018; Wilson 2021).

There were also imperfect assertions that a territorial-style sovereignty could be extended over ‘territorial seas’ and the resources therein. The distances to which this sovereignty extended was not definitive or agreed but relied on vague definitions of how far this could be controlled from land (Bederman 2012; Fitzmaurice 2014; Lipman 2015). Cornelius van Bynkershoek, for example, argued in 1702 that sovereignty over territorial seas could be extended as far as the distance that a cannon-shot could be fired from



Fig. 2 The Salish Sea, including the maritime border of the U.S. and Canada. Map drawn by author using ArcGIS Pro

land (Bynkershoek and Magoffin 1923). These imprecise definitions represented the reality that faced any attempt to claim sovereignty over sea spaces, which could only be maintained where there was a constant presence to uphold that sovereignty. This could be in the form of a fort to oversee a coastal expanse or a naval vessel to police sea lanes. Nevertheless, there remained a clear distinction between (i) sovereignty within territorial seas and control of resources therein and (ii) sovereignty over commerce and navigation on the high seas. In the former case, this constructed a form of territorial-style sovereignty over a very limited marine area near to expanses of landed sovereignty. In the latter, this focused on extending imperial control over the activities and acquisitions of people (both subjects and non-subjects) operating throughout ocean space. As Steinberg (2001) asserts, this was an *extension* of social power by projecting jurisdiction over landed subjects to include their maritime activities rather than an *exertion* of social power through naming and occupying ocean space.

In projecting these imperfect conceptions of maritime jurisdiction over Indigenous coastal and marine spaces,

Europeans conflicted with pre-existing coastal and marine jurisdictions. On arrival in Indigenous sea spaces, Europeans encountered connected maritime worlds that were managed through various rules and regulations concerning sea-based activities and resources. These did not distinguish between marine, foreshore, and dry lands in the same way that European law did. Instead, the laws surrounding marine territory and resources were sometimes (but not always) interlinked, in which exclusive resource rights or resource management rights were embedded within established forms of tenure that linked land and sea spaces (Reid 2015, 2017). For example, Hamilton (2019) outlines that reef net fishing by the WSÁNEĆ peoples on the west coast of Canada was a sacred fishing technique that was intertwined with the law and governance of marine territory and resources (see Fig. 2). Under WSÁNEĆ law, fishing locations (SWÁLET) were not owned but, instead, families belonged to the location of the SWÁLET. All close relatives belonged to the SWÁLET and through these kinship relations gained familial property-like entitlements to fishing locations, which could not be violated. This kinship-based conception of



Fig. 3 Ghana, with detail reproduced from an early eighteenth century European map including African polities and European fortifications. Map drawn by author using ArcGIS Pro. For original, see Rare Book Division, The New York Public Library, 'A Map of the Gold

Coast, from Issini to Alampi by M. D'Anville,' New York Public Library Digital Collection, accessed 26 June 2021, <https://digitalcollections.nypl.org/items/510d47df-ffd3-a3d9-e040-e00a18064a99>

space was linked to *WŚÁNEĆ* creation stories in which the islands of the territory, whose name translates as 'relatives of the deep', were created when XALS, the creator, established the islands by throwing *WŚÁNEĆ* people into the ocean. Reef net fishing was not simply a regulated fishing practice but tied kinship relations and creation stories of dry land with responsibilities and property-like rights over marine space and resources. Dominant European concepts did not and could not account for such property-like rights over marine space, while these concepts also erected a stark (albeit inexact) divide between land and sea realms that also conflicted with notions of the connectedness and fluidity of land and sea space evident in some (but not all) Indigenous ways of knowing. Of course, Indigenous conceptions of marine space were not homogenous. Instead, Europeans conflicted with diverse Indigenous concepts of marine governance that included claims to marine space and resources as personal, collective, spiritual, or loaned property as well as established governance surrounding resource management, coastal tenure, and ocean stewardship.

These conceptions then guided domestic and inter-societal legal regimes surrounding coastal and sea spaces. In early modern Ghana, for example, European coastal presence was established through the construction of fortifications from the fifteenth century onwards, which were utilised to manage trade with African polities (see Fig. 3). These forts were only permitted following treaties

and trading agreements with African leaders who maintained control over the extent and rights of European presence within their coastal domains. Alongside managing trade, these forts were also intended to police and protect European shipping that trafficked in the region, extending limited jurisdiction over European traffic in coastal waters to deter rival European traders. The Europeans within these forts, which were established next to African coastal towns, were also assimilated into coastal society (Benton 2002, 2011a; Green 2019; Shumway 2011, 2018). This resulted in inter-societal arrangements surrounding maritime activity that linked European and African activities. Willem Bosman (1705), in his account of late seventeenth century Ghana, wrote that the Dutch at Axim, Shama, and Elmina claimed a 'toll' of one fifth of the total fish captured each day by local fishermen and boasted 'no other Europeans have this peculiar Prerogative, nor do any of them exercise such a Sovereign Authority over their Negroe [*sic*] Subjects.' More commonly, Europeans employed African canoemen to navigate the heavy surf in order to carry goods and peoples between fortifications and vessels anchored off the coast and also to carry letters between fortifications. Only African canoemen had the skills and knowledge to navigate these rough coastal areas (Gutkind 1989; Dawson 2018). The resultant disputes between African mariners and European traders or fort administrators were then managed through the local

palaver system, which Shumway (2015) describes as ‘an indigenous African legal code for both local and international dispute settlement and alliance.’ This system relied on negotiations that included all of the authorities whose domains were affected by a dispute or agreement, and played a role in maintaining relations from an individual to a government level. African mariners (and others) called on the palaver system to resolve disputes with Europeans, which could result in violence when a resolution was not met. Europeans also participated in the palaver system to secure treaties or other agreements with African elites who they were dependent on for supplies, labour, and trade. The practice of making palavers developed as a shared and mutually understood practice between Europeans and Africans in coastal Ghana during the long period of interactions prior to formal British colonisation in 1874 (Reese 2013; Shumway 2015).

In this example, positive agreements in the form of treaties and trading agreements enabled European presence in coastal Ghana while Europeans were integrated into pre-existing legal practices to manage or negotiate the multilateral interactions between European and African peoples. These forms of multilateral inter-societal agreements were characteristic of European colonial projects prior to the nineteenth century and resulted in the frequent movements of various practitioners, litigants, and defendants across the lines separating one legal system or sphere from another. This is not to say that the diverse forms of inter-societal law that developed in any one locale produced legal spheres beneficial to both groups. Instead, pluralistic legal spheres existed in various forms of tension and accommodation, facilitating opportunistic boundary crossing and the protection and advancement of Indigenous interests on the one hand and the dispossession of Indigenous rights, resources, and lands on the other (Halliday 2013). This also resulted in the hybridisation of legal concepts, which penetrated ‘plural’ legal spheres as Indigenous and non-Indigenous peoples navigated and adapted the rules of the other party to fit their aspirations (Duve 2017).

When Europeans attempted to police maritime activities within the sea lanes that they aimed to control, this extended not just to other Europeans but also to Indigenous peoples. Within proximate waters to European landed presence, this could take the form of the prohibition of certain types of vessels or targeted attacks on the nearby maritime powerbases of Indigenous groups (whether vessels or fortifications). In and between proximate waters, Europeans sometimes attempted to incorporate Indigenous shipping within regulatory systems established to extend control over commercial shipping routes or to prohibit certain types of vessels and maritime practices. Indigenous maritime attacks were also portrayed as outright piracy rather than legitimate attempts to practice, maintain, expand, or reestablish Indigenous

control over marine spaces (Bahar 2019; Kwan 2020a; Lipman 2015; Risso 2001).

This was the context behind the conflict between Kanhoji Angria, the English East India Company, and the Portuguese on the Konkan coast in the Indian Ocean in the seventeenth and eighteenth centuries (see Fig. 4). In the sixteenth century, the Portuguese began to impose control over maritime traffic in the waters surrounding Portuguese Goa through the implementation of the cartaz system, in which non-Portuguese vessels were required to purchase a pass from the Portuguese in exchange for Portuguese maritime protection. Any vessels that did not carry a pass could be seized and confiscated by the Portuguese. The English East India Company implemented a comparable pass system to tax maritime traffic bound to and from their settlement at Bombay (modern-day Mumbai). In the late seventeenth century, the Marathan emperor granted Kanhoji Angria command of coastal fortresses on the Konkan coast and appointed him as admiral of the Marathan Navy, establishing him and his descendants as the dominant power on the Konkan coast. The Angrias then established their own passes (known as a *dastak*) based on the European system, which they utilised to attack European shipping as well as the shipping of their rivals—the Mughal empire—that did not carry a *dastak*. The European powers, however, portrayed Angrian attacks as outright piracy—denying the Marathan empire the same sovereignty and jurisdiction over sea spaces that they claimed—and undertook a series of campaigns against Angrian fortresses and shipping (Elliot 2010, 2013; Layton 2013; Risso 2001). In this case, a non-European maritime power adapted the regulatory system constructed by European colonisers in order to contest European dominance at sea while also advancing their own power against their chief rivals. When they did so, their sovereignty was called into question and then ignored by the European powers who manoeuvred to suppress non-European maritime competition. By claiming certain forms of sovereignty over ocean spaces or activities, while denying non-European sovereign powers the same rights, Europeans attempted to establish their own hegemony over that space through the construction of inconsistent and distinctly unequal forms of regional ocean governance.

Within and across empires, the ways in which jurisdiction was claimed and extended across territorial enclaves and maritime expanses was not alike. There were multiple contexts in which European and Indigenous groups operated and each played a determinative role in shaping, contesting, and reshaping pluralistic governance on the ground. This resulted in an overlapping and intertwining array of legal practices, in which European claims of sovereignty and possession did not equate with the realities of complex legal plurality emerging on the ground (Burbank and Cooper 2013; Ford 2010). By the nineteenth century, this form of



Fig. 4 Konkan Coast with detail of Angrian forts and European settlements in the early eighteenth century. Map drawn by author using ArcGIS Pro

unequal but multilateral legal pluralism within colonised spaces gave way to the privileging of a ‘monist-pluralism’ through the expansion of colonial territorial sovereignty. This resulted in the assimilation, subordination, and violation of Indigenous law under an overarching colonial legal framework (Nursoo 2018).

Territorial sovereignty and Indigenous marine dispossession

The imposition of colonial territorial sovereignty occurred as European empires expanded their control over new and existing sites of colonisation or as former European settler colonies transformed into independent settler governments with their own agendas to consolidate and expand territorial control (Anghie 2005; Ford 2010; Duve 2017). This was possible only when European and settler state powerbases had expanded to the extent that they could project a dominant influence over regional geopolitics while solidifying and extending control over terrestrial and marine spaces

(Benton 2002; Hamilton 2019). Depending on the intentions of the coloniser, the expansion of territorial sovereignty focused on either (i) the dispossession and eradication of Indigenous jurisdiction to make way for further settlement and absolute settler control over territory, bodies, and resources, or (ii) the subjugation of Indigenous governance and subjects within defined territorial boundaries under an overarching colonial administration that could exploit this control to extract raw materials, control regional markets, or secure terrestrial and marine zones against imperial rivals (Anghie 2005; Ford 2010). Both constructions attempted to transform Indigenous populations into ‘dependents’ of the colonising state who were then dispossessed, displaced, or eliminated depending on the interests of the coloniser and the changing conditions in any one place. Despite attempts to foster legislative and judicial uniformity over vast territories and expanses, however, disparate forms of monist-pluralism developed across locales as a result of Indigenous resistance, adaptation, and assertions of sovereignty (Benton and Ford 2013; Duve 2017; Fitzmaurice 2014; Ford 2010; Hamilton 2019; Mann 2011; Pasternak 2014).

The imposition of colonial territorial sovereignty was directly linked with the gradual ascendancy of colonial jurisdiction over marine space and Indigenous bodies at sea. Prevalent claims that limited jurisdiction over territorial seas could be extended from land meant that colonial powers—now claiming territorial sovereignty over island groups and coastal areas—also exerted sovereign rights over vast littoral expanses and territorial seas, including jurisdiction over the marine resources within these areas. This led to the extension of colonial sovereignty over coastal spaces and proximate waters through legal mechanisms surrounding the regulation and control of commercial and extractive marine activities. At the same time, the extension of sovereignty over Indigenous bodies on land also enabled greater claims to police and regulate Indigenous bodies at sea. Collectively, these claims led to Indigenous dispossession through (i) the undermining of Indigenous propertied claims to marine space and resources and (ii) the suppression of Indigenous maritime activities through discriminatory regulations (Hamilton 2019; Steinberg 2001).

As Harris has explored in his study of the legal capture of salmon in British Columbia, these were not mutually exclusive strategies but could involve the legal construction of marine space and resources within territorial seas as a commons open to all colonial subjects, which was followed by discrimination against Indigenous groups through rules and regulations surrounding licences, fishing gear, and vessel types. This then made way for colonial commercial control. Indigenous peoples were only to be integrated into colonial fisheries as labourers and not as competitors, suppressing both Indigenous marine ownership and commercial enterprise. Establishing a public right to marine space provided opportunity to transform ocean space into regulated and exclusive jurisdictional spaces under colonial control. Analogous to what occurred on land, Indigenous marine rights—including those formerly recognised in treaties or through customary inter-societal practices—were superseded to make room for the expansion of colonial control and industry. Policies of conservation and industrial development of coastal and marine areas and resources also worked to displace Indigenous Peoples and remove their rights to exist within these spaces. In the process, the same sovereignty that colonial polities claimed over marine space and the maritime activities of their subjects was increasingly denied to Indigenous polities (Harris 2001; Mowforth 2014; Reid 2015, 2017; Walker 2002).

This was interlinked with colonisers' misplaced beliefs in the superiority of their understandings of ocean space and resources in comparison to Indigenous communities, even though Indigenous ways of knowing had developed over centuries of close connection with adaptation to, and observation and experience of their surrounding environments. This erroneous sense of superior knowledge can be seen in

the language and decisions of colonial authorities during a series of disputes arising in coastal Ghana between 1898 and 1923 following the introduction and spread of the *ali* (a large herring drift net) and *yevudor* (beach seine net). Coastal fishing groups using these nets were accused by other communities of depleting the seas due to the nets' large size and small mesh, which enabled unprecedented volumes of catch while causing destructive impact on juvenile fish in particular. As a result, community authorities attempted to ban the use of these nets in the proximate waters where they claimed jurisdiction over fishing activities (Vercrujisse 1984; Walker 2002).³ Contesting parties, however, appealed directly to colonial courts in attempts to have bans invalidated. The precedent for this occurred in 1898 when a colonial judge overturned a ban imposed by Ga fishermen on the use of the *ali* at Teshie on the basis that this was a new custom and therefore not enforceable under the *Supreme Court Ordinance 1876* (which was judged to maintain only customs already in force prior to the passage of the ordinance). The judge also remarked that concerns about the impact of the *ali* on fish stocks were misplaced, commenting that this went against 'the experience of practically the whole civilised world.' The judge recommended 'that the government should rather encourage than discourage the use of the Ali net.'⁴ Over the next two decades, byelaws introduced by customary authorities spoke to the destructive impact of nets while these concerns were continually cast aside by colonial authorities with sentiments such as 'the best fishing net is the net that catches the most fish.'⁵ In 1916, in a government-published guide for district commissioners appointed to the Gold Coast Colony, the concerns of fishing communities were dismissed as being evidence of their primitive nature: 'The native, however, is foolishly conservative, and clings tenaciously to the customs of his fathers, detesting innovations.' The author suggested that the situation could be resolved if 'the somewhat truculent fishing community realise that the remedy lies in their advancing with the times

³ For discussion of a similar conflict in nineteenth-century Scotland, see Peter Jones *Technological Innovation and Resource Management in the Fisheries of the British Isles, ca. 1400–1900* (PhD thesis, University of Strathclyde, Scotland, 2016), ch. 3.

⁴ Ghana National Archive (hereafter GNA), Cape Coast Division (hereafter CC). Memorandum on the Use of Ali Nets and Local Fishing Industry, c. 1923. This is referred to as Document Archive No. RAO 484-CP330/23 in Vercrujisse (1984) and GNA2 in Walker (2002). Special thanks to Bolanle Erinosh, Jennifer Fynn Asiam, Moses Dzidzenyo and Jonathan Nyaaba at the University of Cape Coast for sharing a copy of this source with me.

⁵ GNA, CC. Confidential, Colonial Secretary's Office, Accra, Gold Coast, 2 January 1924. This is referred to as GNA 6 and No. 7/ SNA.29/1921 in Walker (2002). Special thanks to Bolanle Erinosh, Jennifer Fynn Asiam, Moses Dzidzenyo and Jonathan Nyaaba at the University of Cape Coast for sharing a copy of this source with me.

and regaining the monopoly of the industry by making Seine nets themselves.’⁶ In this case, the justified concerns of fishing groups about the impact of destructive fishing gear and methods, which they were experiencing first-hand, were met with disdain by colonial authorities who renounced these concerns through deeply racialised notions of ‘native’ aversion to innovation and modernity. At the same time, community authority over proximate waters and the activities practiced there were undermined by colonial courts, thereby stemming the ability of communities to restrict the spread of destructive practices in order to protect local fish stocks.

The imposition of territorial sovereignty also ran parallel to the increasing supremacy of colonial (and especially British) sea power in the nineteenth century. This not only enabled colonisers to undermine Indigenous sovereignty by coercing entry into formerly regulated markets—via ‘gunboat diplomacy’ to force unequal ‘free trade’ agreements—but was also employed to extend colonial control over Indigenous maritime activities (Steinberg 2001; Banner 2007). This included maritime activities occurring on the high seas and on coastal expanses that did not fall under direct colonial control. This was achieved through colonial-dominated suppression regimes surrounding piracy and slavery, which were reliant on a series of bilateral agreements with Indigenous authorities that provided European naval forces with the jurisdiction to stop, seize, and suppress Indigenous shipping. This also justified assaults on coastal outposts on the grounds of piracy or slavery (Benton 2011b; Benton and Ford 2016; Chappell 2018; Kwan 2020b; Steinberg 2001; Sicking 2018; Pitts 2018). To focus on slavery, the British pursued a series of bilateral treaties with European and non-European powers following the abolition of the British slave trade in 1807. These treaties provided the British Royal Navy with the rights to stop and search suspected slaving ships sailing under the flags of the other signatory party (Benton and Ford 2016). As Keene (2007) argues, the actual principles in these treaties differed depending on whether the British were interacting with African, American, Arab, or European authorities. Treaties with European and American states granted equal rights to stop, search, and detain the shipping of the other party. Treaties with Arab and West African rulers, however, subjugated or replaced Indigenous marine sovereignty over the maritime activities of their subjects with that of British sovereignty. This removed jurisdiction from Arab and West African rulers and instead extended British jurisdiction over their shipping and subjects at sea. In West Africa especially, the British also began to deny the capacity of African rulers to make treaties

that were recognised by the law of nations, so that British sovereignty was extended over regional shipping without ceding any reciprocal rights of search and seizure. By establishing jurisdiction over the slave trading traffic of various parties, the British Royal Navy could practice multilateral jurisdiction over the activities occurring in West African waters with and without agreements with African polities on shore.

The denial of the sovereignty of West African rulers was linked to the transformation of the existing interstate order through the construction of a Eurocentric international law. Prior to this point, Europeans had made agreements with non-Europeans on a regular basis and, in doing so, regularly recognised non-European sovereignty and jurisdiction (Alexandrowicz 1973; Anghie 2005; Pitts 2018). This was true even where colonisers sought to undermine or subvert such sovereignty or where, as Pitts (2012, 2018) stresses, these agreements were thought to occupy a different legal space than agreements made between Europeans. The expansion of colonial jurisdiction over diverse areas from Africa to Oceania in the nineteenth century led to new methods in cataloguing difference within a hierarchal model of civilisation. Distinguishing between ‘civilised’ and ‘uncivilised’ nations through a deeply racist Eurocentric lens of what constituted civilised society enabled colonial powers to reconceive the existing interstate system through judgements that only ‘civilised’ polities were admitted to the family of sovereign nations bound by international law (Anghie 2012; Koskenniemi 2002; Obregón 2012). This discourse was then employed to question whether non-European powers held limited or *any* sovereignty within the international community. Sovereignty became the reserve of ‘civilised’ states and, therefore, only ‘civilised’ states could have their sovereignty violated. This enabled imperial expansion through the denial or restrictions of non-European sovereignty and through new imperial agendas to elevate ‘uncivilised’ societies into the family of ‘civilised’ nations. Both provided new legitimacy for the extension of colonial territorial sovereignty over Indigenous bodies, spaces, and resources. This also enabled colonisers to claim and advance their own sovereignty over marine space while undermining the sovereign claims of Indigenous polities (Anghie 2005; Fitzmaurice 2014; Koskenniemi 2002; Nuzzo 2017; Pitts 2012, 2018).

Imperial consolidation in the late eighteenth and nineteenth centuries, therefore, not only moved to extend territorial sovereignty over Indigenous space, bodies, and resources, but also shut out Indigenous polities from the international legal community as sovereign actors in their own right. This multilateral dispossession sought to acknowledge Indigenous sovereignty only at the point in which their autonomy was relinquished and subsumed under colonial control (Anghie 2005; Craven 2012; Koskenniemi 2002). Imperial *claims* to absolute territorial sovereignty

⁶ The British National Archives, Colonial Office 96/568, No. 514. *Gold Coast Colony. Hints to District Commissioners. By E. C. Eliot, (Provincial Commissioner), July 1914* (Accra: Government Press, 1914).

and presumptions of jurisdictional control and primacy over land and sea space, however, does not accurately reflect the complex and contested jurisdictional frameworks that developed in reality (Benton 2002; Ford 2010; Pasternak 2014). The existence of multiple overlapping jurisdictions over space led to conflicting and ambiguous legal practices surrounding the control of people, resources, and activities occurring on land and at sea (Benton and Ross 2013; Brooks 2018; Crawford 2020; Ford 2010; Harris 2001; Wanhalla 2015). Even as colonial-dominated legal orders emerged within bounded (although imperfect) territorial units in the nineteenth century, these were crafted and recrafted by the conflicting jurisdictions that managed everyday interactions and practices. Rather than creating uniformity, this led to the construction of heterogenous, conflicting, and overlapping legal systems that were unique to each locale and were influenced by the diverse practices and interactions of Indigenous, colonial, and international law. Within these unique structures, claims to territorial sovereignty paved the way for the paramountcy of imperial power in defining and controlling the parameters of Indigenous rights and jurisdiction on land and at sea.

Constructing ‘customary’ law, indigeneity, and ‘traditional’ usage rights

Indigenous authorities and peoples were not passive when colonisers manoeuvred to relocate jurisdictional sovereignty over Indigenous space and bodies away from their control. By working within and rejecting imposed legal frameworks, Indigenous groups sought to advance and protect certain rights and customs (Benton 2002). The inequalities between colonial and Indigenous authorities in any one region, as well as the interests of colonisers and Indigenous groups, dictated how far such accommodation or resistance found success in protecting or advancing certain forms of Indigenous jurisdiction (Benton and Straumann 2010; Chanock 1985). Whatever the power imbalances or interests at play, colonial administrations had to assimilate and accommodate Indigenous jurisdiction in one form or other in order to advance and maintain their claims to territorial sovereignty (McHugh 2013). These uneven negotiations then shaped the hybridised legal systems that emerged within overarching colonial structures (Benton 2002). In the process, diverse power inequalities and ideologies were established in law alongside fixed constructions of ‘customary’ laws, Indigeneity, and ‘traditional’ usage rights.

To protect their rights and authority, Indigenous authorities were required to translate their customs to fit colonial expectations of ‘customs’ and ‘traditional’ authorities. This was achieved by inventing new or adapting existing customs and authorities. The forms of ‘customary’ law that were then

recognised and divested with the power and authority of the colonial state were ingrained not only in colonial conceptions and constructions of what ‘customary’ law should and could be, but were also shaped by what Indigenous groups and authorities perceived would fit colonial expectations of customary law. Translating and adapting Indigenous law to fit within a rigid colonial framework transformed diverse power imbalances, societal inequalities, and ideological assumptions into fixed legal realities (Chanock 1985; Mann 2011; Ranger 1983). This not only ‘froze’ customary law as a set of rigid and proscribed rights based on ahistorical assumptions of the perpetuity of these customs since pre-colonial times, but also ‘froze’ customary law as it was translated and misrepresented under colonial rule at times of intense societal upheaval. In both cases, customary law was constructed to represent a ‘traditional world’ that often did not (and does not) reflect the complex realities, adaptability, and fluidities of Indigenous laws. The protection of the right to perform Indigenous or customary authority was then dependent on the overarching colonial structures that divested them with jurisdiction (Barker 2011; Ranger 1983; Watson 2015).

The invention or elevation of specific forms of ‘custom’, which were then codified as ‘customary law’, also transformed existing divisions and hierarchies within Indigenous polities. In certain places and at certain times, this worked to strengthen specific groups’ interests over others—whether old over young, men over women, ‘indigenous’ over ‘immigrant’, rival group over rival group, or chieftain over subject. These inequalities and power relations were then embedded within an overarching legal framework. Through recourse to colonial law, Indigenous groups and leaders invented claims to customary law and authority over bodies and spaces where it did not previously exist or gained new dominance when their position became codified as the ultimate embodiment and overseer of customary law and practices on land and at sea. Following the expansion of their authority under colonial structures, these groups could then mobilise customary laws—whether through invention or the manipulation of pre-existing practices—to entrench their supremacy and displace other forms of authority that existed on the ground (and in and around the water) (Chanock 1985; Perbi 2018; Ranger 1983). In order to contest such constructions, colonised peoples had to work within the codified customary framework, which further established the authority of this framework.

It is important not to understate the power imbalances at play here as, ultimately, what was permitted as ‘custom’ was often dependent on what colonial administrations would tolerate and the role that they envisaged for Indigenous authorities across different sites of colonialism. At the same time, ‘toleration’ was also dependent on how colonisers perceived and engaged with such agreements in practice (Evans and

Nanni 2015). Recourse to ‘custom’ by colonial authorities could also be a means to contain legal claims by Indigenous groups by refusing to recognise claims as ‘customary’. This is particularly pertinent as colonial administrations may have been willing to accommodate existing and imagined tenure rights on land—whether collective or individual ownership—but marine tenure was less translatable to colonial legal systems (Allen et al. 2019; Enyew 2019). Dominion over foreshore areas was claimed by the state while the high seas remained unownable, and neither could accommodate Indigenous claims to property rights over marine areas (Curran et al. 2020). In Fiji, for example, the Deed of Cession in 1874 between iTaukei Chiefs and the British Crown was considered to transfer sovereignty and ownership over all of Fiji to the British Crown, including ‘possession of and sovereignty over the waters adjacent thereto and of and over all ports harbours havens roadsteads rivers estuaries and other waters and all reefs and foreshores’ (University of the South Pacific n.d.). The colonial administration then granted the majority of land back to the iTaukei as inalienable property. However, a similar system of marine tenure was not adopted despite the fact that iTaukei practices did not separate land and sea spaces but instead recognised tenure over inshore areas. Disregarding iTaukei rights, the *Rivers and Streams Ordinance 1880* decreed that marine spaces were open to the public for common use. This was reversed 43 years later when the *Birds, Games and Fish Protection Ordinance 1923* recognised customary fishing rights and restricted usufructuary fishing rights in qoliqoli (customary fishing grounds) to the registered iTaukei owners; this was again confirmed in the *Fisheries Act 1942*. However, qoliqoli ownership was recognised only as exclusive usage rights within fisheries law while the State Lands Act maintained that the ownership of foreshore areas remained with the crown. This plural system of ownership has continued following independence in 1970, in which registered qoliqoli areas are recognised and managed locally by the proprietary iTaukei owners—promoted and supported through the Locally Managed Marine Area Network (LMMA)—but such rights continue under the ultimate authority of the government that holds legal dominion over foreshore areas (see Fig. 5) (Techera 2010; Sloan & Chand 2016; Jit 2020).

This is not an example of complete dispossession or disempowerment as iTaukei communities successfully pushed for recognition of their rights to autonomously manage and maintain communal fisheries through the registration of qoliqoli areas under the colonial and independent governments of Fiji. These rights have enabled iTaukei to preserve their control over fisheries management, the declaration of Marine Protected Areas (MPAs), and negotiations with commercial interests who desire access to qoliqoli areas. Yet the lack of recognition over secure property rights has also limited iTaukei’s formal authority to, for example, stop poachers

and commercial infringements (Techera 2010; Sloan and Chand 2016). Qoliqoli rights in Fiji demonstrates some of the challenges and potential ambiguities surrounding the preservation or reclamation of marine tenure where the dominant form of law recognises only state dominion over foreshore areas and not the communal or individual property rights recognised in Indigenous or customary laws.

The absorption of Indigenous governance and ‘customary’ practices under a dominant colonial framework provided colonial administrations (and the resultant nation-state administrations) with the ultimate purview over the boundaries of Indigenous rights and jurisdiction as recognised at the dominant national level (Watson 2015). Recognition of customary law did not undermine or overthrow colonial power and structures but, instead, reproduced and reinforced colonial power and structures by rejecting the independent sovereignty of Indigenous polities. Rather than an acknowledgement of jurisdictional authority *maintained* by Indigenous sovereignty, this authority was transformed into a right *granted* to a cultural minority by an overarching authority (Barker 2011; Hamilton 2019; Watson 2015; de Costa 2014). This is a fundamental part of the conflation of racialisation and colonialism, in which Indigenous Peoples and local communities are constructed as cultural minorities within nation-states and legal structures that have emerged from or are a direct product of colonialism. This frames Indigenous rights and customs within a body of doctrine surrounding equality of rights, subjecthood, and opportunity under a dominant state framework (Byrd 2011; Laidlaw and Lester 2015).

By controlling the framework in which the rights of Indigenous Peoples and local communities were recognised, colonial, and state administrations then also controlled the means through which ‘Indigeneity’ and ‘traditional’ practices were acknowledged. This required communities to meet the legal tests constructed by colonisers to prove their Indigeneity and/or the long-standing nature of their customs and practices (McMillan and McRae 2015; Watson 2015). These same characteristics were used to represent Indigenous groups as primitive and backward, meeting the characteristics of ‘uncivilised’ peoples within European racial science that then justified their oppression and exclusion (Anghie 2005; Koskenniemi 2002). This created a ‘static’ and ‘fixed’ Indigeneity that ignored the historical reconditioning and transformations of Indigenous society before and during colonisation.

Fixed notions of Indigeneity are also tied to ahistorical conceptions of Indigenous groups as landbound and static populations. Such constructions of a ‘bounded’ Indigeneity explicitly ignore the existence of Indigenous networks—both landed and marine—prior to, during, and following colonisation which featured frequent mobility and exchange across vast distances and global marine spaces (Carey and

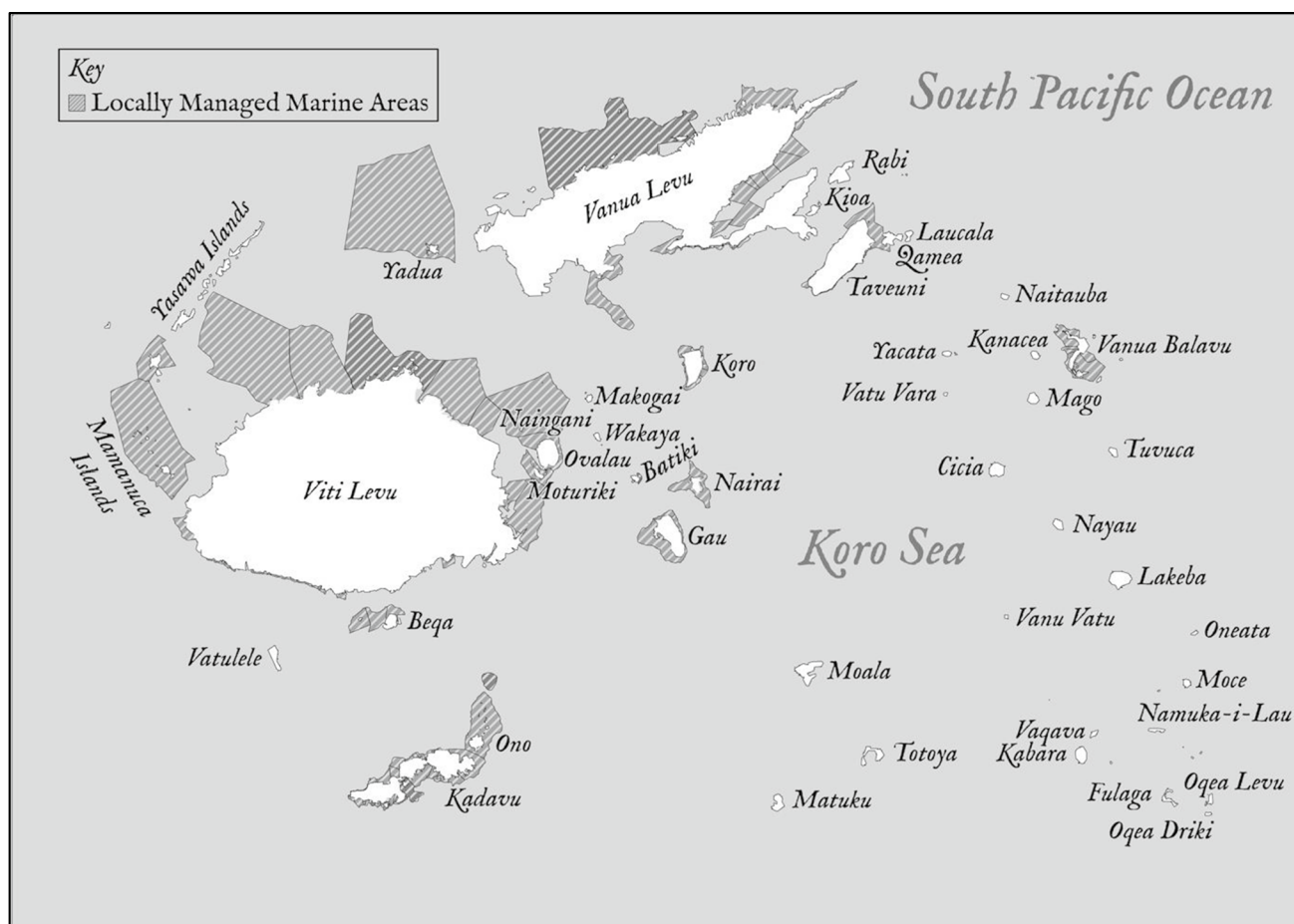


Fig. 5 Fiji, including detail of Locally Managed Marine Areas (LMMA). Map drawn by author using ArcGIS Pro. LMMA data from UNEP-WCMC and IUCN (2021), Protected Planet: The World Database on Protected Areas (WDPA) and World Database on Other

Effective Area-based Conservation Measures (WD-OECM) [Online], July 2021 (Cambridge, UK: UNEP-WCMC and IUCN). Available at: www.protectedplanet.net

Lydon 2014). Rather than pre-existing, the ‘landbound’ and ‘static’ nature of certain Indigenous communities was crafted through the encroachment of colonial boundaries and the upheaval of Indigenous spaces that displaced Indigenous groups and forced them into restricted and defined territorial units within nation-states. This was partly achieved through state recognition of communal tenure and stewardship over certain spaces as well as the creation of reservations. This was not only a means to expunge Indigenous claims to land and resources appropriated by colonisers, but also to limit the movements of Indigenous populations and the extent of Indigenous jurisdiction within state boundaries (Byrd 2011; Wadewitz 2012).

‘Static’ Indigeneity also fits a very particular stereotype about ‘traditional’ use of resources for purely subsistence reasons, a prevalent trope that dates back to the very beginnings of European colonisation. This was then codified into law—first in inter-societal agreements and later under colonial-dominated legal

frameworks—through colonisers’ recognition of Indigenous usage rights for ‘subsistence’ or ‘cultural’ purposes rather than for extractive potential or commercial exchange (Rice 2014). With regards to marine resources, this centred on rights to subsistence fishing, sealing, and whaling (Fitzmaurice 2019). Recognising only the subsistence or cultural rights of Indigenous populations to resources then provided the opportunity for colonial dominance over the commercial use of these and other marine resources. This ignored Indigenous entrepreneurship and venture capitalism, which was continually suppressed or undermined through the unequal power of state and non-Indigenous-dominated commercial industries. Constructing Indigeneity and ‘traditional practices’ within a landbound framework misconstrued and homogenised the relationship of Indigenous and local communities to space, and ignored the entrepreneurial and commercial agency of diverse Indigenous groups (Reid 2015; Russell 2014; Sanderson and Willms 2019).



Fig. 6 Saint Vincent and the Grenadines. Map drawn by author using ArcGIS Pro

The simplification and homogenisation of Indigeneity to fit within colonial state and interstate frameworks continues to produce questions around the nature of Indigeneity itself and how this relates to the traditions of other groups whose Indigeneity is questioned or for local communities that do not identify or are not recognised as ‘Indigenous’. One example of this is the debates around communities and groups whose presence in a particular region had not predated European colonisation but who have maintained distinctive cultural traditions and customary practices across generations. This is the background to debates surrounding the artisanal whaling rights granted to the population of Bequia in St. Vincent and the Grenadines (SVG) (see Fig. 6). In 1875, William Thomas Wallace, the son of a Scottish plantation owner, established a whaling station at Friendship Bay in Bequia after sailing with Yankee whalers in the 1860s. He later joined in partnership with Joseph Ollivierre, who established another station on the nearby island of Petit Nevis. Between 1880 and 1920, the whaling industry supported 20% of the Bequia working population both directly and indirectly. Although the Caribbean whaling industry

declined after the 1920s, shore-based whaling continued from Bequia (Finneran 2016, 2018). In 1981, SVG joined the International Whaling Commission (IWC) to vote for the international moratorium on commercial whaling. In the resultant agreement, SVG was given a quota of three whales per year for ‘aboriginal subsistence whaling’ (ASW); this was later reduced to two humpback whales in 1998. At the 2012 meeting of the IWC, the ‘Statement of Need’ submitted by SVG requested a quota of four humpback whales, writing that ‘whaling in Bequia is an old tradition’ and that ‘whalers and whale songs are part of the folk-art of Bequia.’ The statement also identified whale meat as an important source of nutrition, estimated at around 12% of the annual animal protein need, and an important alternative to imported animal protein for an island not self-sufficient in foodstuffs (IWC 2012). During the vote on ASW, several nation-state representatives questioned whether Bequian whaling met the necessary requirements as these traditions were established and carried on by whalers of African and European descent; the representative for the Dominican Republic even stated there were no longer any Indigenous Caribbean peoples,

questioning Bequia's rights to subsistence whaling while ignoring the existence of recognised Indigenous Caribbean groups, such as the Garifuna and Kalinago. In this vote, Bequian whalers were reliant (and continue to be reliant) on the support of the SVG government and other nation-state representatives to uphold their rights to ASW as managed by the IWC. This is an issue created by the intense entanglements of Indigenous, African, and European populations throughout the long history of colonisation in the Caribbean, which is also linked to judgements of the validity of Indigeneity and 'traditional practices' based on deeply racialised concepts that are embedded in ahistorical ideas of cultural stasis before, during, and following colonisation (IWC 2013; Crawford 2020; Strecker 2016).

Even as the right to self-identification, jurisdiction, and access to marine resources for Indigenous Peoples and local communities is enshrined in legal instruments such as UNDRIP and UNDROP, these aspirations remain difficult to achieve due to the various legal tests, challenges, and misconceptions surrounding customs, rights, and tradition across national governments and interstate orders. These issues continue to limit the recognition of dynamic and multilateral Indigenous and customary jurisdiction on coasts and at sea, which remain beholden to the success of Indigenous pressure in forcing these issues into non-Indigenous state and interstate courts (Pasternak & Scott 2020). This means that protection of the rights and practices of Indigenous Peoples and local communities are dependent on cyclical state decisions. Calls to national or international law can open up and close down possibilities for legal accommodation depending on the decisions of non-Indigenous courts past, present, and future (Curran et al. 2020; Evans and Nanni 2015). This is particularly true as legal recognition does not always equal rights in practice, particularly where Indigenous Peoples and local communities claim jurisdiction or possession over areas of extractive potential and regularly come up against violent dispossession or exclusion by states and commercial forces (Duve 2017; Mowforth 2014). State control of the boundaries of Indigenous rights leaves the resolution of conflicting claims up to cyclical state decisions made on a case-by-case or project-by-project basis. This means there is a recurring need for Indigenous communities to challenge state authority to grant extractive rights or implement 'development' and 'conservation' projects in areas where Indigenous Peoples and local communities claim or possess rights and jurisdiction (Curran et al. 2020). This reinforces a system of fragile gains and swift losses, reflecting the constantly fluctuating and unequal relationship between state and 'customary' or 'traditional' governance, where momentous gains in one legal forum can be quickly lost or infringed upon in another (Evans & Nanni; Nikolakis et al. 2019; Watson 2015).

To give one example from an ocean governance perspective, Indigenous rights to marine space that have been historically recognised by state governments have also had to contend with the Law of the Sea Convention (1982), which imposed arbitrary ocean borders through the creation of the 'Exclusive Economic Zone' (EEZ). This better defined the idea of 'territorial seas' within international law, in which the state that claimed territorial sovereignty on land could claim absolute sovereignty over 'territorial seas'—defined as extending 12 nm from the low-water baseline in the UN Convention on the Law of the Sea (1982)—and exclusive rights to the jurisdiction of marine resources within the EEZ—extending up to 200 nm from shore. If Indigenous marine claims cross the border into the EEZ of another state, negotiations have to take place between the two states—that are officially recognised as sovereign powers and the custodians of EEZs—rather than between the Indigenous group and the two states extending jurisdiction over Indigenous-claimed marine space and resources. In the interstate order, the Indigenous group are considered the subjects of one state and, as such, the protection of their customary rights relies on interstate negotiations within which they are not a sovereign party. Reid (2015) discusses how this impacted Makah fishers in Cape Flattery in the Pacific Northwest (USA) after the declaration of 200 nm exclusive economic zones by the USA and Canada in 1977 (see Fig. 2). The boundaries of these zones shut Makah fishers out of their most productive halibut fishing banks—Swiftsure and 40-Mile (La Prouse) Banks—which now fell under exclusive Canadian jurisdiction. This occurred only 3 years after the Makah gained a significant victory in *United States v. Washington* (1974), which recognised Makah rights to a fair commercial share of salmon and steelhead fisheries that were protected in the Treaty of Neah Bay (1855) but that were then violated by the settler government. Rather than safeguard Makah treaty rights to fish these waters, US diplomats instead focused on securing access of non-Indigenous recreational fishers in negotiations with Canada in 1979.

As the Makah case demonstrates, the existence of multi-lateral overlapping jurisdictions across local, national, and international scales means that the rights of Indigenous peoples and local communities are being both recognised and contested across all levels at all times. Consistent across these scales, however, is that the inclusion or exclusion of these groups in decision-making and the protection and recognition of their rights—rights, it must be remembered, that they have never renounced—is reliant on the decisions and resolutions of dominant nation-state and interstate structures. Even where interventions or restructurings seek to disrupt or intervene in the systems of dominance present in state structures, the participation and inclusion of Indigenous groups and local communities does not halt the ongoing processes and structures of colonialism.

Conclusion

The exercising of Indigenous and customary marine rights remains subject to the ongoing regulation, ‘toleration’, and promotion of the state. As a result, Indigenous marine rights are always in flux. How far the exercising of Indigenous authority or rights over marine spaces is contested or recognised is reliant on decisions made in non-Indigenous legal forums. Indigenous agency and resistance to colonial, state, or commercial interests keeps these issues alive through the continual struggle for recognition or maintenance of rights. Yet the claims and counterclaims of these groups are managed predominantly through state and interstate forums and are reliant on these forums for formally recognised decisions. As such, the state remains the chief arbiter of the boundaries of the rights of Indigenous Peoples and local communities, while presumptions of absolute sovereignty over ‘territorial seas’ and EEZs provides the state with the ultimate control over the arbitration and management of maritime space and resources (UNCLOS 1982). As Liboiron (2021) has recently argued, the colonial process is continued through the assumptions of states (and other non-Indigenous or non-community actors and institutions) to the rights to imagine how marine spaces and resources should be organised and managed, even where such imaginings are meant to enact positive transformations (such as for conservation purposes). This presumption of rights, as well as every assertion of rights, access, and jurisdiction by Indigenous Peoples and local communities in the face of non-Indigenous and non-community presumptions of rights, access, and jurisdiction, is borne from colonial power imbalances designed to undermine Indigenous peoples in favour of colonial control, governance, and use. This has developed over centuries, with layer upon layer of dispossession and assumption of rights becoming embedded within modern governance frameworks that cannot be untangled from the long and complex histories of colonisation, but which must be fully interrogated and understood within their highly specific local contexts.

History cannot be used to disentangle these issues by providing access to a ‘pure’ Indigenous law or ‘pure’ colonial law. As Duve (2017) suggests, there is no ‘pure’ Indigenous or colonial law and advancing such claims obscures the deep entanglement and development of law in sites of colonisation. This occurred as pre-existing systems of European and Indigenous laws with their own unique characteristics across distinctive polities were adapted and transformed to manage new relationships between people and place. This should also not be the goal, as this provides another means to ‘freeze’ customary law and reproduce historical inequalities by not recognising the adaptations, developments, and flexibilities of customary law over time prior to and following European colonisation. This also ties the validity of contemporary customary laws to their links with historical laws rather than recognising their legitimacy within contemporary society

(Barker 2011; Chanock 1985; Hamilton 2019; Ranger 1983).⁷ History can, however, enable understanding of how the entanglement of these issues has led to the entrenchment of unequal power dynamics and structural inequalities, specific articulations of customs and Indigeneity, and particular values and ideologies surrounding terrestrial and marine space, resources, and property. Each of these has worked to dispossess, undermine, and submerge customary laws and practices as they have come to sit in relation to national and international frameworks. The ways in which these issues were entrenched across diverse colonial spaces then enabled further dispossession of the rights and customs of Indigenous populations and local communities by ‘freezing’, impeding, or violating them (Nursoo 2018).

These dynamics can only be deconstructed (but not disentangled) through the examination of the long history of Indigenous and non-Indigenous interactions, conflicts, adaptations, and assimilations within specific locales and regions as well as across national and international levels. Indigenous marine dispossession occurred across multiple scales and it is only through a multiscale analysis rooted in deep historical context that we can begin to understand the full extent of structural prejudices impacting on the marine rights, customary laws, and livelihoods of Indigenous Peoples and local communities living within the spatial boundaries constructed by colonialism. Without this understanding, attempts to develop an inclusive and locally beneficial ocean governance will continue to be impeded by the embedded structures of colonialism that were constructed across local, national, and international scales in order to regulate, dispossess, and eradicate the marine rights and practices of Indigenous peoples. The success of such governance relies on the deconstruction of existing assumptions, prejudices, and obstructions facing the marine governance practices of Indigenous Peoples and local communities while rooting future governance in community values, beliefs, and management practices. This, however, should not attempt to simply draw from that knowledge and practice to inform top-down management but should and has to be genuinely locally managed as is exemplified by the success of existing locally managed marine governance and conservation regimes, such as LMMAs and ICCA.⁸ These recognise that Indigenous Peoples and local communities are ‘the de facto custodians of many state and privately governed protected and conserved areas, and they are also conserving a significant

⁷ This also places Western constructions of time and history as the framework through which the historicity of customary law is evaluated (Rifkin 2017).

⁸ LMMA is stands for Locally Managed Marine Area. See LMMA Network <https://lmmanetwork.org/>. ICCA is an abbreviation for “territories and areas conserved by indigenous peoples and local communities” or “territories of life.” See ICCA Consortium <https://www.iccaconsortium.org/>.

proportion of lands and nature outside of such areas' to the extent that they play an 'outsized role in the governance, conservation and sustainable use of the world's biodiversity and nature' (ICCA Consortium 2021). These existing examples provide tangible paths away from dominant, unequal, and imposed top-down ocean governance while also ensuring the goal is not the extraction of Indigenous and community knowledge in attempts to assimilate this into state-controlled ocean governance. Regardless of intent for sustainable ocean governance or otherwise, such approaches only continue the long histories of colonialism and unequal ocean governance rooted in and responsible for enduring marine dispossession.

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