DISENTANGLING THE SOURCES AND NATURE OF INDIGENOUS RIGHTS: A CRITICAL EXAMINATION OF COMMON LAW JURISPRUDENCE

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Abstract The 'indigenous renaissance' of the last few decades continues to generate copious litigation around the Commonwealth. While courts frequently invoke common principles, it would be going too far to say that a unified jurisprudence exists. Moreover, modern jurisprudence in this area is arguably inconsistent and frequently discriminatory, which means that borrowing across jurisdictions should proceed cautiously, mindful of localized nuances and limitations. This article argues that any suggestion that the common law as it has evolved in any particular jurisdiction should be emulated as a model indigenous rights theory must be rigorously scrutinized, for indiscriminate application of doctrines could lead to discordant outcomes.

Key words: aboriginal title, continuity doctrine, extinguishment principles, indigenous peoples, land rights.

I. INTRODUCTION

An inevitable consequence of Western European imperialism was widespread dispossession of indigenous peoples—the acquisition of land and natural resources, after all, was the driving force behind overseas expansion. Physical displacement occurred gradually, sustained variously by the invaders' denial of the legal capacity of native peoples, or of the latter's moral worth or, in some extreme instances, of their very existence. Once legitimated by law, the expropriation of lands flourished as morally and philosophically justified, until no continent had escaped European dominance. The enormity of this project is measurable not only by its epic geographic scale, but also in its enduring longevity. For despite the number of decades that have elapsed since many of colonialism's formal aspects have been dismantled, it is still not uncommon to find indigenous peoples on the fringes, refugees in their own lands.

From about the middle of the last century, however, indigenous peoples in disparate locations worldwide launched in earnest struggles for legal redress. Invigorated by a transformed international framework wherein the protection

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of human rights has become increasingly perceived as a supranational concern in spite of the Westphalian ideal, domestic litigation initiated by indigenous peoples began to challenge the hegemonic legacy of settler laws. In the countries making up the former British Empire this would become a recurring battle in which the theme was redress for historic dispossession and recognition of traditional or customary land rights. From Canada to New Zealand, Australia to Belize, one by one national courts have been confronted with current disputes around land ownership and land use, all originating in British imperial expansion and its disruptive, often cataclysmic consequences for the original occupants.

The geographic sprawl of the former British Empire combined with the effluxion of time have meant that despite its shared provenance, the common law developed in distinct and unique ways, and this is no less true for issues around indigenous land rights. Yet, despite these divergences, the commonality of the colonial experience has engendered an almost unprecedented degree of referencing by national courts of each other. Judicial expansiveness in this regard has in turn misled some commentators into assuming the existence of a 'unified' doctrine of aboriginal title. In a 2007 article Jérémie Gilbert writes that judicial innovation in Canada and Australia in particular has fostered the development of a 'body of law which is referred to as aboriginal or/and native title doctrine'.[1] And after referring to national decisions from various parts of the Commonwealth, Gilbert posits that the common positions espoused therein on the subject of indigenous land rights 'suggest the emergence of a unified jurisprudence on what could be labelled as a doctrine on "indigenous title": a combination of aboriginal (the Canadian label) and native title (the Australian label).'[2]

As tidy as this sounds—or perhaps because of its tidiness—Gilbert's analysis is problematic because it oversimplifies what is an intricate and complex area of law. This is unwelcome not merely because of its lack of rigour, but also because there are practical dangers to falsely analogizing. If the mythology of a unified jurisprudence on aboriginal title gains currency across jurisdictions, this risks a lack of fit. The objection here is not just to the possibility of a muddled jurisprudence, but it is also to the potentially adverse consequences for litigants where localized differences are ignored. Put another way, doctrinal clarity is essential in order to minimize the incorrect application of principles and discordant outcomes.

Bearing these considerations in mind, I invite closer scrutiny of the leading cases in this area against three principal claims made by Gilbert, commencing in the following section with the so-called emergence of a unified doctrine on indigenous title. In section III I examine common-law decisions on aboriginal

[1] J Gilbert, 'Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title' (2007) 56 ICLQ 584.
[2] ibid 590.

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title to illustrate how superficial comparisons among jurisdictions actually mask what are distinct sources of this title, revealing at the same time the detrimental consequences of indiscriminate borrowing. This sets up the framework for examining the last of Gilbert's claims, which is that the jurisprudence developed by the Canadian Supreme Court and the High Court of Australia can serve as a model for a general legal theory on indigenous land rights, in this way promoting reconciliation. Aside from the initial difficulty of identifying a unified common law doctrine of aboriginal or/and native title, the classic paradigm relating to the treatment of aboriginal rights in both of these jurisdictions is one wherein judicial enlightenment has invariably provoked a severe backlash. Whether precipitated or fuelled by popular sentiment, both the judiciary and the legislature have invariably ended up in steady retreat from initial gains. This does not mean that these jurisdictions have not made useful contributions to doctrines developing around indigenous rights, but any transplantation or borrowing should proceed cautiously, mindful of nuances and limitations. I then conclude in the final part with a tentative explanation of why litigation of indigenous rights' issues has been so problematic, and offer some alternative options that possibly counter the limitations existing in the jurisprudence of common law courts.

II. COMMON LAW RECOGNITION OF ABORIGINAL LAND RIGHTS

As national courts around the Commonwealth have been increasingly confronted with disputes engaging what is undeniably a highly specialist and arcane area of law, the temptation to cut and paste from other jurisdictions within the same legal family has apparently been irresistible. Great prominence has been afforded to some of the seminal cases, notably the 1992 *Mabo* decision from Australia[3] and the equally historic *Delgamuukw* decision from Canada in 1997.[4] The principles there laid down have been extracted and liberally applied elsewhere, despite differences in context and circumstances. The frequency of this cross-fertilization strongly suggests that Australian and Canadian jurisprudence stand at the vanguard with regard to the recognition of indigenous rights to land. As Gilbert generously describes the process:

> considerable developments have taken place under the jurisprudence of common law jurisdictions in the last decades . . . based on the emergence of a body of law which is referred to as aboriginal or/and native title doctrine . . . mainly developed through the jurisprudence of both the Supreme Court of Canada and the High Court of Australia in the 1990s.[5]

[3] *Mabo v Queensland (No. 2)* (1992) 107 ALR 1.
[4] *Delgamuukw v British Columbia* [1997] 3 SCR 1010.
[5] Gilbert (n 1) 584–5.

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Closely allied to this interpretation is another suggestion from the same source that modern developments in this area represent an epistemic recalibration of indigenous rights. According to Gilbert, historical dispossession of indigenous peoples 'could be regarded as perfectly legal, as in most situations the reference to the rules of conquest, discovery or *terra nullius* were perfectly legal in this period of history.'[6] Thus, he argues, where the common law currently recognizes indigenous title this involves a rejection of old standards in favour of evolving legal principles.[7]

This is an ahistorical analysis, with one of its shortcomings being the prominence it gives to the decisions of the Australian High Court and the Supreme Court of Canada. Undeniably, while there has been an increase in the litigation of aboriginal rights' claims in recent decades, Australian and Canadian courts are recent converts in this regard. In the former, there was a consistent denial of the existence of native title for close to 200 years,[8] while in Canada although belated recognition came in the middle of the last century,[9] the Supreme Court has never ruled favourably on the substance of any aboriginal title claim, preferring instead to shut down litigation on various procedural grounds. By contrast, however, in other parts of the Commonwealth or of the former British Empire the articulation or recognition of aboriginal rights enjoys an ancient pedigree. However equivocal that older body of jurisprudence might have been it is no more discriminatory or unfair than the doctrines around aboriginal rights that have been applied recently. Given the evident lack of clarity regarding the historical roots of judicial recognition of aboriginal rights, two of the most established doctrines are discussed below: first, the doctrine of aboriginal title and second, the continuity doctrine.

A. The Doctrine of Aboriginal Title

One of oldest and most established theories of aboriginal title to land is as a substantive right recognized at common law, where the title exists as a result of the legal effect given to pre-sovereignty native occupation of lands. Several commentators[10] have identified the theoretical foundations of this doctrine in the trilogy of cases that came before the United States Supreme Court in the first half of the nineteenth century.[11] In all of them the leading judgments were given by Chief Justice John Marshall, and though at times his language was

[6] ibid 593.

[7] ibid 594.

[8] From *Cooper v Stuart* (1889) App Cas 286 to *Milirrpum v Nabalco Party Ltd* (1971) 17 Fed LR 141.

[9] *Calder v AG of British Columbia* (1973) 34 DLR (3d) 145.

[10] See, eg, N Mickenberg, 'Aboriginal Rights in Canada and the United States' (1971) 9 Osgoode HallLJ 119; D Kelly, 'Indian Title: The Rights of American Natives in Lands They Have Occupied since Time Immemorial' (1975) 75 ColumLRev 655; B Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (University of Saskatchewan Native Law Centre, 1983) 17–38.

[11] Namely *Johnson v M'Intosh* 21 US (8 Wheat) 543 (1823), *Cherokee Nation v Georgia* 5 Pet 1(1831) and *Worcester v Georgia* 6 Pet 515 (1832).

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offensive and his philosophy objectionable, no one of these decisions can be examined in isolation. Instead, in the nine years that lay between them it is possible to trace an evolution in Marshall's approach, in which what emerged was a doctrine of Indian title that recognized the land rights of Native Americans.

In *Johnson*, the first of the trilogy, Marshall CJ acknowledged that Native Americans were 'the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion.'[12] This remarkable concession (coming almost 170 years before Australia's epiphany in *Mabo*) has been generally overlooked because of a skewed focus on other parts of the judgment and a failure to consider the doctrine as it evolved. One of the weaker aspects of Marshall's reasoning in *Johnson* lay in his treatment of the juridical basis of European settlement. Marshall stated that 'discovery' was the basis of the Crown's title, which was legitimated by the Royal Commissions and Charters.[13] He reasoned expansively that the 'very grant of a charter is an assertion of the title of the crown . . . and the charter contains an actual grant of the soil, as well as of the powers of government'.[14] However, leading thinkers at the time were divided on the juridical effect of discovery,[15] and given the fierce European maritime rivalry that existed there were predictably competing views, encompassing both discovery *and* possession, which were invoked to legitimate the acquisition of territory.[16]

Aside from the legal consequences of discovery, a more troubling aspect of Marshall's ruling in *Johnson* is his explanation for the non-consensual appropriation of native lands. Marshall based his conclusions on the established practice of the English government in acquiring territory on the American continent, pointing to the various Charters as evidence of the Crown's assumption of an exclusive power to appropriate lands in spite of the presence of the Indians thereon. After surveying various Charters issued by the English Crown, some from as far back as 1496 regarding discovery and taking possession of unknown lands, as well as others issued in the early 1600s relating specifically to taking possession of territories on the American continent, Marshall CJ observed: 'Thus has our whole country been granted by the Crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees.'[17]

As justification for this exercise of undiluted dominance, Marshall adverted to the level of civilization attained by native societies, stating that 'the character and religion of [the continent's] inhabitants afforded an apology for

[12] *Johnson* (n 11) 573. [13] ibid 576. [14] ibid 603.

[15] F De Victoria, *De Indis et De Ivre Belli Relectiones* (Ernest Nys ed, rep, Oceana Publications 1964) 123; Hugo Grotius, *Mare Liberum* (Richard Hakluyt trans, Liberty Fund 2004) 14.

[16] JT Juricek, 'English Claims in North America to 1660: A Study in Legal Constitutional History' (Ph.D. thesis, University of Chicago 1970) 186–200.

[17] *Johnson* (n 11) 579.

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considering them as a people over whom the superior genius of Europe might claim an ascendancy.'[18] For good measure, he also reiterated that the charters and commissions to which England traced its title authorized the discovery and possession of 'such remote, heathen, and barbarous lands, as were not actually possessed by any Christian prince or people'.[19]

Predictably, these aspects of Marshall's judgment have been heavily criticized, not the least for their scandalous racist underpinnings.[20] *Johnson* heralded a reduced status for native Americans in terms of their rights to land, both in the obvious sense that henceforth they could not freely alienate their land, as well as in the unacknowledged reality that the inexorable march of European settlement meant that they were often compelled to relinquish territory.[21]

More damaging has been the legacy of this decision where viewed in isolation. The equivocation that permeates Marshall's reasoning—notably, for example, his acknowledgement of an 'Indian right of occupancy' simultaneously with a power in the discovering nation to 'grant the soil, while yet in the possession of the natives',[22] has spawned a conflicting jurisprudence. Like Biblical text this case has been invoked for entirely antagonistic purposes, both to reinforce[23] and to deny[24] the rights of Native Americans to land. Critics claim that it facilitated the judicial creation of rules regarding the extinguishment of aboriginal title, manifested most graphically in subsequent decisions that viewed extinguishment as raising political and not justiciable issues.[25] Less harshly, Kent McNeil posits that it is because later judges have been unable to understand the interest described in *Johnson*, that of a 'right of occupancy', that they have denied aboriginal title its constitutionally protected status as a property right.[26]

These are not necessarily invalid critiques, particularly insofar as they acknowledge that the source of later judicial denials of aboriginal rights partly lay in a misunderstanding of the rationale in *Johnson*. Ultimately, an accurate understanding of the doctrine that emerged out of US Supreme Court in the early nineteenth century can only be had from a consideration of all three cases of the period on Indian title. Whatever equivocation exists in *Johnson*, one ineluctable fact is that consistently throughout these decisions the territorial

[18] ibid 573.

[19] ibid 577.

[20] See, eg, JH Lengel, 'The Role of International Law in the Development of Constitutional Jurisprudence in the Supreme Court: The Marshall Court and American Indians' (1999) XLIII AJLH 117, 127 and A. Abinanti, 'A Letter to Justice O'Connor' (2004) 1 IPJLCR 1.

[21] A Trelease, *Indian Affairs in Colonial New York: The Seventeenth Century* (Cornell University Press 1960) and GE White, *History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815–35* (Macmillan Publishing Company 1988) 736–7.

[22] *Johnson* (n 11) 577.

[23] *Cramer v US* 261 US 219 (1923); *US v Shoshone Tribes* 304 US 111 (1937); *US v Alcea Band of Tillamooks* 329 US 40 (1946).

[24] *Tee-Hit-Ton v US* 348 US 272 (1954).

[25] Mickenberg (n 10).

[26] K McNeil, *Common Law Aboriginal Title* (Clarendon Press 1989) 244–67.

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rights of Native Americans were recognized. By the time Marshall delivered the judgment in *Worcester*, nine years after *Johnson*, this position was forcefully and unequivocally expressed:

> It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.[27]

Crucially, the source of this entitlement was grounded not in narrow common law doctrines relating to land, but instead in wider principles which derived both from the law of nations[28] and the practice and policy of the British crown towards its overseas possessions, dubbed an aspect of imperial constitutional law.[29] The latter was a body of law that grew out of Crown policies and practices to govern various issues relating to Britain's expanding empire, such as the constitutional status of colonies, the legal parameters of the relationship between the Crown and its overseas possessions and legal rights of aboriginal peoples.[30] Moreover, this embryonic Colonial law was not developed in isolation, but was shaped by the 'inter-societal custom and law' generated by the interaction of the native and settler societies.[31] According to Brian Slattery:

> Although the doctrine [of aboriginal rights] was a species of unwritten British law, it was not part of English common law in the narrow sense, and its application to a colony did not depend on whether or not English common law was introduced there. Rather the doctrine was part of a body of fundamental constitutional law that was logically prior to the introduction of English common law and governed its application to the colony.[32]

That this was indeed a 'body of fundamental constitutional law' is evident from its application outside the American context in other jurisdictions where settler populations came into contact with native societies. In New Zealand, for example, the rights of the indigenous population to their land obtained judicial recognition from as long ago as 1847, the court maintaining that such rights were 'entitled to be respected' and could not be extinguished without 'the free consent of the Native occupiers'.[33] Like his American counterpart, Chapman J sourced these native rights in the law of nations as well as in fundamental

[27] *Worcester* (n 11) 542–3.

[28] Mickenberg (n 10).

[29] B Slattery, 'Understanding Aboriginal Rights' (1987) 66 CanBarRev 737. Note that the descriptions 'imperial constitutional law' and 'British colonial law' are used interchangeably here.

[30] MD Walters, 'The Continuity of Aboriginal Customs and Government under British Imperial Constitutional Law as Applied in Colonial Canada, 1760–1860' (PhD thesis, University of Oxford 1995) 21–4.

[31] B Slattery, 'Aboriginal Sovereignty and Imperial Claims' (1991) 29 Osgoode Hall LJ 702 and generally J Webber, 'Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples' (1995) 33 OsgoodeHallLJ 623.

[32] Slattery, Understanding (n 29) 737–8.

[33] *R v Symonds* [1840–1932] NZPCC 387.

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principles of British colonial law.[34] In modern times, the Marshall decisions have been particularly influential in Canada, where they shaped a developing jurisprudence that recognized aboriginal rights to land at common law based on pre-sovereignty occupation.[35]

B. The Continuity Doctrine

While under the preceding doctrine indigenous rights obtain legal recognition under British colonial law, there is an even older doctrine by virtue of which indigenous rights are sourced directly through indigenous laws and customs themselves that survive the change in sovereignty. This source is more of a procedural device, referred to as 'continuity' principles. Simply put, this doctrine distinguishes between public and private rights: on the acquisition of territory the former pass to the new sovereign, whereas the latter are retained by the conquered peoples in the absence of any specific act of expropriation at the time of conquest. The roots of the continuity doctrine are of great antiquity, and where modern courts in Canada, Australia, Malaysia, Kenya, Belize and Botswana[36] have applied some version of it there was nothing novel or revolutionary involved. Instead, these courts were simply continuing a tradition that reaches all the way back to ancient conquests engaging Roman law.[37]

In more recent times, from the immediate aftermath of Columbus' journeys onwards when a frenzied period of European expansion was unleashed, continuity principles gained renewed currency. During this period there was an accompanying explosion of intellectual debate surrounding the legitimacy of the conquest of indigenous Americans, much of which was premised on racist and self-serving theories that denied indigenous peoples any rights to their own lands.[38] However, an influential body of opinion emerged at the same time challenging these views, most prominently in the work of the pioneering Dominican theologian Francisco de Vitoria who posited that natives were rational beings and that their lack of Christian faith was no justification for stripping them of their property. In a lecture entitled 'On the Indians lately discovered', Vitoria famously asserted that the Pope had no power over the Indians and could not grant away their lands; taking their possessions, he opined, 'would be theft or robbery no less than if it were done to

[34] ibid 388.

[35] *St Catharines Milling and Lumber Co. v The Queen* [1887] 13 SCR 577, 608–17 and *R v Côté* [1996] 3 SCR 139; Traces of Marshall's reasoning are also evident in *Guerin v Canada* [1984] 2 SCR 335 and *Calder* (n 9).

[36] These are all jurisdictions relied on by Gilbert as evidencing instances of the application of 'aboriginal or/and native title doctrine': (n 1) 585.

[37] MD Walters, 'The "Golden Thread" of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*' (1998–99) 44 McGillLJ 721–2 and RL Barsh, 'Indigenous Rights and the Lex Loci in British Imperial Law' in K Wilkins (ed), *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Purich 2004) 92.

[38] One of the best accounts of this period is contained in Robert Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press 1990).

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Christians'.[39] Vitoria's theories helped to revolutionize the epistemology of indigenous rights, and his influence can be discerned in the writings of his contemporaries such as Dominic Soto and the famous Spanish missionary Las Casas, as well as in that of other commentators in subsequent centuries.[40]

Even more consistently than international law, the common law has long respected the continuity of private rights[41] (as distinct from British colonial law that independently recognized the legality of indigenous occupancy). As far back as 1608 Coke CJ ruled that 'if a King come to a Christian kingdom by conquest, seeing that he hath *vitae et necis potestatem*, he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain.'[42]

Calvin's Case was followed in a number of other cases[43] and by the mid-eighteenth century it had become well entrenched. In subsequent cases the principle was refined and expanded, generating an entire body of law concerning the consequences of sovereignty and the power of the Crown upon the acquisition of new territory. In summary, it was laid down that in settled colonies Englishmen 'carried' their laws with them, whereas in colonies acquired by conquest or cession local laws remained. These principles were eventually enshrined in Blackstone's highly influential *Commentaries on the Laws of England*.[44]

Thus by the end of the 19th century both international law and the common law recognized aboriginal rights in parallel and distinct ways, each source containing principles which anchor modern jurisprudence on the subject. Given this history, it is almost fanciful to suggest that a body of law relating to indigenous rights is now 'emerging', and it is even less credible to assert that Australian and Canadian courts have been mainly responsible for these developments. Further, as will be argued in the following sections, increased litigation regarding aboriginal rights within recent decades has not always developed the law on aboriginal title; indeed, in many instances its effect has been the opposite.

[39] Victoria (n 15) 123.

[40] M van Gelderen, 'Vitoria, Grotius and Human Rights: The Early Experience of Colonialism in Spanish and Dutch Political Thought' in W Schmale (ed), *Human Rights and Cultural Diversity* (Keip Publishing 1993) 215, 218 and 221; MF Lindley, *The Acquisition and Government of Backward Territory in International Law* (Negro Universities Press 1969) 12–17.

[41] B Slattery, The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of their Territory (D.Phil. thesis, University of Oxford 1979); J Hookey, 'The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?' (1972–73) 5 Fed L Rev 88–9, and see Walters, Golden Thread (n 37) 722–9, where he identifies four justifications based on principle, as distinct from mere precedent, for the application of continuity principles.

[42] *Calvin's Case* (1608) 7 Co R 1, 19b.

[43] *Blankard v Galdy* (1703) 2 Salk 411, 91 ER 356; *Lyons v East India Co.* (1836) 12 ER 782; *Kielley v Carson* (1843) 4 Moo PC 63, 13 ER 225.

[44] 1 Bl Comm 104–5.

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III. THE FICTION OF A UNIFIED COMMON LAW JURISPRUDENCE

Reasoning by analogy is a common (and possibly the easiest) method of analysis. However, unless the process is conducted systematically, it could overlook inconsistencies and lead to discordant outcomes. To be sustainable, defensible even, there should be points of similarity that permit copying in the first place,[45] and the actual process of borrowing should involve engagement with reason or principle. The alternative of indiscriminate borrowing is to run the risk of engaging in what Ernest Young describes as merely 'counting noses'.[46] An examination of modern jurisprudence on the subject of indigenous rights raises a strong suspicion that some amount of the latter practice exists, whereby precedent is applied with little regard for fit or outcome.

Gilbert boldly asserts that 'national courts have applied a high level of comparative analysis referring to a similar common law approach'[47] which in turn 'suggest[s] the emergence of a unified jurisprudence on what could be labeled as a doctrine on "indigenous title"'.[48] National courts have indeed referenced each other liberally on the subject of indigenous rights, but mutual referencing alone cannot lead to a 'unified' jurisprudence. On the contrary, what indiscriminate borrowing has done is to muddle distinct doctrines, and because there has been little engagement with underlying principle, increasingly the result is a chaotic jurisprudence.

The most prominent area of confusion lies in judicial and academic discourses on the source of aboriginal or native title. Commenting on the source of aboriginal title in Canada, Lamer CJC said in *Delgamuukw v British Columbia*:

> it is now clear that although aboriginal title was recognized by the Proclamation, it arises from the prior occupation of Canada by aboriginal peoples. That prior occupation, however, is relevant in two different ways, both of which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law … What this suggests is a second source for aboriginal title – the relationship between common law and pre-existing systems of aboriginal law.[49]

The most that can be gleaned from Lamer's impenetrable reasoning in this passage is that he identifies two sources of title: one being the 'physical fact of occupation' assessed in light of a common law presumption, and the other a 'relationship' between the common law and pre-existing systems of aboriginal law. The first of these is based squarely on the seminal work of Kent McNeil,

[45] VC Jackson, 'Constitutional Law and Transnational Comparisons: The *Youngstown* Decision and American Exceptionalism' (2006) 30 HarvJL&PubPoly 191.
[46] EA Young, 'Foreign Law and the Denominator Problem' (2005) 119 HarvLR 151.
[47] Gilbert (n 1) 589. [48] ibid 590. [49] *Delgamuukw* (n 4) 1082.

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who posits that factual occupation can give rise to title because under principles of real property law, occupation is proof of possession.[50] The second source, however, is impossible to decipher, for Lamer CJC does not elaborate on what aspect of the identified 'relationship' is instrumental or, indeed, how a relationship (as distinct from a system of law) can give rise to legal rights in the first place. Does 'relationship' refer to the inter-societal law generated by common law and aboriginal systems, or does it refer to aboriginal law which is saved by common law continuity principles? Both options constitute separate sources, each one conceptually distinct from McNeil's thesis, so by juxtaposing them in this way Lamer CJC has spawned considerable uncertainty.

Unfortunately, the inattentiveness displayed by Lamer CJC has been echoed and even extended by academic commentary. According to Gilbert, the 'roots of indigenous title are to be found in indigenous customs and laws that preceded the acquisition of sovereignty by colonizers. Thus, these titles are based on the *recognition of pre-existing indigenous laws*, and on the common law principle that *occupation is proof of possession*'.[51] With this statement, what Gilbert does is to conflate two separate sources of aboriginal title, for 'the recognition of pre-existing indigenous laws' refers to the continuity doctrine, while 'occupation [as] proof of possession', is a reference to McNeil's theory that sources title in the *municipal* law of real property. What Lamer and now Gilbert have done is to lump distinct theories together, treating them as interchangeable. However, cases from a variety of common law jurisdictions have relied on differing (and distinct) sources of aboriginal title, and to treat these as a single interchangeable source is a mistake. In the preceding section two sources of aboriginal rights to land were identified: the doctrine of continuity, by which rights to land are sourced in pre-existing indigenous laws that continue after a change in sovereignty, and the doctrine of aboriginal title, derived from British colonial law, through which pre-existing occupation of land by indigenous peoples obtained legal recognition. While these are among the oldest doctrines by which indigenous rights have been recognized, they do not exhaust the means that ground modern aboriginal title. Two principal remaining theories are the recognition doctrine and very recently a doctrine of 'common law aboriginal title', which is sourced in the (private) law of property.

A. The Recognition Doctrine

Under the recognition doctrine a change in sovereignty is said to abrogate all existing rights, whether private or public, so the only interests in land retained by the existing population are those expressly recognized by the incoming

[50] McNeil, *Common Law Aboriginal Title* (n 26) 198–204.
[51] Gilbert (n 1) 591 (emphasis added).

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sovereign. It purports a 'radical discontinuity' as a result of the change in sovereignty.[52] It is most closely associated with a narrow line of Indian cases,[53] though it was recently applied in the first indigenous land rights case heard in the High Court of Guyana.[54] However, given the drastic consequences of its application, the doctrine has long been regarded as legally and morally indefensible, out of step with logic as well as with prevailing authorities.[55]

B. Common Law Aboriginal Title

The doctrine of common law aboriginal title is of relatively recent origin. It owes its existence to Professor Kent McNeil, who theorized in his pioneering study that factual occupation of land by indigenous peoples is sufficient proof of legal possession which, in the absence of any other claim to or interest in the said land, entitles them to a proprietary title under basic tenets of English property law.[56] A title through this method is anchored firmly in municipal law, for it relies on a presumption of English property law that factual occupation is proof of legal possession or ownership. This theory is therefore distinct from the doctrine associated with the Marshall Supreme Court under which pre-sovereignty occupation was accorded legal status by a combination of the law of Nations and Imperial constitutional law, which applied to a territorial acquisition irrespective of the introduction of the common law in its narrower sense.[57] Thus an important difference between the two doctrines is that McNeil's thesis is grounded in domestic law, whereas Marshall's doctrine is an application of British colonial law.[58]

Another difference between the two theories is that while McNeil's is concerned with the present, the other looks to the past. Since the whole thrust of McNeil's approach is to place indigenous occupants of land in the same position as other (non-aboriginal) occupants, its principled application dispenses with the need to prove pre-sovereignty occupation. Indeed, McNeil himself makes this clear by stating: 'Some of these problems [of proving continuous occupation since the acquisition of Crown sovereignty] can be avoided if the aboriginals who claim title are *presently* in occupation of the lands claimed by them. In that situation, they can rely on their own occupation

[52] Slattery, Ancestral Lands (n 10).

[53] *Joravarsingji v Secretary of State for India* (1924) LR 51 IA 357; *Secretary of State for India v Kamachee Boye Sahaba* (1859) 7 Moo IA 476; 15 ER 9; *Cook v Sprigg* [1899] AC 572; and *Secretary of State for India v Bai Rajbai* (1915) LR 42 IA 229.

[54] In *Thomas v A-G of Guyana* GY 2009 HC 7 (HC of Guyana, 30 April 2009), Chang CJ held that since neither Imperial power (the Dutch or the British) gave 'de jure recognition' to any system of indigenous customary law, no customary rights or interests exist in the present.

[55] For a penetrating discussion of the Indian cases see McNeil, Common Law Aboriginal Title (n 26) 165–71.

[56] ibid chap 7.

[57] *Côté* (n 35) 172–3.

[58] See also G Lester and G Parker, 'Land Rights: The Australian Aborigines Have Lost a Legal Battle, But. . .' (1973)
11 AltaLRev 196.

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and the common law presumption that occupiers of land have title to fee simple estates.'[59] This is a crucial aspect of McNeil's theory apparently overlooked by Lamer CJC, who, by finding pre-sovereignty occupation to be relevant in light of a common law principle, has made its application more difficult.

C. The Detrimental Consequences of Indiscriminate Borrowing

How, then, did these distinct sources come to be lumped together in Lamer's judgment in *Delgamuukw*? If one were to search for the origins of this confusion, one would probably find an answer in the series of steps marking the transplantation of doctrines across divergent jurisdictions, thereafter cemented in the accompanying commentary. Prior to *Delgamuukw*, Canadian law recognized two sources of aboriginal title: the application of continuity principles,[60] and the alternative of constitutional recognition as granted by the common law.[61] But by 1997, when the Canadian Supreme Court was faced with the appeal in *Delgamuukw*, McNeil's novel theory had just been applied by the Australian High Court in *Mabo*. The trouble was, however, that four separate concurring judgments were delivered in *Mabo,* so discerning a common position is not straightforward. In the judgment delivered by Toohey J, McNeil's theory was discussed closely, though as an alternative source of native title.[62] When the Canadian Supreme Court came to deal with this issue in *Delgamuukw*, it apparently overlooked the important fact that McNeil's theory had been developed as an alternative to the traditional doctrines which focused on historical occupation. This slippage was compounded when Lamer CJC juxtaposed two distinct sources in an obscure passage that did not explain their connection, if any.[63] All this confusion was reinforced in Gilbert's analysis, which presented what had hitherto been distinct sources of aboriginal title as joint or interchangeable.

Laxity in the application of indigenous rights theories is undesirable for reasons beyond nostalgia for doctrinal purity. The source of entitlement directly influences the means of proof and determines the nature and scope of any resulting title. The choice of which doctrine to invoke is therefore one that must be made mindful of history and context. The alternative of taking a generic approach is to ignore limitations unique to each doctrine, which could then operate to defeat a land claim where circumstances differ in material respects.

The recognition doctrine, for example, which states that no pre-existing rights survived a transition of sovereignty except insofar as they were explicitly recognized and affirmed by the incoming Sovereign, would non-suit claimants

[59] K McNeil, 'A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?' (1990) 16 MonashLRev 107 (emphasis added).
[60] *Guerin* (n 35).
[61] *Côté* (n 35).
[62] *Mabo* (n 3) per Toohey J [99]–[120].
[63] *Delgamuukw* (n 4) 1082.

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if invoked in places where no land rights legislation exist. While this doctrine has obvious limitations, which renders it less likely to be relied on by indigenous peoples, other more popular sources as identified above are no less fraught.

A prime example is the continuity doctrine, which has tremendous evidential and conceptual difficulties, belying its current popularity. Applicants must establish a connection to the land claimed which existed at the time of sovereignty and continued thereafter up to the present.[64] Given the early roots of colonization, this necessitates evidence of events and laws dating back hundreds of years, an enormously difficult burden for most aboriginal societies which lack written records. Any change in the colonial power—not an infrequent occurrence as territorial possessions changed hands routinely—amounted to discontinuity and could signal the loss of pre-existing rights. Indeed, early cases from around the Commonwealth floundered on this ground alone.[65] Another difficulty posed by the continuity doctrine, as will be demonstrated below, relates to the identification of pre-existing laws.[66]

McNeil's doctrine, for all of its contemporariness, poses its own challenges. Because it involves the application of real property principles, it requires skilful navigation between the highly artificial English law and indigenous patterns of land use.[67] English property law consists of intricate and arcane rules, starting with the fiction of original crown ownership of all lands. It has no experience of dealing with features of land use that are unique to aboriginal societies, such as their sacred, spiritual relationship with land, their concept of stewardship rather than ownership, their seasonal patterns of use and so on.[68] In the past, many of these unique aspects of aboriginal land use confounded Western jurists and theorists, as embodied in the writings of Vattel whose utilitarian philosophy was invoked on occasion to justify the dispossession of migratory societies.[69] These dangers are no less in the present, as evidenced by the convoluted application of this doctrine in *Delgamuukw* and the damaging influence that decision has in turn exerted.

In *R v Marshall; R v Bernard*, at issue were the rights of the Mi'kmaq to cut logs on what were described as Crown lands in Nova Scotia and New Brunswick. The current Chief Justice, McLachlin CJC, held that aboriginal title 'is established by practices that indicate possession similar to that associated with title at common law', which necessitated a process of

[64] This at least is how these principles have been applied in Australia: *Yorta Yorta v Victoria* (2002) 194 ALR 538.

[65] *Milirrpum* (n 8).

[66] See notes 90 to 96 and accompanying text.

[67] As to the dangers of doing so in countries where the common law *is* applicable, see B Slattery, 'The Metamorphosis of Aboriginal Title' (2006) 85 CanBarRev 269.

[68] For a discussion of indigenous conceptions of land see *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Ser C) No. 79 (Inter-Amer Ct HR 31 Aug 2001); and G Christie, '*Delgamuukw* and the Protection of Aboriginal Land Interests' [2000–01] 32 OttawaLRev 89 (note 5 and works cited therein).

[69] E de Vattel, *The Law of Nations* (Chitty trans, Sweet and Maxwell 1834) Book I [77]–[81].

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'matching common law property rules to aboriginal practice'.[70] In her exposition of common law property rules regarding legal possession, McLachlin CJC identified the requirements laid down in *Delgamuukw* for title as exclusive physical occupation of land.[71] Despite repeated lip-service to the need for sensitivity to aboriginal perspectives, McLachlin CJC appeared not to follow her own advice, for she held that 'occasional entry and use [of land] is inconsistent with . . . the approach to aboriginal title which this court has consistently maintained'.[72] Applied to the facts of that case, it meant that the seasonal use made by the Mi'kmaq of the territory in question could not found aboriginal title, and their convictions were restored.

Since aboriginal peoples are known to pursue migratory lifestyles, and often use the resources on the land occasionally as opposed to cultivating it, McLachlin's test of occupation maximizes the difficulties of aboriginal societies in claiming title to territory historically used by them. Her approach which requires 'matching' common law rules to aboriginal practices is not an entirely unforeseeable development of Lamer's test in *Delgamuukw*, which attributed relevance of pre-sovereignty occupation to a rule of English property law. In the matching process later conducted by McLachlin CJC, aboriginal practices alien to Western values were marginalized, highlighting the pitfalls of thoughtless borrowing.[73]

These differences among various jurisdictions, particularly in the type (and consequences) of doctrines applied, make claims of a 'unified' doctrine of indigenous title unsustainable. To recap, in the course of the last 300 years colonial courts and their successors have recognized a variety of sources of aboriginal title. There is the *doctrine of aboriginal title*, which is a species of British colonial law and practice and which applied to a territory as a necessary incident of British sovereignty. This body of law recognized aboriginal rights, including pre-sovereignty native occupation of lands. There is the *doctrine of continuity*, by which indigenous rights to land are rooted in indigenous laws themselves, which are held to continue in a territory even after a change in political sovereignty. This doctrine is well established both at international law and under the common law. More recently, there is the *doctrine of common law aboriginal title*, which sources aboriginal rights to land in the domestic real property law, simply by applying the legal presumption that factual occupation of land gives rise to possession and ownership. Finally, there is the *recognition doctrine*, by which the only aboriginal rights recognized are those which have been explicitly granted by statute. However, as discussed above, each of these

[70] *R v Marshall and R v Bernard* [2005] 2 SCR 220, 245.

[71] ibid 246; but this was not a wholly accurate summary of Lamer's dicta on the point—see *Delgamuukw* (n 4) [149].

[72] *Marshall and Bernard* (n 70) 247.

[73] For detailed critiques of this decision see K McNeil, 'Aboriginal Title and the Supreme Court: What's happening?' (2006) 69 Saskatchewan Law Review 293–305, P Chartrand, '*Marshall and Bernard*: Return of the Native' (2006) 55 UNBLJ 135 and Slattery, Metamorphosis (n 66) 279–86.

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sources has limitations unique to its application, and an uninformed choice of one or the other could result in the denial of a land claim. It is for this reason more than any other that interpretations of a unified jurisprudence must be resisted.

IV. THE COMMON LAW AS A MODEL

Gilbert's biggest claim, and the one requiring the most careful scrutiny, is that the jurisprudence developed by the Canadian Supreme Court and the High Court of Australia can serve as a model for a general legal theory on indigenous land rights. This he develops in several ways. One plank of his argument is that this emerging common law doctrine on indigenous title treats historic dispossession in light of evolving legal principles, the latter being, apparently, superior to past standards.[74] As an example of this favourable evolution Gilbert cites *R v Van der Peet*,[75] where Lamer CJC held that reconciliation of indigenous peoples' prior occupation with Crown sovereignty requires that the perspectives of both systems be taken into account and weighted equally.

The trouble with this analysis is that it plucks out and extrapolates from an isolated portion of one case. *Van der Peet* is only one in a trilogy of cases handed down by the Canadian Supreme Court in 1996 dealing with aboriginal rights, so basing a conclusion on one statement from this case is patently misleading. A balanced assessment of Canadian jurisprudence on the subject of aboriginal rights requires an examination of *Van der Peet* in its entirety, as well as its companions, which, if conducted, would reveal that predictions of reconciliation are overly sanguine. As discussed above, the most recent Supreme Court ruling on the subject of aboriginal title completely marginalizes the aboriginal perspective in its treatment of seasonal use and occupation of land, but even before *Marshall and Bernard* the bias of Canadian jurisprudence was unmistakable. Australian jurisprudence is no less compromised, so it would be a mistake to blindly follow the common law as it has evolved in these jurisdictions. Undeniably, while there have been positive developments, many deficiencies linger and the overall treatment of aboriginal rights has been quite uneven. A closer focus on the key elements of aboriginal rights jurisprudence, namely its source, manner of proof, content and durability, will illustrate these concerns.

A. Sources of Indigenous Rights

According to Gilbert, for the first time in legal history, under the doctrine of indigenous title courts have recognized the legal value of indigenous customary systems of land tenure. In support, he cites a succession of decisions from courts in Canada, South Africa, Malaysia, Kenya, Botswana,

[74] Gilbert (n 1) 592–4.

[75] [1996] 2 SCR 507.

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Belize and Australia.[76] However, a closer look at the jurisprudence of some of these jurisdictions reveals considerable ambivalence on the subject of indigenous rights. One example is provided by the application of continuity principles as a source of native title in Australian jurisprudence since *Mabo*.

Since the doctrine of continuity operates to preserve pre-existing private rights (including rights of property) on a change of sovereignty, it necessarily follows that the 'public lands' which pass to an incoming sovereign during this process cannot include lands subject to pre-existing customary interests, as the latter are private in nature. However, the logic (and justice) of this conclusion has been denied in Australia, where legislation making provision for 'waste land' was interpreted as including lands subject to pre-existing customary interests. In *Fejo v Northern Territory*,[77] the High Court held unanimously that a fee simple grant in 1882 had extinguished any native title interest in the land, as an estate in fee simple is equivalent to full ownership and is therefore incompatible with any other right or interest (unless the subsequent right or interest was granted by statute, the owner in fee simple or by a predecessor in title). Once extinguished, native title could not be revived when the land was resumed by the Crown.

The problem with this reasoning is that the grant in question had been made pursuant to section 8 of the *Northern Territory Land Act 1872*, which only empowered the Governor to make freehold and leasehold grants of 'waste lands'. In construing this provision, the Chief Justice and five other Judges held in a single joint judgment that 'The power to deal with waste lands in the Northern Territory (including the subject lands of the case) was to be found wholly within the 1872 Act. . . . That Act permitted the making of an unqualified grant of an estate in fee simple.'[78] But this did not address the issue, for it failed to explain how the statutory provision could include lands subject to pre-existing aboriginal interests.

Rejecting an alternative submission of the appellants that the fee simple grant should be read as having been made subject to native title rights, the majority held that even though at common law a fee simple estate could be subject to other interests (easements and *profits à prendre* being obvious examples), this could not include native title rights as the latter owed their existence to a different body of law and traditions.[79] In a separate concurring judgment, Kirby J echoed this point, adding that native title rights are 'inherently fragile' since they are dependent on a different legal system for protection.[80] Arguably, this was a fine and ultimately irrelevant distinction, since native title rights had earlier been acknowledged by this very Court to be of a proprietary nature. Moreover, the common law has never made

[76] Gilbert (n 1) 591–2.
[77] *Fejo v Northern Territory* (1998) 156 ALR 721.
[78] ibid 739.
[79] Per Gleeson CJ and Gaudron, McHugh, Gummow, Hayne and Callinan JJ, ibid 739.
[80] ibid 757.

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distinctions based on the source of property rights,[81] so there was no reason in principle why native title rights should be treated differently from an easement or other common law interest. In any case, the recognition of native title rights deemed necessary by the High Court had already been accorded,[82] so the Justices' explanation was indefensible even upon its own terms.

In addition to its unpersuasive rationale, this ruling contravened Australian precedent of very recent origin. In *Mabo*, Justices Deane and Gaudron clearly held that in the absence of clear and unambiguous words, waste lands legislation could not be construed as extinguishing or denying native title.[83] Justice Toohey was equally direct, saying: 'traditional title may not be extinguished by legislation that does no more than provide in general terms for the alienation of the waste lands of the colony or Crown land.'[84] These are unequivocal statements, but they were ignored in *Fejo*.

What seems to have happened here was that after *Mabo*, presumably when the implications of the continuity doctrine began to register, the High Court sought to contain its initial exuberance by limiting the doctrine's scope. To do so, the judgment in *Fejo* distorted established common law principles relating to the continuity of private proprietary interests. This reversal mirrors precisely what occurred in Canada from the time of *Delgamuukw* in 1997 to *Marshall and Bernard* in 2005, creating the impression that in these countries enlightenment is closely followed by second thoughts, hence the subsequent judicial and legislative restrictions. Because of this ambivalence, characterizing the common law in either of these countries as a model is an assessment which cannot withstand rigorous scrutiny. This conclusion is reinforced when other aspects of aboriginal title jurisprudence are examined.

B. Proof of Indigenous Rights

Proving the existence of rights has always been a gruelling undertaking for indigenous peoples. Nowhere are these realities more graphically highlighted than in Australia and Canada. In Canada, as pointed out above, the test for proving aboriginal title has been rendered much more difficult, for the latest Supreme Court decision in *Marshall and Bernard* requires the assessment of indigenous use of the land from a Eurocentric standpoint. Since aboriginals never enclosed their territories or remained sedentary, establishing 'exclusive

[81] *Attorney General for the Isle of Man v Mylchreest* (1879) 4 App Cas 294; and for a detailed account of the common law on this issue see K McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title' (1996) 1 AILR 192–6.

[82] In *Mabo* Brennan J described native title as a proprietary right: (n 3) 36.

[83] *Mabo* (n 3) 84; Likewise, in Canada Aboriginal title has been described as a 'right to the land itself', per Lamer CJ in *Delgamuukw* (n 4) [140].

[84] *Mabo* (n 3) 153; Note, there is even a passage in the judgment of Brennan J (48) that can be construed in support of this position.

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use and occupation' will make claimants less likely to succeed in proving aboriginal title.

The difficulties increase where aboriginal peoples claim free-standing rights in the land, as distinct from actual title. In *Sparrow*, an early case which examined the legality of a net length restriction contained in the appellant's Band food fishing licence, the Supreme Court held that aboriginal rights receiving constitutional protection were those that were already in existence at the time the Constitution came into effect (which was 1982). Moreover, the court held that the phrase 'existing aboriginal rights' had to be interpreted flexibly to take into account the evolution of aboriginal rights, so that rights could be 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'.[85] By the following decade, however, this humane and culturally sensitive approach was all but abandoned when a series of cases arose in which aboriginal peoples asserted rights of a commercial nature. In the very *Van der Peet* decision cited above, the issue was whether the Sto:lo people had an aboriginal right to fish commercially, and the Supreme Court decided that in order to qualify as an aboriginal right the activity in question must be 'an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.'[86] As if this were not onerous enough, to qualify as a right the practice, custom or tradition must have existed at the time of *contact* with Europeans—long before either the British or the French asserted (much less acquired) sovereignty.

The genesis of this test is entirely unclear, violating as it does not only logic and humanity but precedent of very recent origin. Obvious problems are proving a practice existed so long ago and that it was 'integral' to the group's culture. What is highly doubtful is that anyone (and far less a judge, most likely of European descent) has the capacity to determine what was integral to an aboriginal society's culture some three or four hundred years ago; what is undeniably offensive is that the descendants of settlers have arrogated to themselves the power to do so. The *Van der Peet* test has been excoriated by commentators, with one of the most incisive critiques coming from scholars Russell Barsh and Youngblood Henderson who describe it as 'philosophically hopeless and morally unjust'.[87] The two make several insightful observations, pointing out first that centrality cannot be objectified, or reliably measured by outsiders; second, that centrality presumes the independence of cultural elements, whereas in reality cultural characteristics are often interdependent; and third, that centrality—assuming it exists—would not be static.

[85] *R v Sparrow* [1990] 1 SCR 1075.

[86] *Van der Peet* (n 75).

[87] RL Barsh and JY Henderson, 'The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand' (1996–97) 42 McGillLJ 993. See also J Borrows and L Rotman, 'The *Sui Generis* Nature of Aboriginal Rights: Does it make a Difference?' (1997–98) 36 AltaLRev 9 and K. McNeil, 'Aboriginal Title and Aboriginal Rights: What's the Connection?' (1997–98) 36 AltaLRev 117.

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Thus in Canada, while *Sparrow* formulated a conciliatory standard with its frame of reference of 1982, this has been undone by *Van der Peet*. The latter not only makes it harder for *any* right to be established, it also renders it highly unlikely that the modern expression of past practices could ever qualify as an aboriginal right—as illustrated by a series of cases where aboriginal groups have claimed rights of a commercial nature.[88]

Similar travails have faced native title claimants in Australia in the post-*Mabo* era. In *Mabo*, it was the continuity doctrine which prevailed with a majority of the judges, the rationale for that decision being that the pre-existing rights of the indigenous inhabitants to the territory had survived the acquisition of sovereignty by the British crown.[89] Replicating *Mabo*'s success, however, has since proved to be an elusive undertaking.

Under the continuity doctrine what must be proven is occupation of the land claimed at the time the British crown asserted sovereignty.[90] In most instances, this requires digging deep into the past, which modern aboriginal societies are often ill-equipped to do. The difficulty of this requirement is exacerbated by the fact that British assertions of sovereignty did not result in the crystallization of boundaries and the cementing of areas of aboriginal occupation. Quite the contrary, European invasion heralded tremendous upheavals in aboriginal societies, disrupting both their sites and manner of living. Thereafter, the perennial conflict for land and resources led to continuous fluidity in both European and aboriginal occupation. Thus, to require any modern aboriginal society to trace its present occupation of land to pre-sovereignty areas or patterns presents a task of Herculean proportions.

These concerns figure prominently in a decision of the Australian High Court in a claim brought by the Yorta Yorta Peoples for recognition of their native title to land and waters in northern Victoria and southern New South Wales. The applicants lost at every level of the Australian judiciary, their ultimate failure resulting from what the High Court viewed as the absence of proof of the continuity of their traditional laws and customs. The High Court held that the applicants had to show that pre-existing native laws and customs had actually survived to the present, for if the 'normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist'.[91]

As if that were not by itself a sufficiently onerous burden, the Court further stipulated that the pre-existing normative system could not give rise to rights and interests after the assertion of British sovereignty, for there could be no parallel law-making system after that event.[92] Thus the applicants were placed

[88] *Van der Peet* (n 75); *Marshall and Bernard* (n 70); *NTC Smokehouse v The Queen* [1996] 2 SCR 672, and cf cases where individual rights are claimed and the stakes are lower, as in *Adams v The Queen* [1996] 3 SCR 101 or *Côté* (n 35).

[89] *Mabo* (n 3) 41.

[90] R Bartlett, *Native Title in Australia* (2nd edn, LexisNexis Butterworths 2004) 143–6; in Canada see *Delgamuukw* (n 4) 1097–1100.

[91] *Yorta Yorta* (n 64) 553.

[92] ibid 552.

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in the impossible situation of having to prove continued adherence to traditional laws and customs *and* the existence of the system which gave rise to them, though that system was expected to flourish in the intervening centuries without functioning. This was necessary since every other normative system in Australia became excluded by the monopolistic nature of British sovereignty. According to Sky Mykyta, commenting on this requirement, 'the Court requires Indigenous peoples to acknowledge what it denies and to keep alive what it says cannot exist'.[93]

Another difficulty posed by the application of the continuity doctrine relates to the proof of pre-existing native laws and customs, in which native title is sourced.[94] While the *Mabo* test has been dutifully echoed in a number of cases, most recently by the Belizean High Court,[95] what it does not reveal is the difficulty of actually identifying those customary indigenous laws. Indeed, patently absent from the majority of cases that purport to give effect to pre-existing indigenous laws through the recognition of a customary land title is any informed discussion as to the existence and nature of those laws. Where courts make an attempt to articulate controlling principles, invariably this involves considerable guesswork, with detrimental results for indigenous applicants. Once again, the approach of the Australian High Court graphically illustrates these difficulties.

In *Yorta Yorta*, the High Court held that the forbears of the applicants had ceased to occupy their lands in accordance with traditional laws and customs. In so finding, the High Court relied on the determination of the trial judge, which was in turn based on historical accounts of aboriginal culture written by a White pastoralist. However, it has been widely acknowledged that those accounts were of doubtful credibility and reliability.[96] This resulted in a rejection of the applicants' claim that their observance of traditional laws and customs met the test of a present connection as required by the legislation. In this way, both historical and modern aboriginal perspectives were completely

[93] S Mykyta, 'Losing Sight of the Big Picture: The Narrowing of Native Title in Australia' (2004–05) 36 OttawaLRev 11 1.

[94] *Mabo* (n 3) 42; This ruling has been reinforced by the *Federal Native Title Act 1993* (Cth), section 223(1) of which defines 'native title' by reference to traditional laws and customs of Australian Aboriginal peoples. This provision has been strictly construed by the Australian High Court as requiring primary focus on those laws and customs: *Western Australia v Ward* (2002) 191 ALR 16–17 and *Yorta Yorta* (n 63) 549.

[95] *Aurelio Cal et al v Attorney-General of Belize* (2007) 71 WIR 110.

[96] M Stuckey, 'Not by Discovery But by Conquest: The Use of History and the Meaning of "Justice" in Australian Native Title Cases' (2005) 34 CLWR 24; For a critique of the trial judge's approach, and a more detailed discussion of the complexities of the requirement related to traditional laws and customs and how this has bedevilled Australian jurisprudence, see K McNeil, 'The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law' in K McNeil (ed), *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (University of Saskatchewan Native Law Centre 2001) 416; see also R Bartlett, 'An Obsession With Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*' (2003) 31 UWA L Rev 35 and A Reilly, 'The Ghost of Truganini: Use of Historical Evidence as Proof of Native Title' (2000) 28 FLRev 462–4.

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ignored. As Kirsten Anker has insightfully pointed out, the Court's interpretation of tradition and culture wholly misunderstood the nature of traditional laws and customs, and by substituting its own understanding and expectations of what these laws and customs constituted, it completely ignored the fact that the customs described by the applicants were simply the contemporary expression of pre-existing practices.[97]

Anker's view is reinforced by indigenous scholar and tribal Judge Zuni Cruz, who argues that historically, 'external recognition' of indigenous knowledge has not been 'accurate, complete, fair or unbiased.' Cruz further charges that the misrepresentation of indigenous laws has often been deliberate in the quest for assimilation of Indigenous peoples by states.[98] At the most charitable, the evident inability of the Australian High Court to navigate certain procedural matters underlines how ill-equipped common law courts are in general to assess unconventional forms of evidence such as oral testimonies[99] and historical materials.[100] Altogether, the *Yorta Yorta* proceedings reveal the dangers inherent in requiring a modern court to estimate pre-sovereignty laws and customs and then expecting its conceptions to be reflected in current practices among indigenous applicants through an unbroken chain of continuity. It often involves much speculation, where the perspectives of indigenous applicants are invariably marginalized in the interpretations placed either upon the past or the present. Allied to these concerns are the fundamental difficulties with any approach that places an inordinate emphasis on strict continuity, given the very nature of colonization that resulted in sometimes minor, but often significant, disruptions to indigenous modes and patterns of living.[101] As it has evolved in these jurisdictions, therefore, common law doctrines impose evidentially onerous and culturally insensitive requirements for proving the existence of rights. As long as these conditions remain, they should be unhesitatingly rejected by other courts as a model for a general legal theory on indigenous land rights.

C. Extinguishment of Indigenous Rights

Claims that a common law doctrine on indigenous title can be seen as a bridge between indigenous and non-indigenous cultures since the same weight is given to both systems of law[102] are definitively exploded the moment one makes a connection between the strength of a title and its source. Notions of equality become impossible to maintain since pre-existing indigenous rights

[97] K Anker, 'Law in the Present Tense: Tradition and Cultural Continuity in *Members of the Yorta Yorta Aboriginal Community v Victoria*' (2004) 28 MelbLRev 1, 17.

[98] C Zuni Cruz, 'Law of the Land – Recognition and Resurgence in Indigenous Law and Justice Systems' in BJ Richardson, S Imai and K McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing 2009) 319.

[99] Mykyta (n 93) 121–2. [100] Stuckey (n 96) 28. [101] Anker (n 97) 26.

[102] Gilbert (n 1) 592.

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can be extinguished under rules of the common law system, which has always been unequivocal about its dominance.[103] Naturally, the reverse does not hold true, so it is thus not credible to speak of the common law achieving (or even aiming for) reconciliation.

In the first place, if these systems were really weighted equally then pre-existing rights would not be subject to extinguishment by grants made under the common law. However, from the earliest times common law courts have insisted that sovereignty carried certain powers to extinguish pre-existing rights in the land. In *Johnson v M'Intosh*, Marshall CJ cautioned that 'all our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.'[104] Elsewhere, other common law courts have followed suit, so that, whatever the source by which indigenous rights are recognized, always present is an accompanying assertion of the Crown's overriding power to extinguish.[105]

Reinforcing the subordinate status of indigenous title is the manner in which the power to extinguish is exercised. Here again, the common law operates discriminatorily, treating rights sourced in indigenous laws differently (and less favourably) than those sourced in its own system. At common law property rights cannot be extinguished other than with appropriate legislative authority, and then only if the required standard is met.[106] Since aboriginal title is a proprietary right, it ought to benefit from this protection. However, in Canada this principle has been desultorily applied,[107] while in Australia it seems to have been completely rejected.

In *Mabo*, having found that native title survived the acquisition of sovereignty by the British crown, the Australian High Court next had to consider the effect of both legislation and executive acts in the years intervening since annexation of the territory. While it was held, incontestably, that 'clear and plain' legislation could suffice to extinguish native title, all the

[103] In none of the cases from any of the jurisdictions discussed here is there any doubt that indigenous rights to land (if they exist in the first place) may be statutorily abrogated. As the discussion in this section shows, what contention there is exists in relation to the required standard to successfully achieve such abrogation.

[104] (n 11) 588.

[105] *U.S. v Santa Fe Pacific Railroad* 314 US 339 (1941) and *Sobhuza II v Miller* [1926] AC 518, 525; See also K Lysyk, 'The Indian Title Question in Canada: An Appraisal in the Light of *Calder*' (1973) 51 CanBarRev 475–6 and R Bartlett, 'The Aboriginal Land Which May be Claimed at Common Law: Implications of *Mabo*' (1992) 22 UWA L Rev 294.

[106] *Entick v Carrington* (1765) 19 State Tr 1029, 1060; I Bl Comm 129–39; *A-G v DeKeyser Royal Hotel* [1920] AC 508; and see K McNeil, 'Aboriginal Title as a Constitutionally Protected Property Right' in Owen Lippert (ed), Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision (The Fraser Institute 2000) 56.

[107] See, for example, *Chippewas of Sarnia Band v Attorney-General of Canada* [2001] 1 CNLR 56, which sanctioned what McNeil has dubbed 'extinguishment by judicial discretion': K McNeil, 'Extinguishment of Aboriginal Title in Canada: Treaties, Legislation and Judicial Discretion' (2001–02) 33 OttawaLRev 301.

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Judges were united in finding that this result could also be achieved by executive act under the crown's prerogative powers. Brennan J, who delivered the leading judgment, based this conclusion on the source of native title. He pointed out that the Crown cannot extinguish an interest validly granted by it without statutory authority, and that a statute will be construed, if possible, as not authorizing any impairment of an interest in land granted by the Crown. However, Brennan continued, since native title is not granted by the Crown no similar constraint exists preventing the Crown from extinguishing it without express statutory authority.[108]

Brennan J acted on this conclusion by finding that aboriginal rights had been denuded not by operation of law, but 'by the exercise of sovereign authority over land exercised recurrently by governments' over the course of the preceding 200 years of settlement.[109] Executive acts in the early years of settlement in Australia occurred long before statutory authorization,[110] so such subjugation to executive pleasure confirms the inferior status of aboriginal interests in land in spite of their proprietary nature.

This approach is legally indefensible. Once it is accepted that native rights in land are of a proprietary nature recognized by the common law,[111] it ought to follow naturally that such rights become clothed with all of the protections accorded to property by the said common law. Included among such protections is the hallowed constitutional principle that private property is not subject to arbitrary executive action. A corollary to this principle is that the Crown cannot commit acts of state against its own subjects, a protection that exists even in times of war.[112] Thus, while the Sovereign can extinguish private rights, this power is exercisable only under the law, which requires valid, enabling legislative authorization.[113]

Compounding the vulnerability of native title is the legal standard to be met for extinguishment to validly occur. The prevailing test is taken from the judgment of Douglas J in *U.S. v Santa Fe Pacific Railroad*, where the strength of 'Indian' rights was reaffirmed as a matter of political expediency. Douglas J pointed to the historic need for peaceable relations with Indians, which necessitated a policy of respect for the Indian right of occupancy.[114] He continued that it would take 'plain and unambiguous language' to deprive the Walapais of the benefits of that policy,[115] affirming robustly that 'extinguishment of Indian title cannot be lightly implied, but doubtful expressions in acts relating to Indians, instead of being resolved in favour of the United States, are

[108] *Mabo* (n 3) 46. [109] ibid 50.
[110] In Australia land grants were initially made by Prerogative grant, and it was not until 1842 that the management and sale of land was first brought under statutory control: *Wik Peoples v Queensland* (1996) 141 ALR 129, 171. [111] As Brennan J himself did: (n 3) at 36.
[112] *A-G v Nissan* [1970] AC 179, 213 (Lord Reid).
[113] *Magna Carta*, 1215, 17 John, cl. 39; See also 1 Bl Comm 134–5; *Main v Stark* [1890] App Cas 384; Slattery (n 29) 748. [114] *Santa Fe* (n 105). [115] ibid 346.

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to be resolved in favour of the Indians.'[116] Despite some equivocation in the way this ruling was actually applied, Douglas J left an enduring legacy in this test that 'plain and unambiguous language' is required to effect the extinguishment of indigenous rights. It has since been followed widely among common law courts, styled 'clear and plain language' in its most common incarnation.[117]

While this test should protect indigenous peoples from arbitrarily losing their rights to the land, since it articulates a standard that must be met by legislation, courts have projected ambiguity onto the test in order to validate confiscatory acts by the state. Thus in Canada there is a lack of consensus as to what actually constitutes 'clear and plain'. At one extreme, liberal judges like L'Heureux-Dube interpret the expression strictly, requiring an explicit statement in the law to effect the extinguishment of an aboriginal right.[118] However, L'Heureux-Dube is in the minority, with the weight of opinion leaning towards a less protective standard. Typical is that espoused by the British Columbia courts, which interpret the test as sanctioning extinguishment by 'unavoidable implication'.[119] The Supreme Court has not provided any clarification,[120] so the effect of this uncertainty is to reinforce the fragility of aboriginal rights in Canada as recognition is simultaneously devalued by the ease with which extinguishment could possibly occur.

In Australia, while judges have paid lip-service to the same 'clear and plain' requirement,[121] the subsequent elaboration of what this entails strips it of any real efficacy. Brennan J accepted that a clear and plain intention was required in order to extinguish native title given the 'seriousness of the consequences' of such actions.[122] But having espoused this laudable position, he proceeded to rule that native title is extinguished by grants of inconsistent interests, such as fee simple estates and even leases.[123] This could happen unintentionally, as it was the effect of a grant that was operative. Only what he termed 'lesser interests', such as authorities to prospect for minerals, would not have this effect.[124] But it is simply a violation of the English language to state a 'clear and plain' intention is evinced by legislation whose *unintentional* effect is to extinguish native title. Moreover, fundamental common law principles which protect private property against arbitrary executive action have also been applied to native title rights. In *Oyekan v Adele* Lord Denning had this to say in

[116] ibid 354.

[117] In Canada see *Calder* (n 9) 210 and *Sparrow* (n 85); in Australia see *Mabo* (n 3) 46; in New Zealand see *A-G v Ngati Apa* [2003] 3 NZLR 643 [113], [148] and [185]; and in Belize see *Cal* (n 95) [89] and [92].

[118] *Smokehouse* (n 88) 712.

[119] *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470, 523 (McFarlane J).

[120] In *Gladstone v The Queen* [1996] 2 SCR 723 Lamer CJC offered unhelpfully at 750: 'While to extinguish an aboriginal right the Crown does not, perhaps, have to use language which refers expressly to its extinguishment of aboriginal rights, it must demonstrate more than that, in the past, the exercise of an aboriginal right has been subject to a regulatory scheme.'

[121] *Mabo* (n 3) 46 (Brennan J).

[122] ibid.

[123] ibid 49.

[124] ibid 51.

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relation to the right of a native ruler to remain in occupation of the official palace in Lagos, which had been ceded to the British crown:

> The courts will assume that the British crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law. . . .[125]

Thus the approach espoused by Brennan J constituted a significant derailment of legal principle, which the remaining judgments in *Mabo* did little to deflect. Deane and Gaudron JJ in a joint judgment posited that native title is 'merely a personal right unsupported by any prior actual or presumed Crown grant of any estate or interest in the land', so that an inconsistent Crown grant would naturally take precedence.[126] However, it is generally understood that the characterization of 'personal' in the context of native title simply refers to its inalienability, and does not imply that it is a non-proprietary interest.[127] In any event, Justices Deane and Gaudron themselves had earlier accepted that pre-existing native interests with respect to land did not have to conform to common law concepts of tenure in order to gain recognition.[128] This was a pointed rejection of Lord Sumner's reasoning in *Re Southern Rhodesia*[129] in favour of a more enlightened approach, so it was quite inconsistent for them to conclude later that native rights in land constituted a lesser interest than one recognized by the common law.

Most problematic of all, however, was the additional ground advanced by Deane and Gaudron JJ that where aboriginal occupation was terminated by third parties, the 'lack of effective challenge would found either an assumption of acquiescence in the extinguishment of the title or a defence based on laches or some statute of limitations'.[130] Given Australia's notorious history of violent aboriginal dispossession,[131] upheld over centuries by the courts, it is highly unlikely that judicial avenues for the successful vindication of aboriginal rights were ever available, and that acquiescence or laches could amount in such circumstances to a valid defence. Ultimately, although Deane and Gaudron JJ took pains to establish the egregious nature of the wrongs

[125] *Oyekan v Adele* [1957] 2 All ER 785, 788. See also *Amodu Tijani v Southern Nigeria* [1921] 2 AC 399; *Sunmonu v Disu Raphael* [1927] AC 881; *Bakare Ajakaiye* [1929] AC 881; *Oshodi v Dakolo* [1930] AC 667.

[126] Per Deane and Gaudron JJ, (n 3) 67.

[127] *A.G. of Quebec v A.G. of Canada* [1921] 1 AC 401 at 408; *Canadian Pacific Ltd. v Paul* [1988] 2 SCR 654, 677; *Delgamuukw* (n 4) 1081–2.

[128] *Mabo* (n 3) 62–4.

[129] In *Re Southern Rhodesia* [1919] AC 211, when finding against the survival of native rights, Lord Sumner for the Privy Council infamously categorized aboriginal peoples according to Western conceptions of development, which in turn determined whether their rights could be recognized.

[130] *Mabo* (n 3) 67.

[131] For a succinct account of this aspect of Australia's history see M Cocker, *Rivers of Blood, Rivers of Gold* (Grove Press 1988) 115–84.

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suffered by Australian aboriginals, whose rights were therefore not 'illusory',[132] the Justices concluded by privileging Crown grants over native interests in spite of the acknowledged illegality of past executive acts.

In spite of the voluminous criticism of this aspect of the *Mabo* decision,[133] the Australian High Court has not budged. In *Wik Peoples v Queensland*,[134] for example, the High Court maintained that grants inconsistent with native title rights operated to extinguish the latter, with their point of departure being the factual one that pastoral leases did not grant inconsistent rights. Likewise in *Western Australia v Ward* the outcome of extinguishment by inconsistent grant was again endorsed by the High Court. This time around, the majority judgment stressed the need for identifying the rights and interests possessed under traditional laws and customs, and comparing these to the legal nature and incidents of the right granted.[135] To the extent that the two were not inconsistent with each other they could co-exist, with native rights yielding to those subsequently granted. Insofar as the two were incompatible, however, native rights and interests would be extinguished by the inconsistent grant.[136]

Once it is accepted that indigenous rights are of a proprietary nature, and once it is accepted that these rights are recognized by the common law—two propositions for which there is copious authority—then they can only be terminated by lawful, constitutional means. Since the standard for so doing has long been settled as clear and plain statutory authorization, this necessarily precludes extinguishment by implication or by inconsistent grant and, more fundamentally, extinguishment by prerogative power. In Australia, despite all the rhetoric of recognition by the common law, indigenous rights and title remain in a vulnerable position, for these standard constitutional safeguards have been routinely ignored by the courts.

V. CONCLUSION

The 'indigenous renaissance' of the last few decades has generated and continues to generate copious litigation around the Commonwealth. In many instances, courts invoke common principles, but still it would be going too far to say that a unified jurisprudence exists. There are many localized differences, and in some jurisdictions legislative intervention has caused the common law to branch off in different directions.

The more difficult question, however, is whether the common law as it has evolved in any of these places is a model to be emulated in any place where

[132] (n 3) 83.

[133] McNeil, Racial Discrimination (n 81); N Pearson, '204 Years of Invisible Title' in MA Stephenson and S Ratnapala (eds), *Mabo: A Judicial Revolution* (University of Queensland Press 1993) 75; L Strelein, 'Conceptualising Native Title' [2001] 23 SydLR 95; M Tehan, 'A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*' (2003) 27 MelbLRev 523.

[134] *Wik* (n 110).

[135] *Ward* (n 94).

[136] ibid 170–95.

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indigenous rights issues remain unresolved. The foregoing discussion suggests that modern jurisprudence on certain key issues related to the source, proof, content and strength of indigenous rights is inconsistent, uneven, and frequently discriminatory. For instance, whereas indigenous peoples have to satisfy a rigorous standard to prove their entitlement to land or resource rights, the mere 'assertion' of sovereignty was enough for the British crown to acquire a variety rights on a breathtaking scale, in some places encompassing an entire continent. Freehold and even leasehold rights sourced in the municipal common law are much stronger than native title rights, the latter being described in Australia as 'inherently fragile'. In Canada, aboriginal title is subject to 'inherent limitations', which limits the use that its holders can make of the land. Ultimately, recognition of indigenous rights has been a Pyrrhic victory for many indigenous peoples, for the common law has always asserted the right to extinguish them.

Indeed, evident from the foregoing is that the existing status quo is not easy to dislodge, not simply because the passage of time makes evidence harder to obtain, but also because the stakes are constantly mounting. Third party interests, natural resource extraction, and concerns about national sovereignty are powerful impediments, which combine to cement opposition to the recognition of indigenous rights from the State and citizen alike. The Sisyphean labours required of indigenous peoples in order to obtain restitution for past dispossession would suggest that current approaches are flawed. If so, it seems obvious that both process and substance need examining: specifically, how appropriate is litigation for settling these matters, and what should be the choice of law? These are significant issues in their own right, so only the briefest of observations can be offered by way of conclusion.[137]

Of the three branches of government, the judiciary seems to be the least well-equipped to deal with issues of the magnitude presented by claims for recognition of indigenous rights to lands and resources. There are the obvious procedural handicaps, such as the adversarial nature of common law courts, their convoluted rules relating to process, the myriad restrictions around expert evidence and out-of-court statements, and the laborious pace at which they function. These impediments, however, pale next to the matters of substance involved.

It is no exaggeration to state that indigenous rights' claims attack the very body and soul of postcolonial societies. Today the acquisition of sovereignty is a distant memory, and however wrongful initial acts of dispossession might have been, those have since been plastered over by centuries of settlement and development. That indigenous peoples may still have a legitimate claim to lands and resources is a prospect with worrisome economic

[137] For a valuable exploration of this issue see GR Schiveley, 'Negotiation and Native Title: Why Common Law Courts are not Proper Fora for Determining Native Land Title Issues' [2000] 33 VandJTransnatlL 427.

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implications, hence the anxiety in jurisdictions where indigenous rights are recognized for the first time, manifested subsequently either in legislative reversal or executive non-compliance. In New Zealand, for example, the historic *Ngati Apa*[138] decision upholding Maori customary rights provoked such controversy that the government reacted swiftly, enacting the Foreshore and Seabed Act (NZ) 2004/93 by which Crown ownership of the foreshore and seabed areas was definitively asserted and existing customary Maori rights extinguished.[139] On the other side of the globe, even though the decision of the Belize Supreme Court in *Cal* has been rightfully celebrated as a positive development, the sobering reality is that internal opposition has been so fierce that the government is yet to implement the court's ruling.[140]

Given the sweeping implications of recognizing indigenous rights, both for third party rights-holders and national development goals, the unsuitability of the judiciary should not come as a surprise. Aside from the institutional limitations, the reality is that the judiciary is an instrument of the dominant system and cannot be realistically held up as a neutral arbiter. This has been observed and critiqued in key common law jurisdictions including the United States, Australia and Canada.[141]

Conversely, direct dealings between indigenous groups and the government on land and resource-use conflicts approximates more closely to a bilateral process of negotiation, which is a flexible and historically sensitive way to proceed. Early support from the executive is also pragmatic, for as experienced by indigenous groups from the Maya in Belize all the way back to the Cherokees in the United States,[142] judicial affirmation of native rights is ultimately meaningless without it.

The other difficulty relates to the choice of law. Since the common law is the law of the dominant system, its rules predictably ensure its own survival, as demonstrated repeatedly in the foregoing discussion. The landmark cases contain many laudable statements professing respect for the rights of indigenous inhabitants, but given the requirements of proof simultaneously

[138] (n 117).

[139] DV Williams, 'Customary Rights and Crown Claims: *Calder* and Aboriginal Title in Aotearoa New Zealand' in H Foster, H Raven and J Webber (eds), *Let Right Be Done: Aboriginal Title, the* Calder *Case, and the Future of Indigenous Rights* (UBC Press 2007) 171.

[140] A Bulkan, 'From Instrument of Empire to Vehicle for Change: The Potential of Emerging International Standards for Indigenous Peoples of the Commonwealth Caribbean' (2011) 37 CLB 468.

[141] In the US it has been advanced as a reason explaining the patently erroneous decision in *Tee-Hit-Ton Indians v US* 348 US 272 (1955), see Mickenberg (n 10); as regards Australia Kent McNeil has suggested that pragmatism could account for the misapplication of the common law in relation to the principles of extinguishment crafted by the High Court: 'The Vulnerability of Indigenous Rights in Australia and Canada' (2004) 42 OsgoodeHallLJ 297–301; and in relation to Canada see Brian Donovan 'The Evolution and Present Status of Common Law Aboriginal Title in Canada: The Law's Crooked Path and the Hollow Promise of *Delgamuukw*' (2001) 35 UBCLRev 43.

[142] J Burke, 'The Cherokee Cases: A Study in Law, Politics and Morality' (1968–69) 21 StanLRev 500.

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laid down, the subordinate nature of indigenous rights and their ultimate vulnerability to extinguishment, those statements often end up amounting to little more than rhetoric.

Conversely, international law has increasingly been embracing more robust standards in favour of indigenous rights. More than two decades ago the Human Rights Committee, the treaty-monitoring body of the International Covenant on Civil and Political Rights (ICCPR), interpreted minorities' right to culture conferred in Article 27 of the treaty to include land rights.[143] Significantly, this was attended by positive obligations on states, requiring 'legal measures of protection' of land and resource rights.

The newly minted United Nations Declaration on the Rights of Indigenous Peoples is a development of considerable importance, espousing as it does robust standards on key issues of land and resource rights and self-determination. Crucially, the unprecedented nature of its formulation, which included the participation of indigenous peoples and their representatives and resulted in the eventual support of a record-setting number of states, point to normative force of the document.[144] Reflecting more broadly on the development of international standards over the past few decades, scholar James Anaya points to an 'international consensus on indigenous peoples' rights',[145] to which he attributes legal and not just moral force.[146] In Anaya's view, the attendant obligations and expectations can already be described as having acquired the character of customary international law.[147]

International processes have well-rehearsed limitations, particularly in their lack of binding enforcement mechanisms. Even so, it would be a mistake to dismiss international law on indigenous rights as irrelevant. International treaty monitoring bodies have demonstrated an increased willingness to rule in favour of indigenous peoples.[148] The CERD Committee has been particularly active, and in proceedings before them they have issued both general findings requesting governments to initiate legislative reform[149] as well as recommendations requiring specific state action.[150] The resulting standards reflect moral

[143] Bernard Ominayak v Canada, HRC, 38th Sess, UN Doc CCPR/C/38/D/167/1984 (26 March 1990), para 33; see also C Charters, 'Indigenous Peoples and International Law and Policy' in Richardson et al (n 98) 178.

[144] M Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 ICLQ 969.

[145] J Anaya, *Indigenous Peoples in International Law* (OUP 2004) 66.

[146] ibid 69.

[147] ibid. On the other hand, it has been pointed out that international standards are not uniform. Combined with the proliferation of international instruments and doubts as to which one prevails, identifying exactly the scope of those obligations is no straightforward task: Charters (n 143) 165–6.

[148] Notable among them are the Human Rights Committee and the CERD (Convention on the Elimination of All Forms of Racial Discrimination) Committee.

[149] See, e.g. CERD Committee, Decision 1(66): New Zealand Foreshore and Seabed Act 2004 (11 March 2005), para 7; CERD Committee, Concluding Observations: Guyana (4 April 2006) CERD/C/GUY/CO/14.

[150] CERD Committee, Decision 1(68): United States of America (11 April 2006).

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vindication of indigenous rights, and more concretely, they have even influenced domestic litigation in one recent instance,[151] indicating an evolving role for international law.

Regional bodies have also been active, and in the recent past there have been several landmark decisions in favour of indigenous communities.[152] Despite the omnipresent challenges of enforcement, these decisions serve a number of important roles: they contribute to the development of a more coherent jurisprudence;[153] they heighten awareness of problems faced by indigenous communities, which can in turn generate solutions; they garner negative publicity which can pressure governments into action; and they provide opportunities for collaboration and activism by indigenous peoples and their supporters.[154]

Admittedly, resort to international law is no panacea for postcolonial disputes around indigenous land rights. At the very least, however, given the procedural and substantive limitations inherent in domestic litigation, evolving international standards present options of potential value. These need not be invoked narrowly through dispute-resolution procedures, but can also be used less confrontationally as evidence of customary international law in order to guide negotiations between indigenous peoples and States and shape legislative and executive policy. In this way, equivocal common-law standards need not figure as the only model for indigenous peoples seeking redress for historical dispossession.

[151] *Cal* (n 95) [118]–[34].

[152] See, eg, *Mary and Carrie Dann v US* Case No. 11.140 (IACHR 15 Oct 2001); *Yakye Axa Indigenous Community v Paraguay* Series C no 125 (Inter-Am Ct HR 17 Jun 2005); *Moiwana Village v Suriname* Series C no 145 (Inter-Am Ct HR 8 Feb 2006); *Sawhoyamaxa Indigenous Community v Paraguay* Series C no 146 (Inter-Am Ct HR 29 Mar 2006); and Saramaka Peoples v Suriname Series C no 172 (Inter-Am Ct HR 28 Nov 2007).

[153] BJ Richardson, S Imai and K McNeil, 'Indigenous Peoples and the Law–Historical, Comparative and Contextual Issues' in *Indigenous Peoples and the Law* (n 98) 11–12.

[154] LJ Alvarado, 'Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of *Awas Tingni v Nicaragua*' (2007) 24 ArizJIntl&CompL 609.

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