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‘Legal at the time’? The case of Mauritian slavery

Didier Michel and Richard Croucher *

ABSTRACT

This paper critiques the ‘legal at the time’ argument used by states and companies which practised slavery, examining the Mauritian case. Although slavery was largely legal prior to its abolition by the British, torts were common under slavery and in one sliver of history, the years of historic rupture, 1794-1839, when the local élite defied first French and then English law, generated systemic unlawful activity. Most types of legal actions for restitution for slavery face formidable difficulties and pursuing reparations supported by broad legal arguments may be a more viable route. Slavery may be argued to have been an illegitimate endeavour *per se*. Whilst sympathetic to that argument, we do not pursue it but rather seek to demonstrate that the ‘legal at the time’ argument against reparations contains significant lacunae even within its restricted terms. We also show that French constitutional law offers possibilities in the form of rights that are not time-limited.

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INTRODUCTION

We critique the ‘legal at the time’ argument used by states and companies involved in slavery and the slave trade, examining the case of Mauritius. Despite the legitimacy of arguments based on the inherent obscenity of slavery we seek not to expand these, but rather focus on a narrower critique focusing both on torts committed when slavery was formally legal and, more importantly, on a brief period when it appears to have lacked any legal foundation at all. While we recognise that some legal cases may be viable, we are more concerned to establish legal arguments within the broader reparations movement. Following Ariela Gross, we seek to ‘expose historical assumptions and narratives that oppose redress’¹. As Gross herself demonstrates, legal judgements on slavery have frequently been informed by incorrect historical assumptions. This work therefore lies at the intersection of law and history.

We consider possible legal arguments available in French and English law, which if they concern those foreign states must be raised in France and Britain as Mauritian law requires². Claims against companies may also be viable in Mauritius under these legal systems because of the continued application of both on the island. We envisage demands for reparation and specific legal actions without entering into much-debated definitional issues on reparations³. We simply conceptualise them as any form of material compensation from the descendants of those who benefitted from slavery to the descendants of those who suffered from it.

Demands for reparations and actions—for example for unlawful enrichment—cannot be clearly separated in terms of their legal foundations. We suggest that the broad political case for reparations may be supported by some of the legal bases referred to below. In other words our argument is primarily based on the spirit of laws rather than on the possibility of bringing specific cases although the latter may occasionally be possible. We conclude that since specific legal actions have very limited possibilities of success, reparations claims based on broad political argument with legal underpinnings may represent a more viable option.

The remainder of the article is structured as follows. First, we provide context on both the international and national debates before sketching essential detail on the history of slavery in Mauritius. Next, in the article’s main body, we examine in turn possible legal bases for reparations claims against companies and ex-imperial states. Finally, we attempt to identify those grounds which appear most likely to succeed.

CONTEXT: INTERNATIONAL LEGAL DEBATES AND MAURITIAN SLAVERY

¹ A Gross “When is the time of slavery? The history of slavery in contemporary legal and political argument” (2008) 96 *California Law Review* at 283-321.

² R Domingue “Legal method and the Mauritian Legal System” Réduit, University of Mauritius, 2003(25).

³ For discussion of these complex issues, see T Craemer 2009; “Framing Reparations” (2009)37/2 *The Policy Studies Journal* at 275-298; S Kershnaer “The inheritance-based claim to reparations” (2002)8 *Legal Theory* at 243-267.

Public discussion of slavery has recently intensified globally, and especially in the USA, Africa and Europe, the poles of the ‘circular trade’. Indeed, there has been a remarkable upsurge of both scholarly and popular interest in slavery’s history and consequences⁴. In the USA, it has moved from being a long-term fringe discussion among intellectuals to becoming a current, mainstream debate⁵. Museums have been created, public holidays instituted, statues erected and demolished, research has intensified and reparations mooted. Entire professions such as accountants have had their role in slavery and the slave trade dissected⁶. The debate has acquired an increasingly international dimension, with a large number of apologies being issued from certain nations to others.

In the USA, the reparations demand has brought some positive if restricted benefits. In some states, companies are required to investigate and disclose their role in slavery⁷. Several major American banks have apologized for the profits their ancestor companies made from slavery and in some cases they have set up funds for the education of slaves’ descendants. In the USA, the issue is clearly linked to other major matters, not least those of Corporate Social Responsibility and national cohesion. Thus, considerable momentum has been generated behind the demand over the last two decades, bringing some minor material results.

In the same period, the demand has brought fewer results in the international context. The first (and, it appears, last) Pan-African conference on reparations occurred in Abuja Nigeria in 1993⁸. International conferences held in Durban in 2001 and 2009 raised the issue’s international profile, but took no very concrete decisions. ‘Durban 1’ involved 170 countries and focused on the reparations issue principally in relation to ex-imperial states, ending with a declaration that slavery and the slave trade constituted crimes against humanity. Reparations were strongly resisted by the ex-imperial states concerned, with the support of some African countries⁹. ‘Durban 2’ generated no material progress.

Powerful general legal arguments have already been eloquently made in support of international reparations but there is now a need to supplement and elaborate these at the level of individual ex-colonies in order to bring more focus and depth to the discussion. Lord Gifford made a major initial contribution to the general arguments at the 1993 Abuja Conference¹⁰. In his influential and compelling paper, he argued that where crimes against humanity were concerned, appropriate forms of legal redress already existed in international law. Where inadequate mechanisms or remedies existed, these could be devised on the *ubi jus, ibi remedium* principle. The principle of reparations paid by states to other states and to victims was established by Germany and Austria’s payments for wartime crimes in 1952 (to Israel) and 1990 (to survivors) respectively. International law also allows for claims by

⁴ The extensive dimensions of this interest in the USA and internationally are discussed in I Berlin “American slavery in history and memory and the search for social justice” March (2004) *Journal of American History* at 1251-1268.

⁵ M A Michelson “The black reparations movement: public opinion and congressional policy making” (2002) 32 *Journal of Black Studies* at 574-587.

⁶ R D Anes “Accounting and slavery: the accounts of the English South Sea Company 1713-22” (2002) 11/2 *European Accounting Review* at 441-452; D Oldroyd, R K Fleischman & T N Tyson “The culpability of accounting practice in promoting slavery in the British Empire and antebellum United States” (2008) 19/5 *Critical Perspectives on Accounting* at 764-784; J R Heier “Accounting for the Business of Suffering: A Study of the Antebellum Richmond, Virginia, Slave Trade” (2010) 46/1 *Abacus* at 60-83.

⁷ P Flaherty and J Carlisle “*The case against slave reparations*” (National Legal and Policy Center, USA 2004) at 5.

⁸ R F Howard-Hassmann “Reparations to Africa and the Group of Eminent Persons” (2004) 173-174 *Cahiers d’Etudes Africaines* at 81-97.

⁹ Human Rights in Development Year Book 2001: *Reparations: Redressing past wrongs*. The Hague: Kluwer Law International and Oslo: Nordic Human Rights Publications. Presidents Mbeki of South Africa, Obasanjo of Nigeria and Wade of Senegal all spoke against reparations (3 September 2001) *The Times*.

¹⁰ A Gifford “Legal arguments in support of reparations” (Paper presented to the first Pan-African Congress on Reparations, Abuja, Federal Republic of Nigeria on 27-29 April 1993).

descendants, as exemplified by the British Foreign Compensation Act of 1950. Gifford advocated claims on behalf of all Africans whether living in Africa or abroad. They would be made against the ex-imperial countries for economic, social, cultural and psychological damage caused by slavery, to be settled by an independent international tribunal where agreement could not be reached.

These arguments help establish a baseline for our rather different discussion, which is concerned with a specific country. We focus on the ‘legal at the time’ argument which Clifford simply sets aside on the grounds that the crime’s sheer dimensions render it invalid. While Clifford’s treatment of the argument has force, there is scope for alternative argumentation. We seek to show that there are strong *prima facie* grounds for rejecting the ‘legal at the time’ contention on the basis that events as documented by historians show that it is at least in part an incorrect and not simply an inappropriate argument. Moreover, as we show, in French law certain rights have been defined as fundamental and, post-French Revolution, cannot be denied in this way.

The ‘legal at the time’ argument is a cornerstone of the case for refusing reparations. Until the League Of Nations’ Slavery Convention of September 1926 (which came into force 9 March, 1927), no instrument existed at international law outlawing slavery. The initial ‘permissions’ for Catholic countries to practice slavery were religious since they were accorded by successive Popes. The argument is linked to the reality that most jurisdictions forbid retrospective legislation in their constitutions¹¹. Max Du Plessis suggests that it is very difficult to argue that acts of slavery committed ‘then amount to a violation of fundamental norms of international law now’¹². The argument is also central to the defences put forward by British banks and insurance companies such as Barclays Bank and Lloyds of London¹³.

However, as we show for the Mauritian case, there is evidence that at least some of the practice of slavery involved *prima facie* breach of laws then current. Colonialism was and is of course legal; slavery was inextricably linked to political power in colonial societies. The power relationships both between slaves and slave owners on the one hand and between the slave owners and the French metropolitan revolutionary and British ‘ameliorationist’ authorities on the other were such that slave owners acted from a position of strength which meant that they could often afford to breach the law with impunity.

Slavery and the slave trade were global phenomena but the Mauritian case is a suitable and in some senses favourable setting for developing our arguments. First, Mauritius experienced *de facto* rule by the Netherlands’ East India Company in the 17th century and then formal Empire by France (1690-1810) and Great Britain (1810-1968). French and English law obtained simultaneously for a long period on the island and continue to do so. Therefore both of these important ex-imperial countries and their very different legal systems are involved. Second, the descendants of Mauritian slaves constitute about 25% of a population of some 1, 275,000¹⁴. Thus, claims affect a relatively compact group and the small order of numbers facilitates plotting human interconnections, important in building evidence of effects on descendants. Third, partly because it links to the ever-present question of race in this

¹¹ P Flaherty and J Carlisle “*The case against slave reparations*” (National Legal and Policy Center, USA 2004).

¹² M Du Plessis “Historical injustice and international law: an exploratory discussion of reparation for slavery” (2003)25/3 *Human Rights Quarterly* at 624-659.

¹³ *The Times*, 16 August 2005

¹⁴ D Michel “Do the descendants of slaves of Mauritius have a claim for reparations?” (LLM dissertation, Liverpool John Moores University 2009) at 76.

multi-racial society, the issue remains a live one in society at large¹⁵. Collective memories of slavery and bonded labour have long been current reference points; the major Mauritian labour revolts of the late 1930s were presaged by meetings in 1935 commemorating the abolition of slavery a century earlier¹⁶. Awareness of the history of slavery and bonded labour is wide among Mauritians. Indeed, it has been suggested that slavery continues to exert a cultural influence on relations between managers and employees on the island¹⁷. As we demonstrate below, Mauritian historians have been exceptionally active in documenting slavery's past. Finally, at least one organisation, the long-standing non-party political *Organisation Fraternelle*, is devoted to furthering the reparations cause¹⁸. It demands that the slave owners' descendants contribute to a fund instituted by the state to ameliorate the position of slaves' descendants, to be administered by the descendants themselves under the control of the Mauritius National Assembly¹⁹. Other parties such as companies and ex-imperial states, would also be asked to contribute. Elsewhere, Mauritania has established a fund to reduce poverty among former slaves. Although this is a different type of fund from that proposed by the *Organisation Fraternelle*, it does demonstrate that some progress has been made in this direction in Africa²⁰.

Mauritius has taken significant steps to recognize and commemorate slavery and its aftermath. The abolition of slavery has been celebrated since 2011 through a public holiday on 1 February. In 2008, Le Morne Brabant, a mountain used as a hiding place by slave maroons became a UNESCO world heritage site. To the best of our knowledge, Mauritius is the first country in the world to set up a commission with the objective of assessing the effects of slavery and its aftermath. The Truth and Justice Commission (TJC) was established in February 2009 *"to make an assessment of the consequences of slave and indentured labour during the colonial period and up to the present, and for that purpose, conduct as complete as possible an analysis...."*²¹. The body's work appears likely further to raise public awareness and to stimulate detailed scholarly understanding both of the possibility of reparations and of the importance of documenting claims adequately. Both are important issues. Reparations and collective claims involve inherent difficulties in identifying possible victims and offenders but these are reduced in the Mauritian case. Many descendants of slaves may trace their ancestors through their genealogy, a possibility made available to citizens by the Mauritian Government²². However the TJC's terms of reference make no mention of reparations and it operates, perhaps necessarily, at a slow pace. Archival resources are crucial to reparations and legal cases alike. The National Archive of Mauritius, a major potential source for the history of slavery was founded at the beginning of the 19th century and therefore may provide documentary evidence to support the case for reparations. But it is poorly resourced and has no publicly-available catalogue.

¹⁵ S Michel *"L'Organisation Fraternelle" Noir sur Blanc* Port Louis: the author, n.d.

¹⁶ S Narain *"The Mauritius Labour Party: historical perspective"* (Unpublished MA dissertation, University of Mauritius :MAU/D JQ3178. N3 1999) at 8-10.

¹⁷ A Ramguttu-Wong *"HRM in Mauritius"* in K Kamoche, Y Debrah, F Horwitz & G N Muuka (eds.) *Managing Human Resources in Africa* (2004, London: Routledge) at 53-68.

¹⁸ See S Michel *"L'Organisation Fraternelle"* at 41-42.

¹⁹ Michel, *Ibid.*

²⁰ S L Engerman *"Apologies, regrets and reparations"* (2009)17/3/4 *European Review* at 599.

²¹ Mauritius National Assembly Report (Debate no. 27, 5 August 2008)

²² Descendants of African slaves may take their birth certificate and identity card to the Nelson Mandela Centre in Port Louis; Descendants of Indians may take these documents to the Mahatma Gandhi Institute. In both cases, their family trees will be documented. These two organisations are funded by the government.

The national context may therefore be summarized as follows. First, slavery involved several ex-imperial powers. Second, there is a high level of public awareness. Third, an ongoing if slow investigation of slavery may, together with long-standing archival resources, assist in building the case.

One possible ground for actual legal claims seems likely to be one of the versions of ‘unlawful enrichment’ available in French, English and Mauritian law. We deal with this further below. The consequence of such enrichment seems likely to have been pain and suffering caused by awareness of the brutal treatment of ancestors, potentially giving rise to concrete mental and physical health issues. Although it may be that (as has been argued on the basis of demographic analysis to be the case in the USA), subsequent generations suffered actual material consequences from the treatment of their ancestors, identifiable consequences tended to dissipate with time²³. On the other hand, Zajonc (2003)²⁴ suggests, on the basis of detailed econometric analysis, more persistent ‘legacy of slavery’ effects on Black enterprise. The relatively disadvantaged position of Mauritian Afro-Creoles may therefore be connected with these diffuse effects from slavery²⁵.

There are numerous and acute possible issues with actual legal claims. The first is that they must be *ratione temporis*: their temporal limits must be defined. Second, they are difficult to document because they must rely on archival sources which may not exist or which may contain lacunae. Third, they would have to be conducted at extreme historical distance. Even if these demanding conditions proved possible to satisfy, certain types of claim in English law such as those for personal injury may be ruled ‘out of time’ in legal terms, i.e. have gone beyond the point where the law may be invoked. We note here however that cases exist in English law where courts have refused to reject personal injury claims on the basis that they were ‘out of time’²⁶. Yet the personal injury has to be established as occurring to the plaintiff as a direct result of slavery however; simply establishing a wrong done to an ancestor and a relationship to that ancestor would be insufficient. Cases have failed on this ground in the USA²⁷. We therefore suggest that reparations represent a more realistic route. The political case may be buttressed by legal arguments.

PRIMA FACIE LEGAL INFRINGEMENTS UNDER DUTCH AND FRENCH RULE

Slavery and the slave trade began in Africa in the 15th century and by the early 16th century both were established practices²⁸. Mauritian slavery and slave trading started at a later stage and lasted, in historical terms, for a relatively short period²⁹.

In 1598, the Dutch East India Company (VOC) first arrived in Mauritius; in two periods of occupation between 1641 and 1710, it practised slavery on the island with a Governor in control of junior officers³⁰. Indeed,

²³ M Ruef and B Fletcher “Legacies of American Slavery: Status Attainment among Southern Blacks Following Emancipation” (2003)82 *Social Forces* at 445–80.

²⁴ T Zajonc “Black enterprise and the legacy of slavery” Winter 2003 *Review of Black Political Economy* at 23-37.

²⁵ R Laville “In the politics of the rainbow: Creoles and civil society in Mauritius” (2000)18/2 *Journal of Contemporary African Studies* at 277-294.

²⁶ See *Connelly v RTZ* [1998]170, 171

²⁷ Flaherty and Carlisle, 2004: 6

²⁸ E Williams *Capitalism & Slavery* (1994, Chapel Hill: The University of North Carolina Press) at 9.

²⁹ J Black *The Slave Trade* (2006, London: The Social Affairs Unit) at 63.

³⁰ J C Low “L’importance de l’occupation néerlandaise dans l’histoire de l’île Maurice” in S J T Evers & V Y Hookoomsing (eds) *Globalization and the South-West Indian Ocean* (2000, Leiden/Réduit, International Institute for Asian Studies/University of Mauritius) at 63.

being in the words of one historian ‘a thoroughly disreputable crew’,³¹ they pushed a high number of slaves to escape and may even have been forced out of occupation by the large number of slave maroons³². If so, this was the only such case of ex-slave success in expelling Europeans at least prior to the Saint Domingue revolt at the end of the 18th century. In the process, serious physical punishments were meted out to slaves and maroons³³. The VOC first left the island between 1658 and 1672. Slave maroons, because of their dependence on settlers, probably did not survive. In a second period of occupation, Mauritius became ‘one of the most unregulated and anarchic of such settlements’³⁴, and another sizeable maroon community was created. A state of constant friction between maroons and settlers obtained. In the second period of occupation, three named slaves were brutally executed without trial by the VOC for allegedly burning down the company’s stores and headquarters in July 1695. This was clearly unlawful at the time. Our argument at this point is not (as it is later in the case of the period 1794-1803) that slavery was structurally unlawful, but rather that the actions of the slave owners appear to have been so. The VOC was unquestionably responsible and many VOC descendant companies exist. One of the victims was Ana de Bengal, whose descendants came down from the hills after the abolition of slavery looking for contract work and whose descendants appear traceable well into the 20th century³⁵. The Dutch left the island in 1710³⁶. Given the existence of several archives containing VOC records and the company’s clear responsibility, a claim for reparations from successor companies or the Dutch state which oversaw and benefitted from the process may be viable.

In 1715 Mauritius came under French occupation. Again, exploitation was organized initially by a company, *La Compagnie des Indes* (1715-1767) which conducted the slave trade on the monarch’s behalf until direct monarchical government began in 1767. The monarch received commission on every slave transported and delivered³⁷. The company also colonized the neighbouring island, Réunion (then the Ile de Bourbon)³⁸.

Serious exploitation of Mauritius began with Bertrand Francois Mahe de La Bourdonnais, appointed in 1735 to administer the island. He became a key figure in the colony’s development. La Bourdonnais focused on sugar production, participating in fierce competition with the British to become leaders in the commodity’s production and sale, which required huge labour inputs³⁹. The slave population grew from 15,027 in 1767 to 65,367 by 1807, essentially in response to the need for agricultural labour⁴⁰.

The main law governing slavery in Mauritius under French and British rule was the *Code Noir*, initiated by Colbert in 1685 and embodied with small modifications for Mauritius in *Les Lettres Patentes* of 1723⁴¹. Shockingly, because of its inhuman terms, it is said to have represented an advance on previous practice⁴². The *Code*

³¹ R Ross “The Dutch as globalizers in the Western Indian Ocean?” in S J T Evers & V Y Hookoomsing (eds) *Globalization and the South-West Indian Ocean* (2000, Leiden/Réduit, International Institute for Asian Studies/University of Mauritius) at 13.

³² J C de l’Estrac “*Mauriciens enfants de mille races au temps de l’Ile de France*”(2004, Port Louis: Graphic Press) at 56.

³³ Ross, *ibid.* at 7-15.

³⁴ Ross, *ibid.* at 12.

³⁵ V Hookoomsing “(Re)constructing identities: Creole and ancestral connections.” in S J T Evers & V Y Hookoomsing (eds) *Globalization and the South-West Indian Ocean* (2000, Leiden/Réduit, International Institute for Asian Studies/University of Mauritius) at 149-155.

³⁶ P J Moree *A concise history of Dutch Mauritius, 1598-1710: a fruitful and healthy land* (1998, New York: Kegan Paul International and International Institute for Asian Studies)

³⁷ C Taubira *L’esclavage Raconté a Ma Fille* (2002, Paris, Bibliophane-Daniel Radford) at 44.

³⁸ R B Allen *Slaves, Freedmen, and Indentured Labourers in Mauritius*, (1999, Cambridge: Cambridge University Press) at 12.

³⁹ Allen, *ibid.* at 56.

⁴⁰ K Noël *L’esclavage a l’Isle de France (Ile Maurice) de 1715 a 1810* (2nd ed, 1991, Paris) at 32.

⁴¹ Noël, *ibid.* at 28.

⁴² Noël, *ibid.*

applied throughout the French colonies, with a significant interlude and exceptions which we expand on below, until slavery was finally abolished by France in 1848⁴³. It consisted of 60 articles, modified in some cases to allow adaptation to local conditions.

Treatment of the Code and its provisions by one influential author may be located within a wider tradition of horror at the inherent inhumanity of slavery. Louis Sala-Molins (2007) stressed throughout his interpretive work on the Code that it reduced slaves to the status of animals or chattels (*biens meubles*)⁴⁴. This is entirely correct, but his emphasis on the Code's nefarious nature⁴⁵, though justifiable, should not obscure the fact that some slave owners broke those clauses embodying even minimal benefits for the slaves. Slave owners did not in this sense behave rationally; rather, they exercised their power over slaves for psycho-social reasons that came to predominate over economic rationality which suggested recognising them as valuable commodities⁴⁶.

The Code sought to regulate slavery's inherent brutalities, recognising that *biens-meubles* had to be looked after precisely because they were property. The imperative was the production and reproduction of slaves and slavery in view of their often very low fertility and high mortality rates. Sala-Molins also correctly evokes the influence of Catholicism on the Code's terms⁴⁷. The triple influences of production, reproduction and Catholicism meant that it placed certain minimal obligations on masters.

Articles 22-6 required masters to feed and clothe their slaves to certain standards⁴⁸. Cases of masters not clothing slaves on these terms have been documented; aged slaves were often treated in this way, as 'non-entities and a burden for their masters'⁴⁹. Yet Article 27 specified that slaves infirm from age or sickness were to be fed by their masters or maintained publicly at their expense⁵⁰. This latter clause has been shown to have been regularly broken in Mauritius⁵¹. Specific punishments, sometimes short of death, were set out (articles 36, 38 and 39) for slaves and fugitive slaves and those who harboured them⁵². Yet even the savage punishments specified were exceeded and unlawfully applied to children as well as adults⁵³. Infringements of the Code's terms are likely to have been sufficiently significant to have been both the subject of contemporary documentation and also of fundamental importance to the slave's (and their descendants') well-being. Some appear not to have been prosecuted at the time⁵⁴. These infringements would form part of a legally-based case for reparations, but require further historical research.

If we accept Karl Noël's account of a relatively benign application of slavery in Mauritius for much of the 18th century, and legal infringements by owners that were less systematic than elsewhere, the situation changed at the end of the 18th century, when structural and systemic infringement occurred. The Code and the system which it

⁴³ L Sala-Molins *Le Code Noir ou le calvaire de Canaan* (4th ed, 2007, Paris: Quadrige Grands Textes, Presses Universitaires de France) at 17.

⁴⁴ Sala-Molins, *ibid.* at 27.

⁴⁵ 'the intolerable obscenity of each and every one of its clauses'; 'l'intolérable obscénité de tous et chacun de ses articles': Sala-Molins, *ibid.* at 10.

⁴⁶ E C Hirschman and R P Hill "On Human commoditization: a model based upon African-American slavery" (1999) 26 *Advances in Consumer Research* 1999 at 394-398.

⁴⁷ Sala-Molins, *ibid.* at 59-71.

⁴⁸ Sala-Molins, *op.cit* at 134-143.

⁴⁹ V Teelock "Bitter Sugar. Sugar and Slavery in 19th Century Mauritius" (1998, Moka: Mahatma Gandhi Institute) at 181.

⁵⁰ Sala-Molins, *ibid.* at 144-145.

⁵¹ Teelock, *ibid.*

⁵² Sala-Molins, *ibid.* at 162-163 & 166-169.

⁵³ Teelock, *ibid.* at 183.

⁵⁴ V Teelock *A Select Guide to the Sources on Slavery in Mauritius and Slaves Speak Out: The Testimony of Slaves in the Era of Sugar* (1995, Mauritius, African Cultural Centre, Bell Village).

purported to legitimate and regulate were sharply challenged by the French Revolution. *La Déclaration des Droits de l'Homme et du Citoyen* of 1789 (DDHC 1789) established clear and comprehensive rights for citizens, including the right to freedom which is the first-mentioned and inalienable right specified in that text. It also enshrined in Article 4, property rights which may have been thought to imply the right to own slaves. However, there is little doubt that the prior right, because the one most emphasised from the very beginning of the DDHC as a text, was the right to freedom and in view of its interpretation since its enactment it appears to offer a basis for reparations claims. In direct response to the French Revolution and more specifically to the DDHC itself, an historic slave insurrection broke out in Saint-Domingue, (now Haiti), in 1791, sending shock waves around the entire world because it *de facto* abolished slavery in that significant and economically productive colony⁵⁵. Crucially, on 16 Pluiose, An II (1794) the French Convention abolished slavery in all French colonies (considered, since 1790, an integral part of France) on the basis of the DDHC. However, the Convention's envoys to Mauritius were threatened and *L'Assemblée Coloniale*, which governed the island's affairs from 1790 to 1803 --formally and ostensibly subject to the laws of the French Republic-- refused to follow it⁵⁶.

Thus, the colonists rejected French law but the Convention did not enforce its decision despite the fact that it had in 1790 declared the colonies an integral part of France and had the support of many soldiers on the island who had taken black women as concubines and wished for them to be free⁵⁷. Theoretically at least, the colonials could have been forced to follow French law but they were not, possibly because the French had little capacity to enforce any decision in a colony where the local élite, allies in the fight against the British, threatened secession. Yet, in Guadeloupe, slavery was abolished⁵⁸. Nonetheless, at least until 1802 and arguably down to 1805, when the Napoleonic government reaffirmed the *Code Noir*'s application, all slave owners in Mauritius used slaves unlawfully. As Noël puts it (127): 'Nothing particular happened in Mauritius until 1803...' when Napoleon became Consul. ('Rien de particulier n'advint a l'Isle de France jusqu'en 1803'). This 'nothing particular' was that slavery continued in full force. Napoleon's reaffirmation of the Code's application confirms that for the previous decade it had been invalid⁵⁹. Thus, persons enslaved and their descendants unlawfully in the period should have a case for compensation against successor companies, as should those born into unlawful slavery and their descendants.

This history may open successor companies to claims for unlawful enrichment, where cases appear most likely to succeed at French law. 'Enrichissement sans cause' is the equivalent under French property law. The principle is that nobody may be enriched without a valid reason. The English legal concept does not share the same legal basis, since at English law the claimant must prove that the defendant has acted dishonestly. Time limitations do not apply to such claims in French law. It arises when someone has acted to someone else's detriment by adding value to his own property. There is no need to prove that there was an agreement between the parties⁶⁰.

Two main conditions must be fulfilled to demonstrate *enrichissement sans cause*. The first is the material condition and the second condition is the cause of action. The material condition is subdivided into three elements.

⁵⁵ C L R James *The Black Jacobins*. (1980, London: Alison and Busby)

⁵⁶ Noël, *ibid.* at 121-131; W Claude *La France et la première abolition de l'esclavage (1794-1802)* (1998, Paris: Editions Karthala) at 35.

⁵⁷ Noël, *ibid.* at 126.

⁵⁸ Noël, *ibid.* at 127.

⁵⁹ Can unlawful enrichment be claimed against successor companies for this period, as in the USA?

⁶⁰ J Carbonnier *Droit Civil, Les Biens, Les Obligations* (2004, Paris: Presses Universitaires de France) at 2435.

The first is that someone's property has gained value. Property in this context has a broad meaning. The second is that the defendant has acted to the claimant's detriment and as a consequence of this has suffered a loss that has added value to the defendant's property. The third element provides that there must be a causal link between the party gaining the advantage and the party suffering the loss⁶¹.

The second main condition is the cause of action. This differentiates *enrichissement sans cause* from unlawful enrichment under English law. Under the latter, to build a case based on unlawful enrichment, the claimant has to prove that the defendant has acted dishonestly. Under French law, they do not.

Whether this offence may be the basis of a case against those slave owners or the Mauritius Commercial Bank which received compensation from the British government and subsequently became profitable, may be tested since the law applies in Mauritius and the conditions may be met although many complex uncertainties exist.

Whatever the case may be in the 'enrichissement sans cause' arena, it is clear that slavery's legal status had changed in a broader sense as a result of the French revolution. Historians differ in their assessments of Mauritian slavery. The most thorough account of the practice under French rule is that of Noël, who in his *L'Esclavage à l'Isle de France de 1715 à 1819* (Paris, 1991), presents a generally benign picture, despite or perhaps because of the lack of slave voice in his work. According to his Francophile account which verges at times on the Panglossian, Labourdonnais took measures to improve the slaves' lot (82); more generally, slaves were not systematically mistreated (26); 'inhuman masters were rare. The patriarchal system was practised by masters with a certain bonhomie' (les maîtres inhumains furent rares. Le système patriarcal y était pratiqué par les maîtres avec un certain bonhomie...':85).⁶² Teelock (1998: 8-9) justifiably criticizes Noël's position, following Ross's⁶³ argument that slavery, as a system based on force, could not be mild. Yet Noël's point about the severity of local slavery retains some force, suggesting that infringements prior to the structural insubordination of the colonists were comparatively incidental. The legal arguments become powerful and comprehensive after 1794 when the local French slave-owning élite refused to apply French law with the consequence that slavery *per se* was at least arguably unlawful.

These arguments apply to descendant companies and the French state. Recent developments in France have shifted the current context in which the history is being discussed. On the double centenary of the French Revolution, France sought explicitly to come to terms with its own history and, consequently, with its role in slavery. The question arises as to whether this has advanced or obstructed the case for reparations and legal claims.

On 10 May 2001, the French Assemblée Nationale enacted the '*Loi Taubira*', declaring in its first article that both the slave trade and slavery constituted crimes against humanity, a crime that became firmly established in international law after the Nuremberg trials⁶⁴. Statutory recognition that slavery was a crime against humanity is significant because cases brought alleging crimes against humanity are not subject to any time limitations. The law condemns both activities and French involvement in them. Its second article provides that both activities will be included in the history syllabus in secondary schools. The third article provides that the French government intends

⁶¹ Arret Boudier (1892) Req. 15 juin 1892, s. 93, 1, 281.

⁶² The author has a Francophile approach: see his account of the island's capture by the British 'malheureusement' ('unfortunately') at 19-20.

⁶³ R Ross *Cape of Torments. Slavery and Resistance in South Africa* (1983, London: Routledge and Kegan Paul)

⁶⁴ Loi 2001-434; 21 mai 2001, *Journal Officiel*

to request the Council of Europe and United Nations to commemorate the abolition of slavery and the slave trade internationally. It also requires France to bring all the countries involved in those activities together to arrive at an agreed date for commemorating their end.

La Loi Taubira is appealing in its explicit recognition of the situation. However it also potentially establishes a roadblock to claims for reparations against France or any of those involved. The law's promoter herself claimed in her speech proposing the law and also in print that the payment of reparations is impossible to realise⁶⁵. Her position is debatable. The question of whether pecuniary actions may be brought in a similar case was ruled on in a decision by the *Conseil Constitutionnel* in February 2004. The *Conseil* is not a Court but has authority to assess whether a law contravenes the Constitution when appeals are made to it by competent persons such as parliamentary deputies and senators. Its decision was reached following passage of a law apologising for the state's treatment of Jews during the Second World War, for which Jewish community organisations sought compensation from the French government. The *Conseil Constitutionnel* held that:

*'Laws enacted by Parliament to condemn particular past events and which declared that these events are crimes against humanity are not open for pecuniary actions. For these laws are also called memorial laws.'*⁶⁶

The *Conseil Constitutionnel*'s decision would have to be overturned for the *Loi Taubira* to provide a basis for claims of any sort. Yet the *Conseil d'Etat* later stated in a 2004 opinion that the purpose of a law is to *provide* rather than to deny rights to individuals, arguably giving rise to a contradiction (*Conseil d'Etat: Opinion 250-2004*). The *Conseil*'s decision therefore stands until and unless it can be challenged.

Some basis for building a case arguably exists in the 'fundamental principles' of French law. The *Conseil d'Etat* (established by Napoleon in 1803) decides on these principles which are neither mentioned in the French Constitution nor enunciated in any statute. The *Conseil d'Etat* is the highest court in French administrative law. The 'fundamental principles' are unwritten rules which a judge may refer to if rights have been breached⁶⁷. In *Société Eky* (1960) it held that DDHC 1789 has always been part of the French Constitution, and further held that actions may be brought against the State under its terms⁶⁸.

In a judgement relating to the freedom of association in 1956, the *Conseil d'Etat* decided that certain rights cannot be denied to the individual. It also held that the State cannot amend them⁶⁹. The incapacity of the state to change these rights was reaffirmed in *Condamine* a year later⁷⁰. Further, and crucially, the *Conseil* ruled in the same judgement that since they originate in the DDHC certain rights are imprescriptible, and no time limit can operate against individuals. The first right announced by the DDHC itself is of course that to freedom and although the DDHC did not itself formally abolish slavery, its terms are, as the slaves of Saint Domingue argued, entirely incompatible with slavery.

⁶⁵ Taubira, *L'esclavage* at 175.

⁶⁶ *Les Décisions du Conseil Constitutionnel* (2004) at 56.

⁶⁷ P L Frier & J Petit *Précis de Droit Administratif* 8th Ed. (2008, Paris: Montchrestien l'Extension Edition) at 15.

⁶⁸ *Conseil d'Etat, Société Eky*, 12 February 1960, R.101

⁶⁹ *Conseil d'Etat, Liberté d'Association* (1956) *Les Grands Arrêts de la Jurisprudence Administratives* (26th ed., 2008, Paris Dalloz) at 157.

⁷⁰ *Conseil d'Etat, Condamine*, (1957), *Les Grands Arrêts de la Jurisprudence Administratives* (26th ed., 2008, Paris, Dalloz) at 172-178.

These judgements appear to hold out some hope for legal actions under French law, directed at the French state (in which case they would have to be taken in France) and the *Compagnie des Indes*' successor companies. The *Conseil Constitutionnel* recently made a judgement that appears to learned commentators to criticise the state for passing memorial laws, implicitly calling on legislators either to desist from doing so or to give them normative effects. The judgement asserted the unconstitutionality of the memorial law's article denying citizens the right to freedom of expression if they deny the Armenian genocide of 1915⁷¹. Nevertheless, the judgement criticised these laws' lack of normative effects and this issue remains to be resolved. Any resolution is likely to have significant consequences for our arguments as well as for the law itself. Currently, the situation is that these laws are increasingly contested by deputies, forcing the issue for legislators.

PRIMA FACIE LEGAL INFRINGEMENTS UNDER BRITISH RULE

France lost possession of Mauritius in 1810. By the Treaty of Paris of 1814, Britain acquired permanent possession of the island and its dependencies. In 1807, the slave trade had already been abolished in all British colonies; the Slave Trade Consolidation Act of 1827 extended and consolidated the prohibition⁷². The slave trade nevertheless persisted, as some countries permitted its continuation and British companies continued to profit from it. It was alleged that the first Governor of Mauritius, Sir Robert Farquhar connived at its unlawful persistence there⁷³. Many of the slaves used on Mauritius were unlawfully imported; it has been suggested that many were brought from the French-held island of Réunion where slave trading remained legal⁷⁴. Clearly, those people traded and their descendants have a *prima facie* case against descendant companies and possibly the British government if active connivance can be shown.

When Britain took Mauritius over, it did so via a significant compromise with the Franco-Mauritians. Britain acted cautiously for fear of not upsetting this established governing élite, many of whom owned some of the 55,000 slaves then on the island⁷⁵. French was kept as an official language. Those previously administering Mauritian affairs remained in office. The legal system was essentially retained. French law remained in force, although certain areas of law which French legislation did not cover came under English common law⁷⁶. A strong and cohesive agricultural élite was consolidated under British rule⁷⁷. This historic compromise was significant for slavery's regulation.

The period 1815-1835 saw considerable conflict between the British imperial apparatus and the local Franco-Mauritian élite on the slavery issue. Though the lawfulness of slave owners' actions was less categorically

⁷¹ Fasc. 1440: Contentieux Constitutionnel des Droits Fondamentaux. s.106 à 117.108: atteinte a la liberté d'expression et effet normative des lois mémorielles; A Levade, B Mathieu "Le législateur ne peut fixer des verities et en sanctionner la contestation" *La Semaine Juridique* Edition Générale no.14, 2 avril 2012, 425.

⁷² J Walvin *Black Ivory: A History of British Slavery* (1992, London: Fontana Press) at 165.

⁷³ M Sherwood "Britain, the Slave Trade and slavery, 1808-1843 (2004)/46/2 *Race and Class* 54-77 at 59.

⁷⁴ J Black *The Slave Trade* (2006, London: Social Affairs Unit) at 70; M Carter, V Govindan & S Peerthum *The Last Slaves: Liberated Africans in Nineteenth Century Mauritius* (2003, Port Louis: Centre for Research in Indian Ocean Studies) at 10.

⁷⁵ Teelock, 1998 at 21.

⁷⁶ B Nadal *Les Constitutions de l'Isle Maurice* (1962, Mauritius Publishing Co., Port Louis) at 79.

⁷⁷ Teelock, 1998 at 75, 115, 175; R Sandbrook, M Edelman, P Heller & J Teichman *Social Democracy in the Global Periphery. Origins, Challenges, Prospects*. (2007, Cambridge: Cambridge University Press) at 131-132.

thrown into question than it had been immediately after 1794, it was nevertheless questionable after the British instituted a Protector of Slaves with the ostensible aim of ameliorating slaves' conditions. This brought major conflict with the Franco Mauritians and, in 1832, open revolt by them; the first Protector was soon pushed out as the Governor took the Franco-Mauritian side. This was part of a wider revolt against British amelioration efforts.

In the period of British rule prior to Emancipation, numerous laws were introduced to improve the slaves' position, but these were not observed by the slave owners and indeed were explicitly rejected by them. For example, after 1827, wages had to be paid to slaves working on Sundays. Yet these laws were, according to the leading historian of slavery in that period, 'ignored altogether'⁷⁸. The entire corpus of 'Amelioration Laws' was rendered 'almost inoperative' by the Franco-Mauritian slave owners⁷⁹. For example, despite Article 11 of the 1827 Ordinance on the Amelioration of Slaves which forbade them, whips were used on slaves; government officials and planters alike accepted that this was the case⁸⁰. The Appeal Court, dominated by the Franco-Mauritians, rendered the punishment laws nugatory. Thus, the notoriously brutal slave owner Desjardins had a fine for beating a woman slave against the terms of the *Code Noir*, remitted on appeal⁸¹.

A systemic 'reinterpretation' of a crucial law was to follow. During summer 1833, the Slave Emancipation Act was passed in both Houses of Parliament declaring that all slaves were free in all British colonies; they were no longer their owners' property⁸². Following their practice after the American Revolution, parliament voted £20 million in government bonds to the slave owners as compensation. Jeremie, a senior British official complained at the time that to award compensation to Mauritian slave owners was to legitimate the position of those who had imported slaves unlawfully⁸³. Since many of the slaves working in Mauritius were imported illegally, it seems possible that the Mauritius Commercial Bank, currently a highly profitable company that was founded on the basis of compensation funds, may be open to cases of unlawful enrichment as discussed above.

Cook's (2003) formulation that American slave managers could literally claim that their people were their greatest asset also applied in Mauritius and they therefore sought to retain labour even after Emancipation to meet growing demand for sugar⁸⁴. Slave owners were concerned that if ex-slaves were to be employed and given wages there was a strong possibility of their being unwilling to work after being paid⁸⁵. Moreover, the slave owners needed to buy time because they were, behind closed doors, looking for a new type of labour as they were unwilling to employ ex-slaves. In 1834, Parliament decided, partly as a result, that liberation would be conducted in two stages. In the first stage, slaves would become 'apprentices' for six years; in the second, they would be free. Slaves had expected full freedom. The decision therefore created uproar: petitions were sent to Parliament and demonstrations and strikes occurred in the West Indies. Consequently, the period was reduced to four years⁸⁶.

⁷⁸ Teelock, 1998 at 150.

⁷⁹ Ibid. at 117.

⁸⁰ Teelock, 1998 at 207.

⁸¹ Ibid. at 117

⁸² A Hochschild *Bury The Chains: The British Struggle to Abolish Slavery* (2006, London, Pan Macmillan) at 347.

⁸³ Teelock, 1998 at 276.

⁸⁴ B Cook, B "The denial of slavery in management studies" (2003)40/8 *Journal of Management Studies*, 1895-1918 at 1898.

⁸⁵ S Michel *Esclaves Résistants* (1998, Port-Louis, Mauritius, Quad Printers) at 6.

⁸⁶ A Hochschild *Bury The Chains: The British Struggle to Abolish Slavery* (2006, London, Pan Macmillan) at 347.

Thus, slavery was officially abolished in Mauritius on 1st February 1835 but ex-slaves were not actually given their full freedom until 31 March 1839⁸⁷. Indian bonded labour was subsequently imported to substitute for slave labour⁸⁸.

‘Apprenticeship’ was enacted by the British Parliament and it was therefore lawful. However, the way that it was implemented appears not to have been. The ex-slave owners simply carried on as before despite apprentices’ raised expectations. As Meyer and Scott (1983)⁸⁹ point out in their affirmation of a long-standing insight from Marx and Weber, formal changes in regulatory regimes generally are at odds with inherited norms, leading to conflicting expectations on the part of actors. As Tinker (1977) pointed out, the Franco-Mauritians ‘continued to dwell in the atmosphere of pre-revolutionary France’ after the British annexation⁹⁰. ‘Apprentices’ were in fact effectively confined to their quarters on plantations; their masters prevented them from leaving by using guards. They also bought and sold them as before⁹¹. To some extent, this was implicitly condoned by government since each estate was legally required to have two guards, but owners both benefitted and offended by treating apprentices as though they were still slaves bound to their masters⁹². The question is whether this may have constituted false imprisonment under English law, since in effect slaves were not free to leave their plantation quarters, the *Camps des Noirs*.

False imprisonment is a tort, defined as the infliction of bodily restraint not expressly or impliedly authorized by law⁹³. The definition of imprisonment was established in 1520 by *Termes de la Ley*:

‘restraint of a man’s liberty whether it be in the open field, or in the stocks or cage in the street, or in a man’s own house, as well as in the common gaol. And in all these places the party so restrained is said to be a prisoner so long as he has not his liberty freely to go at all times to all places wither he will...’⁹⁴.

In *Grainger v Hill* (1838), i.e. prior to the ‘apprentices’ full freedom, it was held that false imprisonment is an intentional deprivation of a person’s freedom of movement from a particular place for any time, however short, unless expressly authorized by law. In this case, the court held that it was not a necessary condition that the claimant was aware of the false imprisonment.

Prima facie, false imprisonment’s conditions as they existed at the time were met by the apprentices’ position. They were forced to remain on the plantations. Restraint was enforced by armed guards; escape through marooning was (as ever) a possibility but guards had to be evaded and serious risks run while punishment was inevitable.

Potential defendants are five sugar estates currently operating in Mauritius and which produced sugar when the island was under French and British dominion. They are Flacq Union Sugar Estate Limited, Medine Bambous,

⁸⁷ S Michel *Esclaves Résistants* (1998, Port-Louis, Mauritius, Quad Printers) at 1.

⁸⁸ H Tinker, *H A new system of slavery: the export of Indian labour overseas, 1830-1920* (1974, London)

⁸⁹ J Meyer & R W Scott “Centralization and the legitimacy problems of local government” in J Meyer & R W Scott (eds) *Organizational Environments: Ritual and Rationality* (1992, Thousand Oaks: Sage) at 179-198.

⁹⁰ H Tinker “Between Africa, Asia and Europe. Mauritius: cultural marginalism and political control” (1977)76/304 *African Affairs* at 321-338.

⁹¹ Teelock, 1998 at 274-276.

⁹² *Ibid*.

⁹³ W V H Rogers *Winfield and Jolowicz Tort* (17th ed, 2006, London: Thomson, Sweet and Maxwell) at 99.

⁹⁴ Rogers at 99-100.

Bel Ombre, St Pierre, and Constance Sugar Estates Limited⁹⁵. The slaves' living quarters are still in place. Many earlier companies have changed their names but the successor companies may be traced and many of these have also operated in partnership with the five sugar estates mentioned above. The TJC has the authority to access all sugar estate records, past and present. These companies may be open to cases for unlawful enrichment through false imprisonment.

CONCLUSION

We have attempted to counter the important 'legal at the time' contention in the Mauritian case, an exercise that we suggest may also be conducted fruitfully for other countries. We put forward four key counter-arguments. First, the Dutch VOC executed alleged offenders without trial, which was unlawful at the time. Second, for some years after 1794, French law had abolished slavery but was rejected by the island's slave-owning élite despite their nominal adherence to French law. Third, and related to the previous proposition, at French law the right to liberty is inalienable, has been since the DDHC and claims that it has been breached cannot be time limited. Fourth, false imprisonment was an offence at English law well before the 19th century and appears to have occurred during 'apprenticeship'. Our arguments are limited in the sense that they do not pursue the broader question of the legal foundations of slavery, a much wider undertaking that would require a much more extended discussion. Our arguments nevertheless encompass both specific events and periods and the broader phenomenon of slavery and the slave trade, post French Revolution. They may be strengthened by further documentation which may be provided by the TJC and through work in the Mauritian National Archives and elsewhere. Nevertheless, we contend that slavery was not always 'legal at the time'. This is for two main reasons: first, torts were undoubtedly committed under slavery and second, the colonists acted against the explicit letter of the law after the French abolition of slavery.

Our propositions counter the argument advanced by some anti-reparations scholars⁹⁶ that demands for reparations are automatically flawed because they necessarily involve a counter-factual, i.e. comparison of a world without slavery (which cannot be observed) with the actual historical situation. They cumulatively also suggest that ground should not be too readily conceded to the 'legal at the time' argument in any national context.

Normally, laws were instituted that allowed profit-maximisation by means acceptable to élites. Yet the law and its formal terms must always--and here slavery is far from an exception--be located firmly within the context of wider social relations. Under slavery, power relations were such that slave owners could act largely without fear of consequences. In the Mauritian context, the slave owners broke even the terms of the *Code Noir* which it could be argued did little more than codify their interests as property owners. They rejected the French Revolution's legal challenge. Then, when the slave owning élite wished to reject British 'amelioration' laws, they referred to the unusual terms of the compromise negotiated when the British took over. In short, they *then* referred to the status of French law (which had crucially changed in content) on the island. They confined ex- slaves to their estates under the transitional 'apprenticeship' arrangements. Thus, while Noël argues that slave abuse was not systematic under

⁹⁵ Michel, 2009 at 34-35.

⁹⁶ See for example, S Kershner "The inheritance-based claim to reparations" (2002)24 *Legal Theory* at 243-267.

French rule, this tends to obscure the fundamentally unlawful nature of the practice of slavery in the decade after 1794.

A case appears to exist against companies operating slavery and the slave trade unlawfully in the years immediately after 1794 on the ground of unlawful enrichment. A case against France for injuries arising from its failure to enforce the abolition of slavery may also exist. A (probably smaller) possibility also exists of cases under the *Loi Taubira* since it remains unclear despite affirmations to the contrary whether such a law can deny individuals rights and therefore operate *against* slaves' descendants material interests. Whether its essentially declaratory nature will serve to raise the profile of slavery and the slave trade and thereby both raise incentives and provide grounds for descendants to make legally-based demands or, on the other hand, simply block them remains uncertain. Legal arguments based on unlawful-at-the-time false imprisonment may have some purchase in English law, but the French civil law tradition appears to offer better prospects since it is more rights-based, transparent and clearly codified.

If the defence that slavery was 'lawful at the time' is at least questionable, it may prove inadequate for states and companies alike seeking to defend themselves against demands for reparations. Redress may be made by companies anxious to avoid negative publicity in the era of 'Corporate Social Responsibility'. Companies and indeed others may ultimately be judged in the court of public opinion, where norms and politics play a larger role than in legal contexts. Nevertheless, historical-legal arguments such as those we advance may have purposes that transcend the boundaries of the legal system itself, by playing a part in mobilising opinion.