The "Golden Thread" of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982

Mark D. Walters*

In this article, the author considers the relationship between the common law status of Aboriginal customs and the constitutional status of Aboriginal rights under section 35(1) of the *Constitution Act, 1982*. It is argued that British imperial and colonial legal precedent provides a basis for a modern interpretation of Aboriginal rights that recognizes Aboriginal customary laws and government. The common law "principle of continuity" under which Aboriginal customs were recognized was employed by judges in order to respect the separation of powers, the rule of law, and fairness, and was not primarily concerned with preserving distinctive cultures. Although Australian courts have re-interpreted common law history to secure a modern theory of Native title, the Supreme Court of Canada in recent cases has chosen to reject the common law foundation of Aboriginal rights, choosing instead to develop a theory of Aboriginal rights from first principles. While the Court's rejection of restrictive imperial/colonial legal precedent is admirable, the author argues that the Court's "integral to a distinctive culture" test actually secures a narrower range of Aboriginal customs than that secured by common law.

Dans cet article, l'auteur examine la relation entre le statut des coutumes aborigènes sous la common law et le statut constitutionnel des droits aborigènes sous l'article 35(1) de la *Loi constitutionnelle de 1982*. Il est soumis que le précédent anglais impérial et colonial fournit un fondement pour une interprétation moderne des droits aborigènes qui reconnaîtrait les lois coutumières et le gouvernement aborigènes. Le «principe de continuité» en common law sous lequel les coutumes aborigènes ont été reconnues a été employé par les juges afin de respecter la séparation de pouvoirs, la primauté du droit et l'équité. Il n'avait pas pour but primaire de préserver des cultures distinctes. Bien que les tribunaux australiens aient reconnu, dans l'histoire de la common law, l'intention d'assurer une théorie moderne de titres indigènes, la Cour Suprême du Canada, dans des arrêts récents, a choisi de rejeter le fondement en common law des droits aborigènes, pour développer une théorie de droits aborigènes à partir de principes primaires. Alors que ce rejet du précédent impérial et colonial soit admirable, l'auteur soumet qu'en examinant si une coutume fait «partie intégrante de la culture distinctive», la Cour assure une catégorie de coutumes aborigènes qui est plus étroite que celle assurée par la common law.

* Faculty of Law, Queen's University. This article is a based upon a paper given by the author at the "Empires, Colonies, Legal Cultures" conference organized by the Australian and New Zealand Law and History Society and the Canadian Law and Society Association, held in Melbourne, Australia on July 3-5, 1998. The author would like to thank participants in the conference for their helpful comments.

To be cited as: (1999) 44 McGill L.J. 711
Mode de référence : (1999) 44 R.D. McGill 711

> *The history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread—the recognition by the common law of the ancestral laws and customs [of] the aboriginal peoples who occupied the land prior to European settlement.*
>
> *McLachlin J., from her dissenting opinion in* R. *v.* Van der Peet.

Introduction

For historians interested in law and lawyers interested in history, the recent re-emergence and revitalization of the common law doctrine of Aboriginal rights in Canada, Australia, and New Zealand is significant.[1] In each of these jurisdictions, judges have sought to accommodate appropriate modern-day responses to Aboriginal claims—which are largely historical in nature—within the common law—which is (paradoxically) both historical and ahistorical in orientation. The resulting doctrine of "common law Aboriginal rights" is itself a paradox: it involves, among other things, judicial (re)interpretation and (re)application of imperial and colonial legal precedents in a post-imperial and post-colonial setting to secure Aboriginal rights that were often denied by imperialism and colonialism.[2]

Playing a central but ambiguous part in this reinvigorated common law doctrine of Aboriginal rights is the idea of "continuity". At least three different and distinct sorts of continuity can be identified within the doctrine. First, the law is concerned in some way with the continuity of Aboriginal "identities". These identities (national, cultural, political, and/or legal), and their concomitant territorial foundations (the lands and resources upon which they were based) pre-dated colonialism, survived (*de facto* at least) colonialism and, it is argued, ought to be recognized and protected today. Second, judges seek to achieve a sense of continuity of "legal rules and principles": true to the common law tradition, they prefer to locate the legal genesis of to-

---

[1] The landmark decisions confirming the common law foundation of Aboriginal rights are: in Canada, *Calder* v. *British Columbia (A.G.)*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145 [hereinafter *Calder* cited to S.C.R.]; in New Zealand, *Te Weehi* v. *Regional Fisheries Officer*, [1986] 1 N.Z.L.R. 680 (H.C.), online: LEXIS (NZ/NZCAS) [hereinafter *Te Weehi*]; and in Australia, *Mabo* v. *Queensland (No. 2)* (1992), 107 A.L.R. 1, 175 C.L.R. 1 (H.C.) [hereinafter *Mabo* cited to A.L.R.].

[2] See *e.g. Williams* v. *Minister, Aboriginal Land Rights Act 1983* (1994), 35 N.S.W.L.R. 497 at 515 (C.A.), online: LEXIS (AUST/AUSMAX), Kirby J.: "The law which has often been an instrument of injustice to Aboriginal Australians can also, in proper cases, be an instrument of justice in the vindication of their legal rights"; and J. Borrows & L.I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 Alta. L. Rev. 9 at 27, arguing that the common law can be "re-forged to accommodate Aboriginal cultures."

day's Aboriginal rights in old judicial precedent. Third, the law of Aboriginal rights is concerned in some way with "inter-systemic" continuity: common law Aboriginal rights derive, in part, from the continuity of Aboriginal customary legal systems, or at least elements of them, within non-Aboriginal legal systems.

The purpose of this article is to consider the ways in which judges have attempted to acknowledge continuity in the first sense—continuity of identities—by recognizing continuity in the third sense—inter-systemic legal continuity—and the extent to which, in doing so, they have adopted or rejected continuity in the second sense—internal continuity of rules and principles within the common law. Part I begins by examining the general ways in which British law in the seventeenth, eighteenth, and nineteenth centuries recognized the local laws and customs of nations that, by consent or force, were added to the British empire, with particular emphasis on the common law justifications for judicial recognition of local law and custom. Part II considers recent cases from Australia and Canada that illustrate divergent approaches to continuity of Aboriginal customary law and, indeed, divergent ideas about the relationships between past and present law and between past and present cultural identities. Particular focus will be placed upon recent Supreme Court of Canada decisions that, arguably, articulate Aboriginal rights as historical-cultural rights by detaching the law from its historical common law foundations. The conclusion drawn is that there are good reasons for having regard to "legal" arguments about colonial and imperial legal history when articulating a theory of Aboriginal rights suitable for the present post-colonial and post-imperial world.

I. The British Imperial Common Law Principle of Continuity: Its Forms and Justifications

Imperialist powers were not always interested in exporting their municipal laws to the nations they subjugated. Indeed, the political hegemony of an empire often depended upon an imperial constitution premised upon legal pluralism. This was the case for the British empire: under the umbrella of Crown sovereignty, distinct nations and national institutions, and laws and customs proliferated. Of course, when imperialism was accompanied by colonialism—*i.e.*, the settlement of British peoples within subjugated territories—English municipal law was usually introduced, and some set of principles governing the relationship between local law and English law was necessary.

Judges did not often distinguish between "imperial" and "municipal" law, but that distinction was of critical importance to their articulation of these principles. As Coke C.J. observed in the early seventeenth century, England and its imperial possessions were governed internally by "several and distinct municipal laws."[3] The legal rules governing the relationship between these municipal legal components and the assertion of sovereignty over new components derived not from English municipal law, but

[3] *Calvin's Case* (1608), 7 Co. Rep. 1a at 19b, 77 E.R. 377 (K.B.) [hereinafter cited to Co. Rep.].

from a separate body of law. Seventeenth-century judges were clear in this respect: "When the question is of the jurisdiction in a dominion or territory belonging to England, the way to determine it is by examining the *law in dominions*," not law "within the realm [of England]."[4] The law relating to the Crown's dominions was later called "the law of empire"[5] or the law of "the British colonial empire,"[6] and can therefore be called imperial law.

Imperial law often derived from prerogative or parliamentary legislation, but certain important imperial legal principles were developed by judges and may therefore be called principles of "imperial common law". In relation to the substantive content of the municipal laws governing distinct components of the empire, the imperial common law provided that: (i) in uninhabited territories acquired by discovery and occupation or settlement, settlers were presumed to be governed by English municipal law as their "birthright", as adjusted to local conditions;[7] and (ii) in inhabited territories acquired by conquest or cession, Parliament or the Crown could abrogate or alter local law, but until this power was exercised, local laws, institutions, customs, rights, and possessions remained in force.[8]

This latter presumption may be called the "principle of continuity".[9] It is this principle that is said to represent at least one of the pillars supporting the common law doctrine of Aboriginal rights.[10]

---

[4] *Process into Wales* (1670), [1668-74] Vaugh. 395 at 418, 124 E.R. 1130 (K.B.) [hereinafter cited to Vaugh.] [emphasis added].

[5] *Campbell* v. *Hall*, [1774] Lofft. 655 at 682, 98 E.R. 848 (K.B.) [hereinafter *Campbell* cited to Lofft.].

[6] *The Queen* v. *Symonds* (1847), [1840-1932] N.Z.P.C.C. 387 (S.C.) at 393 [hereinafter *Symonds*].

[7] See *Blankard* v. *Galdy* (1693), 4 Mod. 215, 91 E.R. 356 (K.B.) [hereinafter *Blankard* cited to Mod.]; *Dutton* v. *Howell* (1693), Show. 24 at 31 (*per* counsel), 1 E.R. 17 (H.L.) [hereinafter *Dutton* cited to Show.]; *Anon.* (1722), 2 P. Wms. 75 (P.C.); *Roberdeau* v. *Rous* (1738), 1 Atk. 543, 26 E.R. 342 (Ch.); and W. Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-69) vol. 1 at 106-107.

[8] See *Calvin's Case*, *supra* note 3 at 17b; *Case of Tanistry* (1608), Davis 28 at 30 (*per* plaintiff), 80 E.R. 516 [hereinafter cited to Davis]; *Craw* v. *Ramsey* (1669), 2 Vent. 1 at 4, 86 E.R. 273; *Witrong* v. *Blany* (1674), 3 Keb. 401 at 402, 84 E.R. 789 [hereinafter *Witrong* cited to Keb.]; *Dawes* v. *Painter* (1674), 1 Freem. 175 at 176, 89 E.R. 126 [hereinafter *Dawes* cited to Freem.]; *Dutton*, *supra* note 7 at 31 (*per* plaintiff); *Blankard*, *supra* note 7 at 225-26; *Anon.*, *supra* note 7; and *Campbell*, *supra* note 5 at 741.

[9] Also labelled the "doctrine of continuity" in B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983) at 1 [hereinafter *Ancestral Lands*].

[10] See generally B. Slattery, *The Land Rights of Canadian Indigenous Peoples, As Affected by the Crown's Acquisition of Their Territory* (D.Phil. Thesis, Oxford University, 1979) [unpublished] at 50-60; *Ancestral Lands*, *ibid.* at 10-15; G. Lester, *Inuit Territorial Rights in the Canadian Northwest Territories* (Ottawa: Tungavik Federation of Nunavut, 1984) at 13-15; P. McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (New York: Oxford University Press, 1991) at c. 4 [hereinafter *Maori Magna Carta*]; and M.D. Walters, "*Mohegan Indians* v. *Connecticut* (1705-

The imperial common law principle of continuity was applied by judges in diverse circumstances throughout the world and, not surprisingly, it was applied in somewhat different ways in relation to different peoples and places. However, some general principles may be derived from the cases. In particular, the cases may be categorized according to the legal dimension within which the continuity of indigenous law and custom was said to occur. Although rarely explicit about these matters, the cases seemed to distinguish between what may be labelled "inclusive" and "exclusive" continuity, and between what may be labelled "imperial" and "municipal" continuity.

A. *Inclusive and Exclusive Common Law Continuity*

British judges applied an inclusive principle of continuity. Unlike rules of private international law that allow judges to apply foreign laws, the principle of continuity served to incorporate local law as British law.[11] Local law continued in force "excepting in point of [sovereignty]"[12]—*i.e.*, it gained a new sovereign root or "rule of recognition".[13]

The case of *Connolly* v. *Woolrich*[14] is illustrative of this inclusive principle of continuity. In 1803, a non-Native trader from Quebec, Connolly, married a Cree woman in British North American territories that, at the time, lay outside the boundaries of any local colonial government. Connolly later returned to Quebec and married a non-Native woman to whom he willed his estate. After his death, children from the first marriage challenged the will in the Quebec courts, arguing that because the first marriage was valid under Aboriginal customary law, the second marriage was invalid. Monk J. acknowledged that Cree law was "as regards the jurisdiction of this Court"—*i.e.*, a Quebec colonial court—"a foreign law of marriage," and was therefore cognizable under the *lex loci contractus* rule of private international law.[15] However, Monk J. insisted that there was another reason for Quebec courts to recognize and apply Cree custom. His Lordship said that since no legislative instrument could be found "abolishing or changing the customs of the Indians"[16] after Britain had acquired sovereignty in 1763, these customs continued in force, and "so long as they are in force

---

1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33 Osgoode Hall L.J. 785 at 791-92 [hereinafter "*Mohegan Indians*"].

[11] There are, of course, similarities between private international law and common law incorporation of local laws in newly acquired territories: see H.A. Amankwah, "Post-*Mabo*: The Prospect of the Recognition of a Regime of Customary (Indigenous) Law in Australia" (1994) 18:1 U. Queensland L.J. 15 at 16.

[12] *Process into Wales*, *supra* note 4 at 400.

[13] See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 144-46.

[14] (1867), 17 R.J.R.Q. 75, 11 L.C. Jur. 197 (Qc. Sup. Ct.) [hereinafter *Connolly* cited to R.J.R.Q.], aff'd (*sub nom. Johnstone* v. *Connolly*) (1869), 17 R.J.R.Q. 266, 1 C.N.L.C. 151 (Qc. Q.B.) [hereinafter *Johnstone* cited to R.J.R.Q.].

[15] *Connolly*, *ibid.* at 138.

[16] *Ibid.* at 96.

as a law in any part of the British empire," it was incumbent upon British colonial courts to "acknowledge and enforce them."[17] Thus, Cree marriage custom was applied not as foreign law but as part of the law of the British empire—there had been *inclusive* continuity of Aboriginal custom *within* British law.

In contrast, the exclusive principle of continuity provides that local laws and institutions remain in force after the assertion of British sovereignty not as elements of British law, but as foreign legal systems. The idea of exclusive continuity derives from American judicial interpretations of Crown practice and policy in North America.

American courts concluded that upon the discovery of North America, the British Crown acquired property and territorial sovereignty in all lands,[18] as well as the sole right as between European states to extinguish—by conquest or cession—Aboriginal rights to self-government and land.[19] Although English law was presumed to apply within settler communities,[20] Indians remained distinct, self-governing nations with limited rights of sovereignty.[21] British (and later American) territorial sovereignty and Native "tribal" sovereignty co-existed.[22] Judicial recognition of "tribal sovereignty" was based on "the general principle that '[i]t is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror'"[23]—*i.e.*, the common law principle of continuity. However, unlike British imperial law, which provided that conquest did not by itself affect existing laws or insti-

---

[17] *Ibid.* at 138.

[18] *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) at 595-96, online: WL (ALL CASES-OLD) [hereinafter *M'Intosh*]; *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810), online: WL (ALL CASES-OLD) [hereinafter *Fletcher*]; and *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831) at 22, online: WL (ALL CASES-OLD) [hereinafter *Cherokee Nation*].

[19] *M'Intosh*, *ibid.* at 573, 589; *Fletcher*, *ibid.* at 142-43, 147; and *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) at 544, 580, online: WL (ALL CASES-OLD) [hereinafter *Worcester*].

[20] *Commonwealth* v. *Knowlton*, 2 Mass. Rep. 530 (Sup. Ct. 1807) at 534, online: WL (ALL CASES-OLD); *Town of Pawlet* v. *Clark*, 13 U.S. (9 Cranch.) 292 (1815) at 333, online: WL (ALL CASES-OLD); and *Van Ness* v. *Pacard*, 27 U.S. (2 Pet.) 137 (1829) at 144, online: WL (ALL CASES-OLD).

[21] *Fletcher*, *supra* note 18 at 147; *M'Intosh*, *supra* note 18 at 587-89; *Cherokee Nation*, *supra* note 18 at 16; and *Worcester*, *supra* note 19 at 542-43.

[22] *Cherokee Nation*, *ibid.* at 27, Johnson J.: "Though without land that they can call theirs in the sense of property, their right of personal self-government has never been taken from them; and such a form of government may exist though the land occupied be in fact that of another." See also *Goodell* v. *Jackson*, 20 Johns. 693 (N.Y. Ct. of Errors 1823) at 714, 717, Kent J. [hereinafter *Goodell*]: "[M]ere territorial jurisdiction" of Britain is not inconsistent with continuity of "*Indian* sovereignty" [emphasis in original]; *Fletcher*, *supra* note 18 at 147, Johnson J.: "[T]heir sovereignty" was limited insofar as Britain (and the United States) had the right to govern others "within their limits except themselves"; and *Worcester*, *supra* note 19 at 580, McLean J.: Natives did not have "sovereignty of the country" but had "attributes of sovereignty" or "self-government".

[23] N. Margold, *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974*, vol. 1 (Washington: Government Printing Office, 1974) at 448; and F. Cohen, *Handbook of Federal Indian Law* (Washington: Department of the Interior, 1945) at 122: both authors quoting *Wall* v. *Williamson*, 8 Ala. 48 (Sup. Ct. 1845) at 51, online: WL (AL-CS).

tutions that continued in force "excepting in point of [sovereignty],"[24] American law provided that "[c]onquest ... [did] not by itself affect the internal sovereignty of the tribe."[25] The reason for this "new and different" rule was that Indians were regarded as "fierce savages" incapable of being incorporated within British or American legal systems.[26] The new rule, then, regarded Native peoples as aliens, and Native laws as foreign as long as Indians retained possession of their lands. Neither Natives nor settlers placing themselves "under their protection, and subject to their laws" could complain about the application of Aboriginal customary law in the non-Native courts.[27] Even after commencement of treaty relations and settlement of Indian nations within reservations, the doctrine of tribal sovereignty continued to inform judicial approaches to Aboriginal customary law. When questions about Native customary law arose in cases otherwise subject to the jurisdiction of state courts, these courts applied Aboriginal custom not as elements of American law, but pursuant to private international law as elements of foreign legal systems.[28]

B. Imperial and Municipal Common Law Continuity

In addition to the inclusive/exclusive distinction, a distinction may be drawn between continuity in the imperial and municipal legal dimensions. Under the exclusive principle of continuity, local law remained in force as a distinct municipal legal system outside the imperial constitution. Under the inclusive principle of continuity, local law continued in force in one of two legal dimensions: (i) as a distinct municipal legal system within the imperial constitution, or (ii) as an element of another municipal system within the imperial constitution. The former sort of continuity is imperial continuity and the latter, municipal continuity. Thus, when the assertion is made that Native custom "continued in force at common law," it is not necessarily the case that Native custom continued as part of the *municipal* common law introduced into a colony for settlers; it may have continued in force at *imperial* common law as a municipal system in its own right.

Inclusive continuity in the imperial dimension was assumed whenever Britain asserted sovereignty over another European people. In such a case, British arrivals within

---

[24] *Process into Wales*, *supra* note 4 at 400.

[25] Margold, *supra* note 23 at 449.

[26] *M'Intosh*, *supra* note 18 at 589-91.

[27] *Ibid.* at 593-94. See *Worcester*, *supra* note 19 at 581, McLean J.: in applying "their own laws" Natives were "responsible to no earthly tribunal"; and at 546-47, 555, Marshall C.J. See also *Goodell*, *supra* note 22 at 710-17; *Jackson* v. *Hudson*, 3 Johns. 375 (Ch. 1808) at 384; *Jackson* v. *Wood*, 7 Johns. 290 (Ch. 1810) at 295; *State* v. *Ross*, 15 Tenn. 44 (1834) at 46; *Elk* v. *Wilkins*, 112 U.S. 94 (1884), online: WL (ALL CASES-OLD); and C. Cushing (Attorney-General), "Relation of Indians to Citizenship" (1856) 7 Ops. Att. Gen. 746.

[28] *Holland* v. *Pack*, 7 Tenn. 157 (C.A. 1823); *Morgan* v. *M'Ghee*, 24 Tenn. 5 (Sup. Ct. 1844) at 6-7; *Johnson* v. *Johnson's Administrator*, 77 Am. Dec. 598 (Mo. Sup. Ct. 1860) at 603; *Earl* v. *Godley*, 44 N.W. 254, 42 Minn. 361 (Sup. Ct. 1890); and *McBean* v. *McBean*, 61 Pac. 418, 37 Or. 195 (Sup. Ct. 1900).

the territory lived under the same local municipal legal system that continued in force for local inhabitants.[29] However, when Britain asserted sovereignty over non-Christian peoples, nineteenth-century courts concluded that, within their colonial enclaves, settlers were not subject to the local law that remained in force as the municipal legal system of Natives within Native communities; rather, English municipal law applied. Thus, cases from North America[30] and India[31] suggest that in these circumstances, judges might presume the existence of two parallel municipal systems in the relevant territory.

The common law presumption of continuity of local law as a distinct municipal system in the imperial dimension was rebutted once a legislative instrument extended English municipal law and institutions over the local community. Thereafter, local law and custom continued (if at all) as elements of local municipal law.[32] The recognition of Native customs under these conditions was not unlike the recognition by English common law in England of local or "particular" customs (like Gavel-kind or Borough-English) practised since time immemorial.[33] Indeed, the continuity of Native customs under newly introduced English municipal law can be explained by reference to a hybrid principle that combined elements of both the imperial common law principle of continuity and the municipal common law particular-custom rule. In essence, the municipal particular-custom rule applied, but the normal requirement of immemorial usage was replaced by continuity of law from a preceding legal system. Judicial support for this hybrid rule derives from Wales[34] and Ireland.[35]

---

[29] *Campbell*, *supra* note 5 at 741.

[30] *Connolly*, *supra* note 14 at 84: in general, English law applied as settlers' birthright in newly discovered uninhabited territories, but in North America, English law would only apply within "trading posts" and would not serve to abrogate "the territorial rights, political organization ... or the laws and usages of the Indian tribes." See "*Mohegan Indians*", *supra* note 10, in which various imperial courts, including the Privy Council, suggested that the Mohegan nation within the colony of Connecticut was a distinct municipal system separate from Connecticut municipal law and courts. See also B. Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal & Kingston: McGill-Queen's University Press, 1990) at c. 1.

[31] See *Freeman* v. *Fairlie* (1828), 1 Moore Ind. App. 305, 18 E.R. 117 (P.C.) [hereinafter *Freeman* cited to Moore Ind. App.]; *In re Justices of Bombay* (1829), 1 Knapp. 1 at 31-32, *per* counsel, 12 E.R. 222 (P.C.); C. Pratt. (Attorney-General) & C. Yorke (Solicitor-General) in G. Chalmers, ed., *Opinions of Eminent Lawyers, on Various Points of English Jurisprudence, Chiefly Concerning the Colonies, Fisheries, and Commerce of Great Britain*, vol. 1 (London: Reed & Hunter, 1814) 195; Sir C.P. Ilbert, *The Government of India, Being a Digest of the Statute Law Relating Thereto*, 2d ed. (Oxford: Clarendon Press, 1905) at 39-59, 490-94, 511, 514-15; and *Maori Magna Carta*, *supra* note 10 at 83-97.

[32] *Maori Magna Carta*, *ibid.* at 92-93.

[33] Blackstone, *supra* note 7 at 76-79. See *e.g. Blankard*, *supra* note 7 at 225: local laws continued until English law was introduced, but "even then some of their old customs may remain."

[34] See *Anon.* (1579), 3 Dyer 363b where Welsh law remained in force as a distinct municipal system after the English conquest. By *Act of Union*, 1536 (U.K.), 27 H. VIII, c. 26, however, Wales was unified with England and English law extended into Wales. Nevertheless, it was held that certain Welsh customs could continue in force because they were "agreeable to some customs in England" and be-

Although the imperial common law principle of continuity forms part of this hybrid principle, the dimension within which Native customs are recognized is clearly municipal, not imperial. Nevertheless, the imperial character of the principle of continuity continues to inform a custom's status at the municipal level. Since the custom derives legitimacy not from immemorial usage but from a preceding legal regime, it may be capable of alteration by the Native community within which it applies. In other words, English municipal law, as adjusted to local conditions, may recognize elements of Native self-government. According to Paul McHugh, the distinction between Native custom in a colonial setting and particular custom in England is illustrated by *Hineiti Rirerire Arani* v. *Public Trustee of New Zealand*, in which Lord Phillimore stated in relation to Maori adoption custom:

> [T]he [Native] Appellate Court said [in a 1906 case]: "It is, however, abundantly clear that Native custom, and especially the Native custom of adoption, as applied to the title of lands derived through the Court, is not a fixed thing. It is based upon the old custom as it existed before the arrival of Europeans, but it has developed, and become adapted to the changed circumstances of the Maori race of today."
>
> It may well be that this is a sound view of the law, and that the Maoris as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs, and that the custom of such a race is not to be put on a level with the custom of an English borough or other local area which must stand as it always has stood, seeing that there is no quasi-legislative internal authority which can modify it.[36]

In other words, the abrogation of Native law as a distinct municipal system within the Empire did not necessarily imply the abrogation of Native law as a distinct system. Native systems might have gained recognition under English municipal common law.

---

cause English law was "to be ministered in like form as in this realm" (*Case of Tanistry*, *supra* note 8 at 40).

[35] In *Case of Tanistry*, *ibid.* at 30, the plaintiff argued that the principle of continuity articulated in *Calvin's Case*, *supra* note 3 at 17b, supported the proposition that the Irish custom of "tanistry" continued in force after the English conquest of Ireland, and that this custom could survive the subsequent legislative introduction of English municipal law into Ireland, and be recognized by that law, on the same grounds that the custom of Gavel-kind was recognized in Kent by English common law. In the end, the plaintiff lost because tanistry was regarded as too uncertain to govern the descent of property.

[36] (1919), [1920] A.C. 198, [1840-1932] N.Z.P.C.C. 1 (P.C.) at 6 [footnotes omitted] [hereinafter *Hineiti* cited to N.Z.P.C.C.]. Local legislation did require courts to have regard to Maori customs relating to land, but this does not alter the relevance of the quoted comment to situations where Native custom only had common law statns: see P. McHugh, *The Aboriginal Rights of the New Zealand Maori at Common Law* (Ph.D. Thesis, Cambridge University, 1987) at 179-80 [unpublished].

C. Discontinuity

Many judges refused to accept that the laws and customs of non-Christian, non-European peoples could be recognized and applied as British laws by British courts. At the time when colonists first began heading for North America, Coke C.J. insisted that upon conquest all "infidel" laws were *ipso facto* void as contrary to the "decalogue".[37] Although the common law attitude to "infidel" law was later modified—Holt C.J. concluded that only infidel laws contrary to the law of God ceased automatically[38]—a second ground for discontinuity developed. By the nineteenth century, it became increasingly common for judges to say that the customs of tribal peoples were "barbarous", "savage", or "uncivilized" and incapable of recognition at common law, and that therefore there was no common law Aboriginal right to lands, resources, or customs.[39] Discontinuity is now regarded as a detour from proper common law principles that certain judges in Canada[40] and New Zealand,[41] and all judges in Australia,[42] took until fairly recently.

Having examined the ways in which judges acknowledged (and did not acknowledge) local law and custom, it is now necessary to consider in more detail the justifications for the principle of continuity.

D. Common Law Justifications for Continuity

So common was imperialist recognition of local laws and institutions that the policy was regarded as a principle of the *jus gentium*. Citing Roman practice, Grotius stated that although a conquering power could impose new laws upon a subjected

---

[37] *Calvin's Case*, *supra* note 3 at 17b. See also *Witrong*, *supra* note 8 at 402; and *East-India Co.* v. *Sandys* [1683-85] 10 St. Tr. 371 at 374-75, *per* counsel. Coke C.J.'s *dicta* were applied to Aboriginal law in the United States in *Cornet* v. *Winton's Lessee*, 10 Tenn. 129 (Sup. Ct. 1826) at 137, and *State* v. *Foreman*, 16 Tenn. 171 (Sup. Ct. 1835) at 177.

[38] *Blankard*, *supra* note 7.

[39] See *R.* v. *Billy William* (Demerara and Essequibo, 1831), reprinted in U.K. Parliamentary Papers, vol. 44, No. 617 at 180; *MacDonald* v. *Levy* (1833), 1 Legge 39 at 45 (N.S.W. Sup. Ct.); *R.* v. *Jack Congo Murrell* (1836), 1 Legge 72 (N.S.W. Sup. Ct.); G. Grey, "Report Upon the Best Means of Promoting the Civilization of the Aboriginal Inhabitants of Australia (1840)" in *Historical Records of Australia*, vol. 21 (Sydney: Commonwealth Parliament, 1924) 34; *Wi Parata* v. *Bishop of Wellington* (1877), 3 N.Z. Jur. (N.S.) 72 (S.C.) at 77 [hereinafter *Wi Parata*]; *Cooper* v. *Stuart* (1889), 14 A.C. 286 at 291, 58 L.J.P.C. 93 (P.C.); *Milirrpum* v. *Nabalco Pty Ltd.* (1971), 17 F.L.R. 141 (N.T.S.C.) at 201, [1972-73] A.L.R. 65 [hereinafter *Milirrpum*]; and *Coe* v. *Commonwealth of Australia* (1979), 24 A.L.R. 118 at 129 (H.C.), online: LEXIS (AUST/AUSMAX).

[40] Whereas *Connolly*, *supra* note 14, recognized Aboriginal customary law and institutions, in *Dodem Sheldon* v. *Ramsay* (1852), 9 U.C.Q.B. 105 at 123, Robinson C.J. appeared in *obiter* to reject the possibility of recognition, saying "the common law is not part savage and part civilized."

[41] Whereas *Symonds*, *supra* note 6, confirmed common law Maori rights, *Wi Parata*, *supra* note 39, later denied them. See P. McHugh, "Aboriginal Title in New Zealand Courts" (1984) 2 Canterbury L. Rev. 235.

[42] See *Milirrpum*, *supra* note 39.

people, the decision to leave in place their own laws and government was "not only an act of humanity, but often an act of prudence also."[43] Although the common law principle of continuity was often traced to the *jus gentium*,[44] Grotius's rationale for continuity is really one of legislative policy rather than justiciable principle. It is therefore important to identify the common law juridical foundations for the principle of continuity—*i.e.*, the reasons behind continuity that would have been compelling to judges as opposed to legislators. Four general common law justifications for the principle of continuity may be identified.

1. Precedent and Past Practice

It can be argued that no better reason exists for a common law judge to apply a particular principle or rule of law than the fact that other judges have done so in similar cases in the past. If so, then the principle of continuity is on solid common law footing. Solicitor-General Sir Francis Bacon asserted in 1608 that there were "many ancient precedents" for the principle of continuity.[45] Indeed, cases in which it was applied date from the dawn of the common law itself: the principle was applied to the status of Saxon rights after the Norman conquest.[46] Seventeenth-century courts did not

---

[43] H. Grotius, "De Jure Belli Ac Pacis Libri Tres" in J.B. Scott, ed., *Classics of International Law*, trans. F.W. Kelsey (Oxford: Clarendon Press, 1925) bk. 3 at c. 8, pt. 1, para. 1; see also c. 15, pts. 9, 10, and c. 8, pt. 4.

[44] *Case of Tanistry*, *supra* note 8 at 30 (*per* plaintiff); *Campbell*, *supra* note 5 at 698, *per* defendant; *The King* v. *Picton* (1812), 30 St. Tr. 225 at 906 (P.C.) (*per* Crown counsel) [hereinafter *Picton*]; F. Maseres (Attorney-General of Quebec), "A Supplement to the Tract written in the year 1766, and intituled Considerations on the Expediency of Procuring an Act of Parliament for the Settlement of the Province of Quebec" Public Record Office (London, U.K.), Colonial Office 42/87:91; J. Marriott (Advocate-General), *Plan of A Code of Laws for the Province of Quebec* (London, 1774) at 12; Opinion of E. Thurlow (Attorney-General) (22 January 1773) in A. Shortt & A.G. Doughty, eds., *Documents Relating to the Constitutional History of Canada, 1759-1791* (Ottawa: The King's Printer, 1918) 440 at 443; *Stuart* v. *Bowman* (1851), 2 L.C.R. 369 (Sup. Ct.) at 408-09, Mondelet J.; and *Johnstone*, *supra* note 14 at 276-78.

[45] "The Argument of Sir Francis Bacon, Knight, His Majesty's Solicitor-General, In the Case of the Post-Nati of Scotland, In the Exchequer Chamber, before the Lord Chancellor, and all the Judges of England" in J. Spedding, R.L. Ellis & D.P. Heath, eds., *The Works of Francis Bacon*, vol. 7 (London: Longman, Green & Co., 1859) 660. See also A.F. McC. Madden, "1066, 1776 and All That: The Relevance of English Medieval Experience of 'Empire' to Later Imperial Constitutional Issues" in J.E. Flint & G. Williams, eds., *Perspectives of Empire: Essays Presented to Gerald S. Graham* (London: Longman, 1973) 9.

[46] See *Witrong*, *supra* note 8 at 402; *Earl of Derby* v. *Duke of Atholl* (1751), 2 Vesey sen. 337, 28 E.R. 217; and *Case of Ship-Money* (1637), 3 St. Tr. 826 at 1214-15, 1021. For arguments about the continuity of the Saxon Constitution after the Norman conquest, see M. Hale, *The History of the Common Law*, 4th ed. (London: W. Strahan & M. Woodfall, 1779), republished (Littleton, Colo.: Fred B. Rothman & Co., 1987) at 77, 95; F. Plowden, *Jura Anglorum: The Rights of Englishmen* (London: E. & R. Brooke, 1792) at 79; and J. Price, *A General View of the Laws, Government, Revenue, Ecclesiastical, Civil, Military, and Naval Establishments of England*, 2d ed. (London: G. Sael, 1799) at 20.

limit their inquiries to judicial precedent, they were also interested in Crown practice and usage.[47] Judicial and Crown practice may have been important for their precedential weight, but they were likely more important as evidence of reasoned approaches to difficult issues (of natural law and reason) and of the extent to which the reasoned analyses of the *jus gentium* in particular had been adopted in Crown usage.[48] In short, it is necessary to look behind references to judicial and state practice to discover the true reasons for the principle of continuity.

2. The Separation of Powers

One legal reason for the principle of continuity was the constitutional separation of powers under the British constitution.[49] From the inception of England's medieval empire, it was recognized that the decision to abrogate or amend local law was a matter for the legislative branches of the State. As Sanders J. observed in 1554 in relation to local law and custom in Wales after its English conquest:

> Edward the first made the Statute of Snowden [in 1284], by which it appears that he considered and perused all the laws of Wales, and some of them he utterly repealed, some he permitted to stand, some he corrected, and some he made anew, and to others he made additions, as he well might, for those under whom the government of Wales was, had always authority to make laws among them.[50]

For a judge to presume to apply English (or any other) law instead of local Welsh custom prior to the above-mentioned statute would have precluded the Crown from deciding, in its legislative capacity and as a matter of policy, which local laws to keep, which to amend, and which to repeal. Thus, English law could not and did not fully displace Welsh law and custom until there were "means to effect it"—namely, a statute.[51] This general point was made more recently and more clearly by Monk J. in *Connolly*:

> The supreme authority of the empire, in not abolishing or altering the Indian law, and allowing it to exist for one hundred years, impliedly sanctioned it. ... [The custom] obtains within the territories and possessions of the Crown of England, and until it is altered, I cannot disregard it. *It is competent; it has been competent during the last hundred years, for the parliament of Great Britain to*

---

[47] See *e.g. Calvin's Case*, *supra* note 3 at 12b, 18b-23b.

[48] *Ibid.*

[49] For a recent statement of the doctrine of separation of powers and the limited role of judges under that doctrine, see *M.* v. *Home Office* (1993), [1994] 1 A.C. 377 at 395, [1993] 3 All E.R. 537 (H.L.).

[50] *Buckley* v. *Rice Thomas* (1554), 1 Plowden 118 at 126, 75 E.R. 182 (K.B.) [hereinafter *Buckley* cited to Plowden]. On this statute, see also *Witrong*, *supra* note 8 at 402; and *Process into Wales*, *supra* note 4 at 398-99.

[51] *Buckley*, *ibid.* at 130.

> *abrogate those Indian laws, and to substitute others for them. It has not thought proper to do so, and I shall not.*[52]

Aside from policy considerations of humanity or political prudence, then, there was a simple legal reason why judges presumed local law to continue: under the doctrine of separation of powers, they had no legislative capacity to change or repeal laws.[53]

3. The Rule of Law (or Necessity)

The ideal represented by the expression "the rule of law" is one to which common law judges have traditionally aspired.[54] According to Joseph Raz, the extent to which a legal system embodies the rule of law bears no relationship to the moral worthiness of the substantive content of its laws—the rule of law may be manifested by evil legal systems very well.[55] However, even Raz accepts that because adherence to the rule of law involves ensuring that power is exercised according to clear, prospective, stable legal rules that are capable of observance and of guiding human behaviour, human dignity is enhanced by its observance even if the substantive content of law is morally repugnant.[56] Whether or not one shares Raz's jurisprudential views,[57] it is clear that judges were forced to confront legal problems arising under an imperial system that was regarded, even by the standards of the day, as morally suspect.[58] In responding to this challenge, they attempted, in so far as feasible within the restricted confines of the judicial role, to develop the imperial common law consistently with the rule of law.

Like the separation of powers, the rule of law—or as judges often said, the principle of "necessity"—is a justification for continuity that is uniquely appropriate for judicial application. The argument is simple: until some alternative law is provided and

---

[52] *Connolly, supra* note 14 at 138 [emphasis added]. In confirming Monk J.'s decision on appeal, Badgley J. agreed, stating that in these circumstances, the "legislative power alone can change the local law" (*Johnstone, supra* note 14 at 333-34).

[53] See generally *Dawes, supra* note 8 at 175-76, where it was said that imperial possessions

> are not governed by the laws of England, unless it were so appointed *by Act of Parliament*; and so Callis and Gascoigne were governed by their own laws; and so are Guernsey and Jersey at this day. ... And so Ireland was not governed by our laws, *till it was so specially ordered by King John* [emphasis added].

See also *Freeman, supra* note 31 at 324-25: local laws remain "till changed by the *deliberate wisdom of the new legislative power*" [emphasis added].

[54] For a recent example, see *Pierson* v. *Home Office*, [1998] A.C. 539, [1997] 3 All E.R. 577 at 605 (H.L.) [hereinafter *Pierson* cited to All E.R.].

[55] J. Raz, "The Rule of Law and its Virtue" (1977) 93 L.Q. Rev. 195.

[56] *Ibid.* at 202-205.

[57] For alternative approaches to the rule of law, see L.L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964); and T.R.S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 Cambridge L.J. 111.

[58] Blaekstone, *supra* note 7, vol. 2 at 7, queried whether "seising on countries already peopled, and driving out or massacring the innocent and defenceless natives ... was consonant to nature, to reason, or to Christianity" (as quoted in *Mabo, supra* note 1 at 22).

enforced, it would undermine the rule of law for judges not to recognize the continuity of existing local laws. As Holt C.J. stated in 1693: "[T]hough a conqueror may make new laws, yet there is a *necessity* that the former should be in force till new are obtained."[59] The Attorney-General for Quebec restated the proposition in 1766, arguing that continuity of local law derived from "the *necessity* of the case, since otherwise the conquered provinces would be governed by no laws at all."[60] The common law simply could not contemplate a legal vacuum—even new subjects of the Crown could not be left in the state of legal uncertainty and chaos that would result. The application of English law was not a viable option. Aside from the separation of powers problem examined above, judges appreciated that any judicial assumption that there was a "sudden application" of English law would result in "great inconvenience, and grievous injustice."[61] It would be "highly inconvenient and dangerous immediately to change" local law.[62] As Monk J. stated in *Connolly*, persons in "remote wilderness" could not travel "three or four thousand miles, in canoes and on foot" to comply with English marriage law; adherence to local Aboriginal custom was the only practical option.[63] Thus, the only judicial principle that secured a stable, ordered legal system capable of guiding human conduct was that which recognized continuity of existing law until alternative legislative provisions were made.

The separation of powers and rule of law justifications for the principle of continuity overlap to a certain extent. An additional reason for judges to insist that it was the job of legislators, not judges, to abrogate local law and introduce English law was that only legislation would meet the requirements of the rule of law as being a clear and prospective source of law capable of guiding individual conduct. Judges insisted that the "alteration of an existing law" in a newly acquired territory be accomplished by legislative instrument the authority of which was clear "on the face of the Act itself."[64] Local law could only be changed by "some public acts" so that those affected "may be informed under whose dominion and under what laws they are to live."[65]

So powerful was the common law presumption of continuity that legislative measures introducing English law as the general law of a colony without expressly abrogating existing local law were occasionally thought to be insufficient to achieve

---

[59] *Blankard, supra* note 7 at 225-226 [emphasis added].

[60] F. Maseres (Attorney-General of Quebec), "Considerations on the Expediency of Procuring an Act of Parliament for the Settlement of the Province of Quebec (1766)" in Shortt & Doughty, *supra* note 44 at 261 [emphasis added]. See also *Picton, supra* note 44 at 946, where Lord Ellenborough said "the old laws continue till the new are introduced, or they must be positively in a lawless state."

[61] *Lyons (Mayor of)* v. *East India Co.* (1836), 1 Moore P.C. 175 at 275, 12 E.R. 782.

[62] *Freeman, supra* note 31 at 324-25.

[63] *Connolly, supra* note 14 at 108-109.

[64] *Cameron* v. *Kyte* (1835), 3 Knapp. 332 at 347, 12 E.R. 678 (P.C.).

[65] *Cremidi* v. *Powell* (1857), 11 Moore P.C. 88 at 97. See also *Advocate General (Bengal)* v. *Ranee* (1863), 2 Moore P.C. (N.S.) 22 at 61, 15 E.R. 808 [hereinafter *Ranee* cited to Moore P.C.]: local laws must be changed by "express enactment".

abrogation. *The Royal Proclamation*[66] of 1763 introduced English law into Quebec after the British conquest of New France; it made no mention of either the abrogation or continuity of the existing French-Canadian legal system. Nevertheless, it was said that the Crown could not have intended to abrogate that system. The Secretary of State for the Colonies invoked the hybrid continuity/particular-custom rule mentioned above and argued that the courts of Quebec ought to apply the "Laws and Customs of Canada, with regard to Property" just as English courts recognized "Gavel-kind Borough-English and several other particular customs."[67] In other words, French-Canadian law would have been regarded as continuing in force in certain localities as an element of the newly introduced English municipal law.

The law officers of the Crown went further. They observed that "[t]here is not a *Maxim* of the *Common Law* more certain than that a Conquer'd people retain their ancient Customs till the Conqueror shall declare New Laws,"[68] and, they concluded, the *Proclamation*'s terms were insufficient to affect this presumption. The "true meaning" of the *Proclamation*, they said, was that only English municipal *criminal* law had been introduced and that French-Canadian property law continued in force.[69] In other words, French-Canadian property law continued in force not as a particular custom under English municipal law, but as the general law of the province under British imperial common law. This became the accepted legal interpretation of the *Proclamation*[70] and it was eventually confirmed by imperial statute.[71] Similarly, a general legislative measure introducing English law was held not to displace Aboriginal marriage custom in western Canada.[72] Thus, the separation of powers and rule of law justifications required not only that abrogation of local law be by legislative instrument, but that the abrogation be express.

---

[66] 1763 (U.K.), 3 Geo. III, reprinted in R.S.C. 1985, App. II, No. 1 [hereinafter *Proclamation*].

[67] Letter from Lord Hillsborough (Secretary of State) to G. Carleton (Governor of Quebec) (6 March 1768), reprinted in Shortt & Doughty, *supra* note 44, 297.

[68] Letter from C. Yorke (Attorney-General) & W. de Grey (Solicitor-General) to the Board of Trade (14 April 1766) in Shortt & Doughty, *ibid.*, 255.

[69] *Ibid.*

[70] Additional Instructions to J. Murray (Governor of Quebec) (24 June 1766), Public Record Office (London, U.K.), Colonial Office 43/1:311; E. Thurlow (Attorney-General) (26 May 1774) in R.C. Simmonds & P.D.G. Thomas, ed., *Proceedings and Debates of the British Parliaments Respecting North America, 1754-1783*, vol. 4 (White Plains, N.Y.: Kraus, 1985) at 53-57; and Marriott, *supra* note 44 at 17.

[71] *Quebec Act*, 1774 (U.K.), 14 Geo. III, c. 83, reprinted in R.S.C. 1985, App. II, No. 2.

[72] *The Queen* v. *Nan-E-Quis-A-Ka* (1889), 1 Terr. L.R. 211, 2 C.N.L.C. 368 (N.W.T. Sup. Ct.) at 215 [hereinafter *Nan-E-Quis-A-Ka* cited to Terr. L.R.]: though legislation had introduced English law into the region, Wetmore J. stated: "I know of no Act of the Parliament of the United Kingdom or of Canada ... which affects in any way these customs or usages."

4. Fairness and Humanity

The separation of powers and rule of law justifications for the principle of continuity may be seen as morally neutral justifications in so far as judges invoking them were concerned not so much about the fairness or justice of respecting continuity than about the procedural steps by which continuity could be lawfully denied. The idea that it was fair and decent to allow a newly subjected people to retain their own laws was rarely, if ever, expressly stated by judges in the seventeenth and eighteenth centuries as a reason for the common law principle of continuity. However, the question about what fairness or humanity required was addressed by writers on the law of nations and must therefore have informed judicial responses. Arguments such as those made by counsel in *Campbell* (citing Grotius), that it was "unusual" for a conqueror to be "harsh and rigorous" and abolish local law and that it was, instead, the practice to be "indulgent" and "suffer the inhabitants ... to possess their own laws,"[73] no doubt influenced judges in their articulation of the common law and construction of legislation. By the nineteenth century, at least certain judges were more open about the moral foundations of the principle. In *Symonds*, for example, Chapman J. insisted that the law relating to Native rights was "animated by the humane spirit of modern times," and governments and courts alike were bound to respect common law Native title "for the sake of humanity."[74] Similarly, Marshall C.J. acknowledged that if judges allowed themselves to be swayed by their "sympathies", they could not help but be moved by the dispossession of Indian nations in the United States of their homelands.[75]

The dictates of humanity and fairness informed the principle of continuity in at least two ways. First, it is a general presumption of common law that rights of property not be taken away in the absence of express legislation.[76] Aboriginal title to land falls within this protective presumption, but so too might "possession" of customs and powers of self-determination.[77] These attributes of nationhood are, clearly, things of value to Native communities, and at least some judges applied the above-mentioned presumption to ensure that Native peoples were not stripped of these valuable possessions except by express legislative instrument.[78] In short, it is only fair that judges presume that things belonging to one people cannot be taken by another.

Fairness and humanity also require respect for cultural differences. By the nineteenth century, courts began to refer expressly to cultural pluralism as a reason for le-

---

[73] *Campbell*, *supra* note 5 at 698.

[74] *Symonds*, *supra* note 6 at 388, 390.

[75] *Cherokee Nation*, *supra* note 18 at 15.

[76] *Cooper* v. *Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180, 143 E.R. 414 (K.B.) [hereinafter *Cooper*].

[77] Indeed the presumption in *Cooper*, *ibid.*, has been extended to all forms of human rights and fundamental constitutional principles: see *Pierson*, *supra* note 54 at 604-605.

[78] Thus, said Johnson J. in *Cherokee Nation*, *supra* note 18 at 27, "their right of personal self-government has never been taken from them," so they must still have it.

gal pluralism. Local law was often thought to be "abhorrent to all feelings, and opinions, and habits" of British society, and therefore judges often applied English law between British settlers even if local law continued to regulate local communities.[79] The converse was also acknowledged. Thus, it was stated that English law was "not applicable to the religious or civil habits of the Mohamedan or Hindoo natives" in India and "on that account," they were "allowed to remain under their own laws."[80] Similarly, one judge held that it would be "monstrous" to construe legislation introducing English law into western Canada as extending English marriage law to the "Territories *quoad* the Indians" for they were "for the most part unchristianized, they yet adhere to their own peculiar marriage custom and usages."[81] Especially in relation to family matters, it was stated elsewhere that the law "treats with tenderness, or at least toleration, the opinions and usages of a distinct people."[82]

There were, however, limits to the common law's tolerance for the usages of culturally distinct peoples. Since Native laws and customs were incorporated into the common law, they had to fit within the moral parameters set by the common law, and any local laws and customs inconsistent with British conceptions of justice or humanity—any customs that were *mala in se*—were considered *ipso facto* void.[83] Indeed, before applying Aboriginal marriage customs in North America, courts ensured that they reflected the sort of rules that the common law itself would impose on marriages conducted in remote places without civil and religious institutions. In *Connolly*, Monk J. concluded:

> This [marriage] law or custom of the Indian nations is ... written in the great volume of nature as one of the social necessities, one of moral obligations *of our race*, through *all time and under all circumstances, binding, essential, and inevitable*, and without which *neither man, nor even barbarianism itself, could exist* upon earth.[84]

In other words, notwithstanding cultural difference, Aboriginal nations of North America followed the same basic customs of marriage as every other human community, and for this reason the custom could be enforced.[85] Those aspects of Aboriginal

---

[79] *Ruding* v. *Smith* (1821), 2 Hag. Con. 371 at 381, 161 E.R. 774 (K.B.) [hereinafter *Ruding* cited to E.R.]. See also *The King* v. *Brampton* (1808), 10 East 282 (K.B.).

[80] *The "Indian Chief"* (1801), 3 C. Rob. 12 at 31-32. See also *Freeman*, *supra* note 31 at 324-25: judges expressed concern that "new subjects" might be "unprepared ... in civil and political character" to receive English laws. See also *Ranee*, *supra* note 65 at 60: laws of India are "at variance with all the principles, feelings and habits of European Christians," and "European laws and usages are as little suited" to natives in India "as the laws of the Mahometans and Hindoos are suited to Europeans."

[81] *Nan-E-Quis-A-Ka*, *supra* note 72 at 215.

[82] *Ruding*, *supra* note 79 at 779.

[83] *Anon.* (1722), 2 P. Wmns. 75 (P.C.).

[84] *Connolly*, *supra* note 14 at 115 [emphasis added].

[85] *Ibid.*

marriage custom, like polygamy, that were (from the British perspective) morally problematic, were held to be "incidental" to the custom and unenforceable.[86]

To summarize, judicial acknowledgement of continuity of local law was informed by considerations of fairness and humanity, though only insofar as judicial office permitted. Like the doctrines of separation of powers and the rule of law, fairness and humanity (in this limited sense) were distinctly common law justifications for the imperial common law principle of continuity.

II. Articulating a Modern Theory of Aboriginal Rights—Judicial Invention or (Re)Interpretation?

A. Mabo *and the "Normative Common Law" Interpretative Method*

To what extent do imperial legal principles relating to continuity of local laws provide a doctrinal foundation for common law Aboriginal rights in former British colonies? A legal historian examining empirical data about what judges actually did would no doubt question the claim that imperial law formed a foundation for Aboriginal rights. In relation to Australia in particular, the expression "common law Aboriginal rights" may be regarded as an oxymoron. Even in New Zealand and Canada, where colonial judges did recognize Aboriginal rights at common law, a historian surveying the entire historical record would have to conclude that, as a matter of fact, the colonial courts of these jurisdictions did not recognize in any thorough or meaningful sense Aboriginal customary laws at common law. Few cases involving Aboriginal issues reached the courts, and when they did, judges seemed reluctant to articulate general doctrine.[87] In short, the adoption of an interpretative approach to common law history that focused only upon explicit statements of past judges—an "empirical common law" interpretative method—would yield only a few common law Aboriginal rights.

However, legal historians and lawyers do not merely collect empirical data about what past judges did; they subject that data to interpretation and analysis. The historian explores reasons behind past judicial behaviour, and relationships between past law and society at the time.[88] In contrast, lawyers and judges in common law systems read past law in order to identify the framework of normative principles within which present law can be articulated and applied to resolve present legal disputes.[89] If past

---

[86] *Ibid.* at 134

[87] M.D. Walters, "The Extension of Colonial Criminal Jurisdiction over the Aboriginal Peoples of Upper Canada: Reconsidering the *Shawanakiskie* Case (1822-26)" (1996) 46 U.T.L.J. 273 at 273-74.

[88] D.H. Flaherty, "Writing Canadian Legal History" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: The Osgoode Society, 1981) 4.

[89] See *e.g.* O.W. Holmes, Jr., *The Common Law* (New York: Dover Publications, 1991) at 1:

> The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of

judges did not expressly address a certain question, later judges can infer general principles from decisions rendered in analogous cases to find answers that may be said to have been inherent within the common law all along. A legal interpretation of common law history must give due weight to the explicit statements of past judges, but with each new case, the authority of former judicial statements can be reconsidered in light of the normative background of the common law as a whole as interpreted today. Courts will "reformulate the law" to keep it in step with the common law's underlying principles of "common justice".[90] Where a common law rule developed by past judges is displeasing to judges today, the old cases may be overturned. When these are measured against the common law's normative background, it can be said that past judges got it wrong and that the common law did not actually provide what they said it provided.[91] As Kirby J. recently stated in the aftermath of *Mabo*[92] and *Wik Peoples* v. *Queensland*,[93] "sometimes Australian law ... is not precisely what might earlier have been expected or predicated."[94] In contrast to the empirical common law interpretative perspective, this approach may be labelled the "normative common law" interpretative perspective.[95]

Thus, the conclusion in 1992 in *Mabo* that the common law of Australia recognized common law Aboriginal title all along, even though judges denied it since the 1830s,[96] is spurious only on an empirical reading of the law. In his dissent, Dawson J. takes such an approach, concluding that recognition of common law Aboriginal title

---

> mathematics. In order to know what it is, we must know what it has been, and what it tends to become.

[90] *Woolwich Equitable Building Society* v. *I.R.C.* (1992), [1993] A.C. 70 at 171-72, [1992] 3 All E.R. 737 (H.L.), Lord Goff.

[91] See *e.g. Foakes* v. *Beer* (1884), 9 A.C. 605, [1881-85] All E.R. Rep. 106 (H.L.); *West Ham Union* v. *Edmonton Union*, [1908] A.C. 1 at 4, 77 L.J.K.B. 85 (H.L.); and *Admiralty Commissioners* v. *S.S. Valverda*, [1938] A.C. 173 at 194, 158 L.T.R. 281 (H.L.).

[92] *Supra* note 1.

[93] (1996), 141 A.L.R. 129, 187 C.L.R. 1 (H.C.) [hereinafter *Wik* cited to A.L.R.].

[94] *Thorpe* v. *Commonwealth of Australia (No. 3)* (1997), 144 A.L.R. 677 at 687 (H.C.), online: Australasian Legal Information Institute <http://www.austlii.edu.au/au/cases/cth/high_ct/unrep321.html> (date accessed: 29 August 1999).

[95] See generally R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) at 238-58 [hereinafter *Law's Empire*]. The "normative common law" approach is illustrated by Lord Atkin's speech in *Donoghue* v. *Stevenson*, [1932] A.C. 562 at 580, 101 L.J.P.C. 119 (H.L.), which identified a "general conception of relations giving rise to a duty of care [in negligence law] of which the particular cases ... are but instances." This general conception could be (and was) extended to novel circumstances. In contrast, the dissenting opinion of Lord Buckmaster reflects an "empirical common law" method, insisting that the categories of negligence liability already recognized in the cases could not be changed or expanded.

[96] Courts in the 1830s (see *supra* note 39) held that Aboriginal peoples had no laws, but it was not until *Milirrpum*, *supra* note 39, that an Australian court expressly held that there was no common law Native title: D. Ritter, "The Rejection of *Terra Nullius* in *Mabo*: A Critical Analysis" (1996) 18 Sydney L. Rev. 5 at 13.

today would "revise history".[97] However, the majority in *Mabo* reads Australia's legal past in a normative light, revising the external face of the common law so that it reflects more accurately judicial authority throughout the colonies and former colonies as well as prevailing moral and political attitudes, but without fracturing the "skeleton" of principle (including Crown sovereignty and the doctrine of tenures) that gives the common law its shape.[98]

At the heart of *Mabo* is the imperial common law principle of continuity examined above: Aboriginal title is held to arise in part from the "traditional laws" and "traditional customs" of indigenous peoples that continued in force after the assertion of British sovereignty over Australia.[99] This principle was part of the common law well before Britain acquired Australia. Indeed, Brennan J. cites in its support the early seventeenth-century *Case of Tanistry*[100] on the continuity of Irish "brehon" custom.[101] Had colonial judges in Australia adhered to the common law, they would have recognized Aboriginal title. It was only "discriminatory denigration" of Aboriginal peoples that led them to conclude erroneously that Aboriginal customary law and land rights were not cognizable at common law.[102] Of course, the High Court is quick to emphasize that in a modern context, common law Aboriginal title survives only where Aboriginals continue to follow "traditional laws" (as "currently" observed) in relation to their lands,[103] and where no inconsistent Crown land grants have been made.[104]

In one sense, *Mabo* changes the law; in another sense, it merely changes our understanding of what the law already was.[105] *Mabo* is, therefore, a classic example of (in Dworkin's terms) Herculean judicial reasoning.[106] Of course, the normative common

---

[97] *Mabo*, *supra* note 1 at 111. For similar arguments, see G.A. Moens, "*Mabo* and Political Policy-Making by the High Court" in M.A. Stephenson & S. Ratnapala, eds., *Mabo: A Judicial Revolution* (St. Lucia: University of Queensland Press, 1993) 49 at 57.

[98] *Mabo*, *ibid.* at 118-19. On the interpretive approach taken in *Mabo*, see F. Wheeler, "Common Law Native Title in Australia—An Analysis of *Mabo* v. *Queensland (No 2)*" (1992) 21 Fed. L. Rev. 271 at 273-74; G. Nettheim, "Judicial Revolution or Cautious Correction?" (1993) 16 U.N.S.W.L.J. 1; R. Bartlett, "*Mabo*: Another Triumph for the Common Law" (1993) 15 Syndey L. Rev. 178 [hereinafter "Another Triumph"]; B. Hocking, "Aboriginal Law Does Now Run in Australia" (1993) 15 Syndey L. Rev. 187; and J. Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*" (1995) 17 Syndey L. Rev. 5 [hereinafter "The Jurisprudence of Regret"].

[99] *Mabo*, *ibid.* at 141.

[100] *Supra* note 8.

[101] *Ibid.* at 34-35, 39.

[102] *Ibid.* at 27-29.

[103] *Ibid.* at 43-44.

[104] *Ibid.* at 49-50.

[105] See *e.g.* "Another Triumph", *supra* note 98 at 184-85; and Hocking, *supra* note 98 at 205. See also *Wik*, *supra* note 93 at 228-29, Gummow J., where it was said that *Mabo* did not represent the evolution of legal rules, but the realization that existing rules were misapplied due to a mistake of *fact—i.e.*, that Aborigines had no law.

[106] R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 105-130; and *Law's Empire*, *supra* note 95 at 238-58.

law method compels judges to be progressive *and* conservative. *Mabo* vindicates Aboriginal claims to land and customs, but because it relies upon rather than refutes the common law, it confirms certain conclusions that are, at least in the Court's view, part of the common law. Thus, it acknowledges that: (i) Australia *was* acquired by settlement in disregard of Aboriginal sovereignty, (ii) Crown sovereignty and title *did* vest without need for conquest or cession, (iii) English law *did* flow in automatically, and (iv) Aboriginal title *is* less worthy of protection than settler titles derived from Crown grant and (therefore) can be lawfully set aside at will by the Crown. Although *Mabo* may be a radical decision in light of Australian legal history, the common law right it acknowledges is restricted, precarious, and vulnerable.[107] The Court in *Mabo* seems more interested in saving common law history from disgrace than in providing Aboriginal peoples with justiciable rights for present and future purposes.[108] Of course, *Wik* remedies this imbalance somewhat by interpreting certain Crown land grants consistently with common law Aboriginal title.

The "normative common law" approach to common law history in Canada, Australia, and New Zealand supports (or could support) a meaningful set of present-day Native rights, including not only rights to lands and resources, but perhaps also rights to follow and develop Native laws on other aspects of Native life—in short, rights of self-determination.[109] Although a *Mabo*-like (re)interpretation of common law history might be necessary, the basic legal materials for constructing a comprehensive common law theory of Aboriginal rights are already part of the common law itself—they are found within the imperial common law principle of continuity. However, it does not necessarily follow that the resulting common law doctrine of Aboriginal rights derives only from *a priori* rules of imperial common law. As Brian Slattery emphasizes, the doctrine derives in part from norms that arose from and guided the inter-societal

---

[107] See M.J. Detmold, "Law and Difference: Reflections on *Mabo*'s Case" (1993) 15 Syndey L. Rev. 159 at 162; G. Nettheim, "The Consent of the Natives: *Mabo* and Indigenous Political Rights" (1993) 15 Sydney L. Rev. 223 at 225-27 [hereinafter "Consent of the Natives"]; R. Bartlett, "Native Title: From Pragmatism to Equality before the Law" (1995) 20 Melbourne U. L. Rev. 282; and N. Bhuta, "*Mabo, Wik* and the Art of Paradigm Management" (1998) 22 Melbourne U. L. Rev. 24 at 36.

[108] *Mabo, supra* note 1 at 50, Brennan J.: "Aboriginal rights and interests were not stripped away by operation of the common law ... but by the exercise of a sovereign authority over land exercised recurrently by Governments."

[109] See *e.g.* Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Canada Communications Group, 1993) at 5-27 where it was said that the common law—and therefore the Canadian Constitution—already recognizes Aboriginal customary law and rights of self-government. See also Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, vol. 1 (Canberra: Australian Law Reform Commission, 1986) at c. 6 where it was said before *Mabo*, the common law does not recognize Aboriginal customary law; Aboriginal customs relating to a broad range of areas ought therefore to be recgonized by statute. See also Amankwah, *supra* note 11 at 32-37; and C. McLachlan, "The Recognition of Aboriginal Customary Law: Pluralism Beyond the Colonial Paradigm—A Review Article" (1988) 37 Int'l & Comp. L.Q. 368. On the extension of *Mabo* to rights of Aboriginal self-government, see "Consent of the Natives", *supra* note 107 at 231; and K.E. Mulqueeny, "Folk-law or Folklore: When a Law is Not a Law. Or is it?" in Stephenson & Ratnapala, *supra* note 97, 168.

practices of imperial officials and local peoples at times and places where power was more or less evenly balanced. In this sense, then, common law Aboriginal rights are a form of "inter-societal law".[110]

Once it is accepted that the common law *did* recognize local customary legal systems in full, the next step in developing a comprehensive modern theory of common law Aboriginal rights would be to explain the legal survival of those systems, or at least elements of them, after centuries' worth of external legislative incursion. Indeed, it is this requirement that may provide the stumbling block. Nevertheless, legal materials for reconciling continuity of local custom with apparently conflicting legislation exists in older precedents.[111] More recently, cases like *R.* v. *Sparrow*,[112] *Wik*,[113] and *Te Weehi*[114] indicate judicial willingness to read instruments of positive law consistently with the continuity of underlying common law Aboriginal rights.

The articulation of a theory of common law Aboriginal rights through the adoption of a "normative common law" interpretative perspective is not without its theoretical and practical objections. If it requires judges to accept the skeletal framework of the common law, it may be argued to affirm an unequal relationship between Aboriginal and non-Aboriginal law. Notwithstanding talk of the "inter-societal" character of the law, if Aboriginal custom only survives *within* the common law subject to its terms, then the oppressive conditions of imperialism and colonialism may be said to be replicated.[115] It may therefore be argued that judges should discard the "normative common law" method and create a foundation for Aboriginal rights that is not dependent upon Herculean efforts to reconcile modern Aboriginal aspirations with cen-

---

[110] B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681 at 691 [hereinafter "Aboriginal Sovereignty"]. See also B. Slattery, "The Legal Basis of Aboriginal Title" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw* v. *The Queen* (Lantzville, B.C.: Oolichan Books, 1992) 120 [hereinafter "Aboriginal Title"], quoted in *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 at 547, 137 D.L.R. (4th) 289 [hereinafter *Van der Peet* cited to S.C.R.]; and B. Slattery, "Understanding Aboriginal Rigbts" (1987) 66 Can. Bar. Rev. 727 at 736-39 [hereinafter "Understanding Aboriginal"]. For similar arguments, see J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. 623 [hereinafter "Relations"]. Unlike Slattery, however, Webber places emphasis on norms derived from cross-cultural practice alone and denies that *a priori* common law rules are relevant at all. Without reference to common law precedent, however, what is the basis for Aboriginal rights in Australia, where settlers and Natives did not create a "normative community" through common experience from which legal rules may be derived? Webber says in "The Jurisprudence of Regret", *supra* note 98, that *Mabo* is really based on arguments about morality involving regret for past wrongs and desire for reconciliation.

[111] See *supra* notes 66-72.

[112] [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [hereinafter *Sparrow* cited to S.C.R.].

[113] *Supra* note 93. See K. McNeil, "Co-Existence of Indigenous Rights and Other Interests in Land in Australia and Canada" [1997] C.N.L.R. 1.

[114] *Supra* note 1.

[115] See Borrows & Rotman, *supra* note 2; "Aboriginal Sovereignty", *supra* note 110 at 691; Detmold, *supra* note 107 at 163; and McLachlan, *supra* note 109 at 378-81.

turies' worth of legal precedent and statute law. A brand new common law foundation for Aboriginal rights could be articulated that focused upon what rights Aboriginal peoples *ought* to have in light of modern moral and political values and realities. Thus, judges might seek to compensate Aboriginal peoples by redistributing to them rights that place them in the position they would have been in today had their rights not been initially denied.[116] Alternatively, judges might de-emphasize history altogether and simply allocate to Aboriginal peoples the rights necessary to protect their identities today.[117] This sort of judicial interpretative perspective may be labelled the "normative political" interpretative method.[118]

The normative political method is not often adopted (openly at least) by common law judges. Indeed, many judges would deny its validity as a *judicial* method of legal reform. To sever today's common law from the common law past is to eliminate the legitimizing force which that past provides to present-day judicial creativity. Although the common law is "judge-made law", judicial law-making is (supposedly) secondary or derivative—it is confined to interpreting and thereby developing the law by analogy to decided cases.[119] Perhaps, then, it is inappropriate for judges to give themselves the power to act like legislators who may develop laws unanchored in existing common law. Of course, it might be different if judges are granted this power by legislative or constitutional instrument. If, for example, Aboriginal rights were entrenched in a constitution and left undefined, perhaps judges would be at liberty to discard common law fetters and start fresh, articulating a theory of Aboriginal rights free from imperial and colonial legal pasts. Indeed, this is (arguably) the position in which judges in Canada find themselves. The entrenchment in section 35(1) of the *Constitution Act, 1982*[120] of existing Aboriginal rights, which are undefined in the Constitution, provides

---

[116] See *e.g.* P. Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stan. L. Rev. 1311.

[117] For a defence of special rights for Aboriginal peoples based on liberal theory that does not rely upon historical arguments, see W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989) [hereinafter *Liberalism*]. See also W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) at 116-120 [hereinafter *Multicultural Citizenship*] where the author recognizes that historical arguments have some, albeit minor, role to play in the defence of national minority rights. See also R. Spaulding, "Peoples as National Minorities: A Review of Will Kymlicka's Arguments for Aboriginal Rights from a Self-Determination Perspective" (1997) 47 U.T.L.J. 35.

[118] It should be noted that Macklem, *supra* note 116 at 1367, suggests that the idea of redistributing sovereignty should inform judicial interpretation of *constitutional* law, and Kymlicka does not purport to identify justiciable principles at all: see *Liberalism, ibid.*; and *Multicultural Citizenship, ibid.*

[119] C.K. Allen, *Law in the Making*, 5th ed. (Oxford: Oxford University Press, 1951) at 341. See *e.g. Myers* v. *D.P.P.* (1964), [1965] A.C. 1001 at 1021-22, [1964] 3 W.L.R. 145 (H.L.), Lord Reid: "The common law must be developed to meet changing economic conditions and habits of thought. ... But there are limits. ... If we are to extend the law it must be by the development and application of fundamental principles." See also *Council of the Shire of Sutherland* v. *Heyman* (1985), 60 A.L.R. 1 at 43, 157 C.L.R. 424 (H.C.), Brennan J.: "[T]he law should develop novel categories incrementally and by analogy with established categories."

[120] Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

a potentially new foundation for Aboriginal rights law in Canada. The ways in which the Supreme Court of Canada has interpreted section 35(1) will now be considered, with a view to determining the extent to which common law history—especially the imperial common law principle of continuity—continues to inform the idea of what Aboriginal rights are in Canada.

B. Recent Canadian Cases: Detaching Constitutional Aboriginal Rights from Common Law History

Section 35(1) of Canada's *Constitution Act, 1982* provides that "existing aboriginal and treaty rights" are entrenched constitutionally. "Aboriginal rights" are not defined. The entrenchment of *existing* Aboriginal rights may imply the entrenchment of: (i) those rights that had been explicitly recognized as Aboriginal rights in the *case law* as of 1982; (ii) in addition to or instead of rights identified in (i), those rights that *might* have been, and *ought* to have been, recognized—*i.e.*, rights that existed implicitly—as Aboriginal rights at *common law* as of 1982; or (iii) those rights that, although not existing at common law as defined by either (i) or (ii), existed in a political, moral, or *de facto* sense in 1982.[121] These three approaches to interpreting "Aboriginal rights" in section 35(1) correspond with the above-mentioned empirical common law, normative common law, and normative political interpretative methods respectively. Which approach to section 35(1) has the Supreme Court of Canada taken?

The Court has clearly rejected the empirical common law method. In *Sparrow*, the Court said (quoting Noel Lyon) that the entrenchment of Aboriginal rights in 1982 was "not just a codification of the case law on aboriginal rights that had accumulated by 1982."[122] It also held that to be "existing", Aboriginal rights had to be "in actuality", so that rights legislatively extinguished before 1982 were not "revived".[123] However, the Court in that case did not need to address whether constitutional rights were limited to rights inherent in the common law as of 1982 (a normative common law approach) or whether they extended as well to rights never before—either explicitly or implicitly—part of the common law (a normative political approach). Further light has been cast upon this issue by a series of cases rendered in 1996 and 1997. A line of cases beginning with *Van der Peet* defines the Court's approach to Aboriginal rights other than title to land,[124] and the Court's decision in *Delgamuukw* v. *British Columbia*[125] defines the Court's approach to Aboriginal title to land.

---

[121] For academic commentary, see K. McNeil, "The Constitutional Rights of Aboriginal People of Canada" (1982) 4 Supreme Court L.R. 255; "Understanding Aboriginal", *supra* note 110; and W. Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II—Section 35: The Substantive Guarantee" (1988) 22 U.B.C. L. Rev. 207.

[122] *Sparrow, supra* note 112 at 1106, Dickson C.J.C. and La Forest J., quoting N. Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 at 100.

[123] *Sparrow, ibid.* at 1091.

[124] *Van der Peet, supra* note 110, applied in: *R.* v. *N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528; *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648; *R.* v. *Adams*, [1996] 3

1. The Theory of Continuity in *Van der Peet*

In *Van der Peet*, a member of the Sto:lo First Nation in British Columbia claimed that provincial fishing regulations violated her Aboriginal right to fish on a commercial basis. The Court adopted a general four-stage test derived from *Sparrow* for section 35(1). For an Aboriginal group to assert an Aboriginal right against inconsistent governmental or legislative measures, it has to show that (i) it has an Aboriginal right to undertake the relevant activity; (ii) the right was not extinguished prior to 1982; (iii) the impugned governmental measure infringes the right; and (iv) the infringement cannot be justified by some more important public interest (like conservation of endangered natural resources). *Van der Peet* was the Court's first opportunity to articulate principles for defining "Aboriginal rights" at stage (i). Writing on behalf of the majority, Lamer C.J.C. held that for an Aboriginal custom, practice, or tradition to qualify as an Aboriginal right protected by section 35(1), the claimant Aboriginal people had to show: (a) "continuity" between the custom, practice, or tradition at issue and a custom, practice, or tradition that was followed by their ancestors prior to contact with Europeans, and (b) the pre-contact custom, practice, or tradition was integral to the distinctive Aboriginal culture of the people.[126] To meet this "integral to a distinctive culture" test, a custom cannot have originated after European contact (though customs may evolve into "modern forms").[127] The custom cannot be something "true of every human society (*e.g.* eating to survive)"[128] but it need not be "*distinct* to the Aboriginal culture" in the sense of being unique to that culture alone. Rather, it must be "distinctive" in that, when considered without reference to other cultures, it can be said to be central to making the culture "what it is".[129] Only integral customs qualify; customs "merely incidental" to integral customs are not protected.[130]

Although Lamer C.J.C. says that this test is premised upon a "concept of continuity",[131] the test is not related to the imperial common law principle of continuity.[132] *Van der Peet* focuses on the continuity of pre-contact cultures and identities; the imperial common law focuses upon the continuity of one legal system upon the assertion of sovereignty by another system. As seen, according to the imperial common law, judges presumed that *all* local laws and institutions (that were not *mala in se* or inconsistent with British sovereignty) remained in force as British laws upon the assertion of British sovereignty. Continuity was not limited to customs "integral" to local culture as it existed prior to "contact" with other cultures.

S.C.R. 101, 138 D.L.R. (4th) 657 [hereinafter *Adams* cited to S.C.R.]; and *R.* v. *Côté*, [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385 [hereinafter *Côté* cited to S.C.R.].

[125] [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [hereinafter *Delgamuukw* cited to S.C.R.].

[126] *Van der Peet*, *supra* note 110 at 554-57.

[127] *Ibid.* at 561-62, 556-57.

[128] *Ibid.* at 554.

[129] *Ibid.* at 560-61 [emphasis in original]; see also L'Heureux-Dubé J.'s reasoning at 591-92.

[130] *Ibid.* at 560.

[131] *Ibid.*

[132] R.L. Barsh & J.Y. Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993 at 1007.

Lamer C.J.C. does not expressly refer to, let alone contrast his theory with, the imperial common law principle of continuity. However, he implicitly acknowledges the difference in approaches in *Côté*,[133] which addresses the status of Aboriginal rights in territories Britain acquired from France. In *Côté*, Lamer C.J.C. observes in passing that "under the legal principles of British conquest," the "pre-existing laws governing the acquired territory of New France were received and continued in the absence of subsequent legislative modification," and that this was one of the foundations for Quebec's "distinct civilian system of private law" today.[134] In applying the imperial common law principle of continuity to French-Canadian law, however, he does not say that only French laws integral to the distinctive culture of *les habitants* of New France continued in force—indeed, their legal system could not have continued in force as a coherent "system" had this been the case. Clearly, the "concept of continuity" that Lamer C.J.C. develops to explain the status of Aboriginal customary law is fundamentally different from the imperial common law principle of continuity he uses to explain the status of civil law in Quebec.

In their dissenting judgments, L'Heureux-Dubé and McLachlin JJ. do expressly refer to, and contrast Lamer C.J.C.'s test with, the imperial common law principle of continuity. L'Heureux-Dubé J. agrees that Aboriginal rights are customs integral to distinctive Aboriginal cultures, but rejects the need for pre-contact continuity. In her view, Aboriginal rights should be "dynamic" and "evolve" in response to modern concerns; therefore, integral customs followed for considerable periods of time qualify for constitutional protection even if they developed post-contact.[135] Says L'Heureux-Dubé J., this approach "relates to the 'doctrine of continuity', founded in British imperial constitutional law," according to which the local law in newly acquired territories "continues at common law."[136] Indeed, her approach is somewhat closer to imperial common law than that adopted by Lamer C.J.C. because it focuses on the date of sovereignty rather than contact and it recognizes—much as the Privy Council did in 1919[137]—that what continues in force is a *legal system* that contains within itself the ability to change and *add* new features to accommodate wholly new circumstances. However, it is not identical to imperial law. Like Lamer C.J.C.'s test, it insists that only culturally integral customs are recognized.[138]

Unlike Lamer C.J.C. and L'Heureux-Dubé J., McLachlin J. in her dissenting opinion both cites and purports to apply the imperial common law principle of continuity. Although she agrees that "history is important", she rejects the idea that only customs linked to pre-contact times qualify as Aboriginal rights.[139] Although she ac-

---

[133] *Supra* note 124.

[134] *Ibid.* at 172-73.

[135] *Van der Peet, supra* note 110 at 599-601. See also L.I. Rotman, "Creating a Still-Life out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada" (1997) 36 Alta. L. Rev. 1.

[136] *Van der Peet, ibid.* at 600.

[137] *Hineiti, supra* note 36.

[138] *Van der Peet, supra* note 110 at 601.

[139] *Ibid.* at 633-34.

cepts that Aboriginal rights are invariably central to distinctive Aboriginal cultures, she rejects the application of an "integral to a distinctive culture" test for identifying what Aboriginal rights are.[140] Citing Brennan J. from *Mabo*, McLachlin J. concludes that Aboriginal rights derive from the "traditional laws and customs of the aboriginal people in question."[141] Because they derive from traditional law and custom, Aboriginal rights will likely have some connection to pre-contact customs and will, almost by definition, be integral to Aboriginal cultures (in her view, few customs would fail to be culturally integral). However, she says there is simply no authority in the decided cases for using contact and cultural integrity as definitive tests.[142]

McLachlin J. therefore looks to "the common law and Canadian history"[143] to find the appropriate test. There, she finds the imperial common law principle of continuity. Citing, *inter alia*, the *Case of Tanistry* and *Mabo*, she concludes that the long history of interaction between Europeans and the common law with Aboriginal peoples is connected by a "golden thread"—namely, "the recognition by the common law of the ancestral laws and customs of the aboriginal peoples who occupied the land prior to European settlement."[144] According to this principle, the "Crown in Canada must be taken as having accepted existing native laws and customs"[145] and (barring extinguishment or treaty) an Aboriginal right will be established once "continuity" can be shown between a modern practice and the Native laws that "held sway before superimposition of European laws and customs."[146] This principle, she says, is consistent with historical reality in Canada, even if it was largely ignored by settlers in British Columbia.[147] McLachlin J. has therefore applied the imperial common law principle of continuity. Her version of the principle is, however, arguably a restrictive one: at least in relation to natural resources, the right cannot be enlarged by (using the Privy Council's expression) "*quasi*-legislative" means,[148] for in her view, the level of resources secured by the right is defined as being the modern equivalent of resources taken under traditional law.[149]

2. The Theory of Continuity in *Delgamuukw*

Van der Peet's "integral to a distinctive culture" test defines Aboriginal rights that are "activities", including rights to use natural resources on lands not subject to Aboriginal title. In *Delgamuukw*,[150] the Court held that this test does not apply to the defi-

---

[140] *Ibid.* at 637-38.
[141] *Ibid.* at 634.
[142] *Ibid.* at 637-38.
[143] *Ibid.* at 641-42.
[144] *Ibid.* at 642-43. See *Case of Tanistry*, *supra* note 8; and *Mabo*, *supra* note 1.
[145] *Van der Peet*, *ibid.* at 645.
[146] *Ibid.* at 634-35.
[147] *Ibid.* at 646-47.
[148] *Hineiti*, *supra* note 36.
[149] *Van der Peet*, *supra* note 110 at 665-66.
[150] *Supra* note 125.

nition of Aboriginal *title*, which is an exclusive proprietary interest in land itself. *Delgamuukw* may be said to represent a return by the Court to the more solid ground of common law principle and, hence, a more familiar form of legal continuity.[151] Writing for the majority, Lamer C.J.C. held that Aboriginal title is an exclusive right to occupy and use land for a variety of purposes that may or may not be linked to uses integral to distinctive pre-contact Aboriginal cultures (so long as these uses do not destroy the nature of the group's "attachment" to their lands).[152] Aboriginal title derives from two sources: the physical fact of prior occupation, and "the relationship between common law and pre-existing systems of aboriginal law."[153] Because Aboriginal title is a *sui generis* interest in land that burdens the Crown's underlying, or radical, title, it vests when the Crown's title vests—*i.e.*, at the point Britain asserts sovereignty.[154] So although the relevant date of inquiry for determining Aboriginal *rights* is the date of European contact, the relevant date for determining Aboriginal *title* is the date Britain asserts sovereignty: any exclusive Aboriginal possessory rights asserted at that date continue thereafter (barring extinguishment or cession) as a burden upon the Crown's title. The requirement in *Van der Peet* that the Aboriginal right be central to a distinctive culture remains, but in relation to Aboriginal title, it is deemed to have been met once exclusive possession is established.[155] In defining which territories a particular group possessed exclusively, Lamer C.J.C. insists that both Aboriginal and non-Aboriginal perspectives be taken into account, and the Aboriginal perspective "can be gleaned, in part, but not exclusively, from their traditional laws."[156] Thus, reference may be made to the "pattern of land holdings under aboriginal law,"[157] including laws on trespass and joint occupation.[158] However, there seems to be no need to show that these laws were culturally integral.[159] Thus, Aboriginal land laws under *Delgamuukw* gain recognition, at least insofar as they are relevant to defining Aboriginal title, on a basis similar to that found in the imperial common law. In theory, then, culturally non-iutegral Aboriginal land laws might be relevant to defining Aboriginal title under *Delgamuukw* even though, on their own, they could not be Aboriginal rights under *Van der Peet.*

---

[151] For arguments anticipating the return to common law principle in *Delgamuukw*, see K. McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 36 Alta. L. Rev. 117 at 129-30, 133 [hereinafter "What's the Connection?"].

[152] *Delgamuukw*, *supra* note 125 at 1080, 1083-84.

[153] *Ibid.* at 1082, 1095-96.

[154] *Ibid.* at 1097-98.

[155] *Ibid.* at 1097, 1101.

[156] *Ibid.* at 1100.

[157] *Ibid.* at 1099-1100.

[158] *Ibid.* at 1105.

[159] *Ibid.* at 1097-98.

3. Identifying the Jurisprudential Basis of the *Van der Peet* Concept of Continuity

If the *Van der Peet* "integral to a distinctive culture" test is not related to the imperial common law, where did it come from? Is the test the result of a radical reinterpretation of common law, or is it a wholly new conceptual foundation for Aboriginal rights? In other words, is it the result of a "normative common law" or a "normative political" method of interpretation? In her dissenting judgment in *Van der Peet*, McLachlin J. concludes that her colleagues attempted to "describe *a priori* what an aboriginal right is" by "reasoning from first principles" when they ought to have followed the "time-honoured methodology of the common law" by looking "to history" and inferring from past judicial precedent what present rights ought to be.[160] In other words, she claims the other judges adopted what has been labelled here a "normative political" interpretative method when they ought to have taken what she calls the "empirical" approach, but which (because it involves interpretation of old cases in new contexts) has been labelled here the "normative common law" interpretative method. Whatever the label, if McLachlin J. is right, then it would appear that Aboriginal rights law in Canada has become detached from its common law roots. It is important to determine if this is true and, if it is, what the implications are.

In fact, Lamer C.J.C. begins his articulation of the "integral to a distinctive culture" test by going straight to the common law. To interpret section 35(1), he says, its purpose must be known, and since section 35(1) entrenched a pre-existing "common law" doctrine, its purpose is found by examining the purpose behind the common law doctrine of Aboriginal rights.[161] He then quotes from leading Canadian, American, and Australian cases, including *Calder*,[162] *Guerin* v. *The Queen*,[163] *M'Intosh*,[164] *Worcester*,[165]

---

[160] *Van der Peet*, *supra* note 110 at 641-42.

[161] *Ibid.* at 538: Lamer C.J.C. denies that the purpose can be found by looking at the reasons behind the constitutionalization of common law rights. See also L'Heureux-Dubé J.'s reasoning, *ibid.* at 594.

[162] *Ibid.* at 539-40. The passage quoted from *Calder*, *supra* note 1 at 375, includes Judson J.'s statement that Indian title derives from "the fact ... that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."

[163] *Van der Peet*, *ibid.* at 540. The passage quoted from *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335 at 376, 13 D.L.R. (4th) 321, includes Dickson C.J.C.'s statement that characterized Aboriginal title as "a legal right derived from the Indians' historic occupation and possession of their tribal lands."

[164] *Van der Peet*, *ibid.* at 541. The passage quoted from *M'Intosh*, *supra* note 18 at 572-74, includes Marshall C.J.'s statement that the "original inhabitants" were recognized as "rightful occupants of the soil, with a legal as well as just claim to retain possession of it ... but their rights to complete sovereignty, as independent nations, were necessarily diminished."

[165] *Van der Peet*, *ibid.* at 543. The passage quoted from *Worcester*, *supra* note 19 at 542-43, 559, includes Marshall C.J.'s statements that Natives were "distinct people, divided into separate nations, ... having institutions of their own, and governing themselves by their own laws" and they were "distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil."

and *Mabo*.[166] He puts particular emphasis on Brennan J.'s statement from *Mabo* that Aboriginal rights derive from "[t]raditional laws" and "traditional customs". In his view, these expressions confirm that Aboriginal rights derive from the "pre-existing culture" of Aboriginal peoples.[167] Citing academic commentary, Lamer C.J.C. then concludes that the doctrine of Aboriginal rights serves to reconcile Aboriginal and non-Aboriginal legal cultures, taking both perspectives into account within the context of Crown sovereignty.[168] From this analysis of cases and commentary, Lamer C.J.C. concludes that the basis of the common law doctrine of Aboriginal rights is the recognition of the fact that, prior to the arrival of Europeans, North America was already occupied by peoples "participating in distinctive cultures," or "distinctive aboriginal societies," with their own "practices, traditions and cultures," and that this fact had to be reconciled with the assertion of sovereignty by the Crown.[169] Section 35(1) provides a constitutional framework for this reconciliation.[170]

To this point, Lamer C.J.C.'s analysis is consistent with imperial common law principles. However, it is here where he makes a conceptual leap that (arguably) detaches *Van der Peet* from the common law. Lamer C.J.C. states:

> In order to fulfill the purpose underlying s. 35(1)—i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions—the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the *crucial elements* of those pre-existing distinctive societies. It must, in other words, aim at identifying *the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.*[171]

Thus, the "integral to a distinctive culture" test emerges. Lamer C.J.C.'s reasoning seems to be this: (a) Aboriginal rights arise from prior occupation of territory by distinctive Aboriginal societies having their own customary laws; therefore, (b) Aboriginal rights are limited to customs that made their societies distinctive. The cases he cites support (a) but do not support (b). Furthermore, (b) does not follow inexorably

---

[166] *Van der Peet, ibid.* at 545-46. The passage quoted from *Mabo, supra* note 1 at 58, includes Brennan J.'s statement that Native title derives from "traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory."

[167] *Van der Peet, ibid.*

[168] *Ibid.* at 547. Lamer C.J.C. cites P. Macklem, "Normative Dimensions of an Aboriginal Right to Self-Government" (1995) 21 Queen's L.J. 173 at 180: rights of prior occupants prevail over subsequent newcomers; Pentney, *supra* note 121 at 258: the common law recognizes prior social organization; M. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw* v. *British Columbia*" (1992) 17 Queen's L.J. 350 at 412-413: Aboriginal rights arise out of the meeting of two dissimilar "legal cultures", and both perspectives must be considered; and "Aboriginal Title", *supra* note 110: Aboriginal rights derive from "inter-societal" law.

[169] *Van der Peet, ibid.* at 538-39.

[170] *Ibid.* at 547-48.

[171] *Ibid.* at 548 [emphasis added].

from (a). Although the cases mention that Aboriginal peoples were "distinct", there is no suggestion that the distinctiveness of their *cultures* was the reason for the recognition of their rights. Indeed, the passages quoted from *M'Intosh* and *Worcester* describe Indians as distinct *political* entities with some degree of *sovereignty*.[172] Two distinct political entities can be culturally identical. Indeed, the Cherokee Nation, whose rights of self-government were acknowledged in *Worcester*, had, by the date of that case, adopted many of the cultural and legal attributes of the surrounding settler society.[173] The only real judicial support for the *Van der Peet* test is a passing comment in *Sparrow* in which it is observed that the anthropological evidence relied upon to establish the right to fish in that case established that, for the relevant Aboriginal people, fishing had always constituted "an integral part of their distinctive culture."[174] But, as McLachlin J. observes in her dissenting opinion, nothing in *Sparrow* suggests that *only* customs integral to distinctive cultures qualify as constitutional Aboriginal rights.

Aside from the cases Lamer C.J.C. cites, the many other cases on the imperial common law examined above in Part I confirm that the point of the common law principle of continuity was not to *protect* distinctive cultures. The common law justifications for continuity were the separation of powers, the rule of law, and fairness. Of course, being fair involved tolerating and respecting cultural difference by respecting local laws. However, fairness also required that a people's possessions and powers be respected because, regardless of culture, these possessions and powers *belong to them* and the taking of belongings of others without their consent is unfair. In fact, no case can be cited where only laws integral to distinctive cultures were recognized. Indeed, no such case exists because such an approach to continuity of laws would have been inconsistent with the other two justifications for the principle. It would have violated the separation of powers by allowing judicial intrusion into the sphere of legislative policy so as to pre-empt and preclude the legislature's decision about the status of local law. Also, it would have violated the rule of law by undermining civil order, stability, and legal certainty in the territory by introducing a confusing and (from the local perspective) arbitrary rule that deprived culturally non-integral parts of the legal system of any force. Even if culturally unimportant laws could be identified by judges swiftly, rationally, and comprehensively so as to avoid chaos (which, given the piecemeal character of judicial decision-making, is highly unlikely), the sudden invalidity of these laws might have deprived the legal order of rules that, in practical terms, were indispensable to its continued functioning.

Although Lamer C.J.C.'s test finds no direct support in the common law, he purports to rely, at least in part, upon the common law. One might therefore argue, con-

---

[172] *Supra* notes 164, 165. This point is emphasized by B.W. Morse in "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R.* v. *Pamajewon*" (1997) 42 McGill L.J. 1011 at 1031.

[173] See R. Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* (Norman: University of Oklahoma Press, 1975); and W.L. Anderson, ed., *Cherokee Removal: Before and After* (London: University of Georgia Press, 1991).

[174] *Van der Peet, supra* note 110 at 548-49, quoting from *Sparrow, supra* note 112 at 1099.

trary to McLachlin J., that the majority's opinion in *Van der Peet* represents a modernized interpretation of the common law rather than a new test derived from first principles. Subsequent cases, however, confirm the extent to which *Van der Peet* detaches Aboriginal rights from the common law. In *Côté* and *Adams*,[175] the Court addressed the status of Aboriginal rights in territories gained by Britain from France. Prior to these cases, doubts persisted as to whether French law denied Aboriginal rights, whether this law continued after Britain acquired sovereignty, and whether prerogative legislation in 1763 acknowledging Aboriginal title extended into Quebec. Although Lamer C.J.C. acknowledges that there are convincing legal-historical arguments explaining the existence of Aboriginal rights in French and British colonial and imperial law, he chooses instead to avoid "murky historical waters"[176] altogether. In his view, section 35(1) "changed the landscape of aboriginal rights in Canada," and if as a matter of fact an integral pre-contact Aboriginal custom was followed after contact without being expressly extinguished, then it simply did not matter that it lacked the "formal gloss of legal recognition" by colonial law or the "legal approval of British and French colonizers."[177] Even in those circumstances, the custom qualifies for constitutional protection under section 35(1) today.[178] To insist upon demonstrating that Aboriginal rights had some legal status at colonial common law would be a "static and retrospective" approach inconsistent with section 35(1)'s "noble and prospective" purposes, one which would "perpetuat[e] the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies."[179] Lamer C.J.C. quotes as support for his approach Brennan J.'s statement in *Mabo* that past justifications for denying indigenous land rights were "unjust and discriminatory" and can no longer be accepted.[180]

Lamer C.J.C. and Brennan J. clearly agree that the common law, as applied in the colonies, was morally repugnant in relation to its treatment of Aboriginal peoples; however, Lamer C.J.C.'s response to this problem is very different from Brennan J.'s. Whereas Brennan J. retains his allegiance to the common law, purging it of errors through (what may be called) a "normative common law" interpretation, Lamer C.J.C. seems to adopt an "empirical common law" perspective, assuming that the common law is "static" and irredeemable. So whereas Brennan J. confronts the common law's chequered past and refashions it to obtain an internally coherent and morally defensible theory of common law, Lamer C.J.C. forsakes the common law and creates, using section 35(1), an independent constitutional foundation for Aboriginal rights.[181]

---

[175] *Côté*, *supra* note 124; and *Adams*, *supra* note 124.

[176] *Côté*, *ibid.* at 167-68.

[177] *Ibid.* at 174-75.

[178] *Ibid.*; and *Adams*, *supra* note 124 at 121.

[179] *Côté*, *ibid.* at 175.

[180] *Ibid.*

[181] Barsh & Henderson, *supra* note 132 at 1008: "[T]he Court has discarded the traditional British Commonwealth framework."

Lamer C.J.C.'s statements from *Delgamuukw* are, however, somewhat more ambiguous than those in *Côté* and *Adams*. On the one hand, he says that the existence of an Aboriginal right at common law is "sufficient, but not necessary" for the existence of a constitutional Aboriginal right under section 35(1),[182] suggesting that section 35(1) extends Aboriginal rights law into territory uncharted by the common law. On the other hand, Lamer C.JC., when discussing the relationship between Aboriginal title and Aboriginal rights, states:

> [T]he common law *should develop to recognize aboriginal rights* (and title, when necessary) as they were recognized by either de facto practice or by the aboriginal system of governance. It also allows sufficient flexibility to deal with this highly complex and *rapidly evolving area of the law.*[183]

This statement suggests that, in Lamer C.J.C.'s view, the common law is less "static" and "retrospective" than he initially suggested.

Reconciling these various statements from *Van der Peet*, *Côté*, *Adams*, and *Delgamuukw*, it can be said that Lamer C.J.C. is willing to acknowledge that the "common law content" of section 35(1) is capable of *some* (perhaps limited) development and expansion beyond the Aboriginal rights explicitly recognized in the case law up to 1982. However, Lamer C.J.C. considers that there is no real need to enter into complex debates about legal history in order to revise centuries' worth of colonial law in order to find an acceptable updated version of the common law, since Aboriginal rights that existed *de facto* can now be recognized under the "integral to a distinctive culture" test of section 35(1). This test, though associated with the common law doctrine of Aboriginal rights, and perhaps capable of description as "evolved" common law, is really a wholly new legal foundation for Aboriginal rights designed to achieve the "noble" purpose of expanding Aboriginal rights beyond the scope of common law rules that, historically, denied or limited Aboriginal rights. At its heart, then, the "integral to a distinctive culture" test is the result of a normative political interpretation, not a normative common law interpretation. It is, as McLachlin J. argues, derived from "first principles".

To characterize the *Van der Peet* test as the result of a "normative political" interpretative method is not to imply that the Court exceeded its proper judicial function, or that the test is legally indefensible. Indeed, this is the sort of interpretive approach that judges confronted with vague constitutional texts must adopt. In many respects, Lamer C.J.C.'s conclusions are textually based. He puts considerable emphasis on the fact that *Aboriginal* rights—or (in the French version) "droits ancestral"—are protected. This language confirms, in his view, that the rights must be "temporally rooted in the historical presence—the ancestry—of Aboriginal peoples in North America."[184] Furthermore, he observes that giving "special constitutional protection" to certain group-based rights in a Constitution which is otherwise informed by "liberal" values

---

[182] *Delgamuukw*, *supra* note 125 at 1091-93.

[183] *Ibid* at 1106-107 [emphasis added].

[184] *Van der Peet*, *supra* note 110 at 534, 539.

emphasizing individual rights requires some special justification.[185] Although one may argue that Lamer C.J.C.'s assumptions about liberalism are wrong or that the test developed is unworkable, it must be accepted that his basic interpretive approach to the Constitution is hardly novel or unprecedented.

4. Reconciling the Imperial Common Law Principle of Continuity with the *Van der Peet* Concept of Continuity

It is now necessary to consider the implications of the *Van der Peet* approach to Aboriginal rights. Lamer C.J.C. must be applauded for seeking to uphold the "noble" ends of section 35(1) by adopting the judicially courageous step of casting aside colonial and imperial law in entirety as unacceptable in modern terms. However, in declining the challenge of reconciling modern and historical legal realities, Lamer C.J.C. may have cast out the good parts of the common law with the bad. What if a fair reading of imperial common law reveals a *larger* category of rights than that secured by *Van der Peet*? By avoiding "murky historical waters", the Court may be depriving Aboriginal peoples of the opportunity to show that, on a correct interpretation of the *colonizers'* law, they had (and arguably still have) a larger bundle of rights than the "integral to a distinctive culture" test allows them. If this were the case, then section 35(1), as interpreted by *Van der Peet*, would not be so "noble" after all.

To illustrate this point, reference to *Connolly*[186] is helpful. In that case, Cree marriage law was held to continue in force after the assertion of British sovereignty. It was applied as a British law because, *inter alia*, it resembled marriage practices followed by other societies at "all times and under all circumstances"; "barbarous" aspects of the custom, like polygamy, were "incidental" and could therefore be ignored.[187] However, if Cree marriage custom embodied an approach to marriage that was essentially universal in all human societies, it would have failed the "integral to a distinctive culture" test, for customs that are "true of every human society" are necessarily excluded by that test.[188] Might polygamy qualify on the grounds that it is not universal? Likely not, for the integral to a distinctive culture test also says that customs "incidental" to integral customs are excluded. *A fortiori*, customs like polygamy incidental to non-integral customs would probably not qualify either. In short, had Monk J. applied the "integral to a distinctive culture" test in 1867, he would have refused to apply Cree custom in this case (though he might have recognized the validity of the marriage for some reason independent of Native custom).

The implications of this result are startling. Not only would Native marriages throughout British North America have been deprived of their assumed legal foundation but so would *every other aspect of Aboriginal life* regulated by customs that were

---

[185] *Ibid.* at 534-35.

[186] *Supra* note 14.

[187] *Ibid.* at 115, 134.

[188] *Van der Peet, supra* note 110 at 554.

not culturally integral. Assuming that they could have been identified, non-integral customary laws would have been woven into the fabric of Aboriginal customary systems. To deny their continued legal validity would have led to the disintegration of Aboriginal systems as functioning normative systems capable of regulating and guiding human behaviour.[189] These culturally "incidental" customs might have been dispensable individually, but the sudden abrogation of all such customs would have stripped Aboriginal customary systems of their subtlety and richness, transforming multi-dimensional, sophisticated systems into flat, one-dimensional sets of culturally core norms standing isolated and unworkable on an otherwise deserted legal landscape. The common law would not have produced such a result. Judges would not have presumed to exercise the legislative function of picking and choosing which customs qualified as integral and which did not; nor would they have applied a concept of continuity that deprived local people of functioning legal systems. In other words, the "integral to a distinctive culture" test is inconsistent with the separation of powers, the rule of law, and the dictates of fairness—the three justifications for the imperial common law's principle of continuity.

This analysis confirms that the *Van der Peet* concept of continuity cannot provide a legal explanation of the historical meeting of Aboriginal and non-Aboriginal legal systems. It also confirms that the common law recognized a broader range of Aboriginal customs than the "integral to a distinctive culture" test. This conclusion and its implications can be illustrated by the following series of formulae. The *Van der Peet* test implies severing customary law into two categories, such that the totality of a nation's law at the time of European contact can be expressed by this formula:

$$\text{preCCL} = \text{ICL} + \sim\text{ICL}$$

Where "preCCL" represents pre-contact customary law, "ICL" represents integral customary law, and "~ICL" represents non-integral customary law. If "CAR" represents constitutional Aboriginal rights under section 35(1), then under *Van der Peet* the following formulae are true:

$$\text{CAR} = \text{ICL}$$

and

$$\text{CAR} = \text{preCCL} - \sim\text{ICL}$$

The Aboriginal customary laws recognized by the imperial common law principle of continuity, on the other hand, are captured by the following formula:

$$\text{CLAR} = \text{preCCL} + \text{postCCL}$$

Where "CLAR" represents common law Aboriginal rights, "preCCL" represents pre-contact customary law and "postCCL" represents new customary laws (if any) arising after European contact (whether it includes or excludes customs adopted after the assertion of British sovereignty depends on whether the nation retains some "*quasi-*

[189] For a similar argument, see Barsh & Henderson, *supra* note 132 at 1001.

legislative" power). In the above formula, both "preCCL" and "postCCL" are assumed to exclude any customs that are *mala in se* or inconsistent with British sovereignty. The following conclusions can therefore be drawn:

$$\text{preCCL} > \text{ICL}$$

and, indeed,

$$\text{preCCL} + \text{postCCL} > \text{ICL}$$

and therefore,

$$\text{CLAR} > \text{CAR}$$

In short, it can be said that constitutional Aboriginal rights under section 35(1) are those customs selected as deserving of constitutional protection from a larger body of common law Aboriginal rights. The selection criteria, the "integral to a distinctive culture" test, therefore narrows the range of Aboriginal rights otherwise recognized by common law. What happens to the unselected common law Aboriginal rights after 1982? Since it would be contrary to the general spirit behind the entrenchment of Aboriginal rights in 1982 to conclude that section 35(1) *extinguished* certain common law Aboriginal rights,[190] it must be concluded that there remains a set of non-constitutional Aboriginal rights at common law (or "~CAR'), defined by the following formula:

$$\sim\text{CAR} = (\text{preCCL} - \text{ICL}) + \text{postCCL}$$

or

$$\sim\text{CAR} = \sim\text{ICL} + \text{postCCL}$$

First Nations in Canada should therefore consider, when constructing their litigation strategies, whether it is worth arguing that non-integral and/or post-contact customary laws (if unextinguished) still have common law status outside the protective boundaries of section 35(1). The only difference between constitutional Aboriginal rights and non-constitutional Aboriginal rights is that post-1982, the latter can be limited or extinguished by any clear and plain legislative instrument, but the former can only be limited by measures that meet the strict standards of the *Sparrow* justification test.

The value of the above argument is that it reconciles the imperial common law continuity principle with the *Van der Peet* "integral to a distinctive culture" test: the former defines common law Aboriginal customs, the latter defines constitutional Aboriginal customs. It also explains why Lamer C.J.C. can apply the imperial common law principle of continuity to define the continuity of French civil law in Quebec, but a narrower theory of continuity to define Aboriginal rights under section 35(1). The difference in approaches is due not to discriminatory treatment but to the different le-

[190] See generally Barsh & Henderson, *ibid.* at 1009: by rejecting the common law principle of continuity, *Van der Peet* represents "a doctrine of *ex post facto* judicial extinguishment."

gal status of the laws at issue: the imperial common law principle of continuity is used to explain the survival of French civil law in Quebec in circumstances in which that law is not *constitutionally* protected from legislative infringement. In contrast, the "integral to a distinctive culture" test is used to define the status of Aboriginal rights today in light of the fact that they are constitutionally protected from legislative infringement. If a Quebec "distinct society" clause were entrenched in a justiciable constitutional provision, then perhaps the Court would have to develop a similar sort of test to determine which aspects of the civil law system that survived (initially at least) under the imperial common law would qualify for special constitutional protection.[191]

The idea that the *Van der Peet* test serves to identify constitutional Aboriginal rights from a larger pool of common law Aboriginal rights is, however, not without problems. The text of section 35(1) suggests that *all* "existing" Aboriginal rights were entrenched. Furthermore, Lamer C.J.C. insists not only that section 35(1) includes *all* common law Aboriginal rights but that the "integral to a distinctive culture" test *extends* protection to rights not acknowledged at common law. Whether one considers *Van der Peet* as expanding or restricting Aboriginal rights as defined at common law will therefore depend on how one interprets common law history.

The reason for the narrow view of common law rights by the Court may be the desire to reconcile two conflicting aims: (i) that all common law Aboriginal rights should be regarded as entrenched, and (ii) that the entrenchment of such group rights in a largely "liberal" Constitution emphasizing individual rights should be limited to certain "special" rights.[192] If it is accepted that *constitutional* Aboriginal rights must be truly "special", then it would have been preferable to give the common law its proper interpretation and then to consider why common law rights were elevated to constitutional status. This approach would have exposed, and allowed a rational discussion about, the real issue underlying *Van der Peet*: why certain Aboriginal common law rights might be deserving of constitutionalization and others not.

Of course, once this issue is exposed as the real concern arising from the Court's decision in *Van der Peet*, the question that Lamer C.J.C. wanted to avoid addressing—*i.e.*, why common law rights were elevated to constitutional status[193]—can be examined. Although it is beyond the scope of this article to develop an argument about the true purpose of entrenchment of common law Aboriginal rights, it is suggested that the protection of distinctive Aboriginal cultures was at best only one of the reasons. Another, more important reason why Aboriginal rights deserve "special constitutional status" in a liberal-democratic Constitution is that it is inconsistent with a true sense of equality and democracy to allow one political entity, *i.e.*, non-Aboriginal peoples (through the federal Parliament), to extinguish unilaterally the rights, laws, and customs of other political entities, *i.e.*, the First Nations. If this is a purpose of section

---

[191] For a satirical comparison of the "integral to a distinctive culture" test for Aboriginal rights and the potential effects of a "distinct society" clause for Quebec, see Barsh & Henderson, *ibid.* at 995-97.

[192] A similar critique of *Van der Peet* is made in "What's the Connection?", *supra* note 151 at 131.

[193] See *supra* note 161.

35(1), it does not seem at all inappropriate to include within its protective boundaries all Aboriginal rights, laws, and customs inherent in the common law whether integral to pre-contact Aboriginal culture or not.

Conclusion

When articulating a modern theory of Aboriginal rights in former British colonies, is it better to save common law history from disgrace, as Brennan J. did in Australia, or to discard common law history as irredeemable and argue from first principles, like Lamer C.J.C. did in Canada? Both approaches are concerned with achieving the "noble" end of protecting the continuity of Aboriginal identities. Both accept that this end involves the recognition by the non-Aboriginal legal system of at least certain Aboriginal laws and customs. However, the former secures this end through internal continuity of common law rules and principles, whereas the latter secures it through discontinuity between past and present law.

It may be argued that there is something compelling about a conscious judicial break with the imperial and colonial legal pasts. A break of this nature might be regarded by citizens of Canada, Australia, and New Zealand as an indication that their respective legal systems had, on this issue, developed genuinely indigenous sources untainted by distasteful associations with shameful aspects of imperialism and colonialism. It might even be interpreted as another long overdue chapter in the decolonialization story, confirming (like the debates about patriation of the Constitution in Canada in the early 1980s and republicanism in Australia today) the insignificance of British links for present and future constitutional development.

A conscious break might be an attractive solution to Aboriginal peoples in particular. This is especially so if the break signalled the birth of new legal orders in which their laws and customs were no longer seen as inferior to the "legally alien"[194] common law and subjected to its many limitations (like Crown sovereignty), but were instead accorded equal status with the common law so as to produce separate sets of distinctly local and non-derivative Canadian, Australian, or New Zealand legal systems. Finally, the conscious break option might appeal to the legal historian. It would let judges, who may be untrained in and unaccustomed to historical analysis, avoid "murky historical waters". Legal history would then focus on the work of professional historians and not be diverted by the revisionist, ahistorical tendencies of legal methodology. The disgrace of the common law, if any, would then be apparent for all to see, not interpreted away retrospectively by well-meaning judges.

Is there a case, then, for basing modern Aboriginal rights law on imperial legal doctrine? Can a vigorous (re)interpretation of common law history—using traditional common law methodology—produce a suitable foundation for Aboriginal rights today? There are grounds for answering these questions affirmatively. To begin with,

---

[194] Borrows & Rotman, *supra* note 2 at 28.

the "imperial" label is used throughout this article to describe the common law principle of continuity in order to emphasize that it is a principle deeply embedded within British legal history and that it is distinguishable from "municipal common law". It is, however, symbolically unfortunate and substantively misleading. It suggests that the hierarchical structure of empire continues to inform the law, not only as between "native" and "settler" but also between colonial periphery and imperial centre. A modern legal interpretation of common law history in Canada, New Zealand, and Australia would begin with the imperial common law principles that pre-existed particular local experiences of colonialism, but these *a priori* principles would be given full substantive content in each jurisdiction only after consideration of those customs and usages arising from Aboriginal-British relationships from which norms regulating their behaviour can be inferred.[195] The resulting doctrine of Aboriginal rights may derive in part from *a priori* imperial legal principles, but it is ultimately a form of "inter-societal" law bridging Aboriginal and non-Aboriginal legal orders.[196] Interpreting our legal pasts in this manner would, says Slattery, allow the focus to shift from "imperial history" to "local history, tradition and perspectives."[197] If so, then the outdated "imperial" label can be dropped and the body of inter-societal law that emerges can simply be regarded as a distinct element of "local" common law. The only danger in doing so would be that this "local" law might be confused with local municipal law and, as seen, Aboriginal law might exist in Native municipal systems distinct from local municipal systems. Indeed, it is partly to draw attention to this possibility that the expression "imperial" is used in this article.[198] The solution, then, is to select a less pejorative term than "imperial" to describe the legal dimension within which such Native municipal systems exist—like, for example, "federal".[199] Thus, Native and settler municipal systems would be said to coexist not under an overarching imperial constitution, but within common law federal constitutions (that arose long before the statutory federations of Canada and Australia were created), comprising distinct Native and settler units.

Other aspects of the common law might also be reconsidered under the normative common law method. Even the most sacred principles of the common law—*e.g.* Crown sovereignty and parliamentary supremacy—could be revisited. In recent years, the meanings of these concepts have been revised—but not rejected outright—by

---

[195] See "Aboriginal Sovereignty", *supra* note 110; "Aboriginal Title", *supra* note 110; "Understanding Aboriginal", *supra* note 110; and "Relations", *supra* note 110.

[196] See "Aboriginal Title", *ibid.*; and "Understanding Aboriginal", *ibid.* See also J. Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629 at 634.

[197] B. Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34 Osgoode Hall L.J. 101 at 107.

[198] For an example of why this distinction may be important, see M.D. Walters, "Aboriginal Rights, *Magna Carta* and Exclusive Rights to Fisheries in the Waters of Upper Canada" (1998) 23 Queen's L.J. 301 at 352-67.

[199] On Aboriginal rights as part of "federal common law", see *Roberts* v. *Canada*, [1989] 1 S.C.R. 322 at 340, 57 D.L.R. (4th) 197; and the commentary by Clark, *supra* note 30 at 30-32, and by Slattery in "Aboriginal Sovereignty", *supra* note 110 at 702.

courts in the United Kingdom to reflect the political reality of that country's membership within the European Union.[200] It would be ironic indeed if courts in former British colonies clung to outdated interpretations of Crown sovereignty and parliamentary supremacy long after they had ceased to be followed by British judges. Finally, there remains the practical and theoretical problems associated with having non-Aboriginal judges defining culturally distinct Aboriginal customs. If this is one of the legacies of imperialism and colonialism, it is not one that can be remedied by a conscious judicial break with imperial and colonial legal history. Until more Aboriginal judges are appointed, the very same problems will exist under the new test for Aboriginal rights that is adopted to replace the common law. Whatever the test, then, non-Aboriginal judges can do no better than remember Lamer C.J.C.'s assertion that Aboriginal rights represent the "bridging of aboriginal and non-aboriginal cultures" and to make genuine efforts to understand and give equal weight to the Aboriginal perspective.[201]

In short, refusal to break with common law history does not imply adherence to outdated imperial legal assumptions and attitudes. As Borrows and Rotman have said, constructing a common law doctrine of Aboriginal rights involves "[c]learing a site in the common law" for Aboriginal peoples for the limited purpose of "providing a toehold to bridge out of colonial territory into one they can call their own."[202] The exploitation by Aboriginal peoples of the common law for this purpose is not "consent to colonialism."[203]

Indeed, most of the ends achieved by the "conscious break" resulting from a normative political interpretation of Aboriginal rights could also be achieved by maintaining continuity between past and present legal principles under a normative common law interpretation. If the content of Aboriginal rights could be the same under either approach, is one better than the other? In pragmatic terms, the normative common law method may be better: it allows Aboriginal peoples to say: "We claim right *x* because it *is* our legal right," whereas the normative political method allows them merely to say: "We claim right *x* because it *ought* to be our legal right." The former is, of course, more persuasive. It is persuasive not because "our sense of justice is offended by the violation of an obscure law of the seventeenth or eighteenth century,"[204] but because our sense of justice is offended by the violation of legal norms that, although articulated in obscure cases of past centuries, are so fundamental to the common law that they transcend their initial imperial and historical contexts.

---

[200] *R.* v. *Secretary of State for Transport, ex parte Factortame*, [1991] 1 A.C. 603, 1 All E.R. 70 (H.L.); H.W.R. Wade, "What Has Happened to the Sovereignty of Parliament?" (1991) 107 L.Q. Rev. 1; J. Eekelaar, "The Death of Parliamentary Sovereignty—A Comment" (1997) 113 L.Q. Rev. 185; and T.R.S. Allan, "Parliamentary Sovereignty: Law, Politics and Revolution" (1997) 113 L.Q. Rev. 443.

[201] *Delgamuukw*, *supra* note 125 at 1065-66.

[202] *Supra* note 2 at 28.

[203] *Ibid.*

[204] "Relations", *supra* note 110 at 626. Webber argues that it is "wrong" to base Aboriginal rights on case law that pre-existed the colonialization of North America.

Aside from this pragmatic concern, however, the argument about the continued role of the common law is like many arguments about how constitutional reform should address the legacy of imperialism: the answer ultimately depends upon what sort of symbolic gestures we want to make. But even if judges do decide, for symbolic reasons, to give up on imperial and colonial common law history as a doctrinal foundation for modern Aboriginal rights, the above discussion of the Canadian experience suggests that they should first read that common law in its best legal light and then ensure that the new foundation for Aboriginal rights they create expands rather than narrows rights otherwise secured by such a "normative common law" interpretation of imperial and colonial legal pasts.

Will securing continuity of Aboriginal identities through continuity of Aboriginal custom at common law as interpreted by judges committed to the continuity of present and past common law rules and principles produce convincing interpretations of legal history? The common law lawyer's sense of order is violated if the reinterpretive process is not undertaken; the historian's sense of order is violated if reinterpretation obscures the realities (whether good or bad) of past law. In the end, the options are not mutually exclusive. We can, and should, read the law in a historical sense, as part of understanding our national histories. This process, however, need not preclude us from looking at law as a normative system for purposes of legal discourse—for the purpose of litigating real issues affecting living peoples. In a common law system, reinvention of the law by judges is a continuous process in which legal history is reinterpreted with each new case.