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SCHOOL OF MĀORI, PACIFIC & INDIGENOUS STUDIES

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## **Abstract**

It is rather late in the day to say that customary law and aboriginal law does not form part of the common law system in the twenty-first century. The adoption by the United Nations of the Declaration of Indigenous Rights last year, and barely a fortnight ago the apology by Australia to the lost generations of Aboriginal children, are examples of the tide flowing towards recognition of more and more indigenous rights. With this sort of development in the political and social arena, the common law cannot insulate itself from this change.

The first task in reconciling Aboriginal law and the common law is to identify aboriginal law. This will involve reverting to historical and contemporary written and oral sources, as well as an understanding of the original aboriginal words themselves. The task will also inevitably involve labeling of indigenous customary practices or social phenomena as in fact law for purely twenty-first century purposes.

When one is faced with any competing, conflicting or even consistency between aboriginal law and the common law, we must look to the various principles, interests and values that such laws are based upon. This is to enable a proper weighing of those principles. Certain principles will ascend others depending upon the facts and circumstances. The process of weighing will ultimately involve value judgments on the part of the examiner.

1. In 1901 the Privy Council in the New Zealand case of *Nireaha Tamaki v Baker* [1901] AC 561 (PC) slammed the New Zealand courts' adoption of a line of reasoning that stated that there was no customary law of the Maori of which the Courts can take cognisance.
2. Instead the Privy Council observed that it was rather late in the day for such an argument to be addressed to a New Zealand Court.
3. The Privy Council was responding to the legal rationale contained in two New Zealand cases of *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 and *Rira Peti v Ngaraihi Te Paku* (1888) 7 NZLR 235.
4. Both cases, which were presided over by the Chief Justice of the day, James Prendergast, contained such racist opinions such as Maori did not have any kind of civil government or any settled system of law. Additionally that marriage according to Maori customary law did not have any legal validity in the eyes of the New Zealand courts.
5. These observations by the New Zealand Chief Justice did not even sit well with a Canadian case that went to the Privy Council notably *St. Catherine's Milling and Lumber Co. v. The Queen* (1888) 14 App. Cas. 46 (J.C.P.C.).
6. At least in that case aboriginal law was not outright denied like in *Wi Parata*. A type of native title was recognised with reference to the Royal Proclamation of 1763. Lord Watson had specifically left open the question of the nature of Indian rights
7. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point.
8. It would not be until the Supreme Court of Canada in *Calder v. British Columbia (Attorney General)* [1973] S.C.R. 313, [1973] 4 W.W.R. 1 that Canadian law was to in fact acknowledge that aboriginal title to land existed prior to the colonization of the continent.
9. Now this paper is premised upon a similar sentiment to the Privy Council *Nireaha Tamaki v Baker* [1901] AC 561 (PC), which is that it is rather late in the day to say that customary law and indigenous law does not form part of the common law system in the twenty-first century.

10. It is my contention that this is a theme running through cases such as *Delgamuukw v British Columbia* (1997) 153 DLR (4<sup>th</sup>) 193 here in Canada, the decision of *Mabo v Queensland (No.2)* (1992) 107 ALR in Australia, and the foreshore and seabed decision in New Zealand known as *Attorney General v Ngati Apa* [2003] 3 NZLR 643.
11. In *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 the Supreme Court of Canada acknowledged the initial Indigenous ownership of the land. It recognised Aboriginal title as being different from land usage rights.
12. In *Mabo v Queensland (No 2)* (1992) 107 ALR (commonly known as *Mabo*) the High Court of Australia did away with the legal fiction that at the commencement of British colonisation in 1788 there was *terra nullius*, or "land belonging to no-one". Instead the High Court recognised the existence of a form of native title.
13. The decision also recognised that the indigenous population had a pre-existing system of law, which, along with all rights subsisting there under, would remain in force under the new sovereign (except where it would be specifically modified or extinguished by legislative or executive action).
14. In *Attorney General v Ngati Apa* [2003] 3 NZLR 643 *Ngati Apa* and other *iwi* (tribal groups) applied to the Maori Land Court for declarations that foreshore and seabed land in their area was Maori customary land.
15. The Attorney-General and other non-Maori parties objected and they relied on legislation and earlier decision of the Court of Appeal (*In Re the Ninety-Mile Beach* [1963] NZLR 461) as having extinguished customary property in the foreshore and seabed.
16. The whole five judges (Elias CJ, Gault P, Keith and Anderson JJ and Tipping J) found that the transfer of sovereignty in 1840 did not also vest the full beneficial ownership of New Zealand in the British Crown.
17. Customary rights continue to exist at common law as a burden on the Crown's radical title until lawfully extinguished.
18. This increased jurisprudential recognition that customary law and indigenous law forms part of the common law system is part of the ever developing indigenous rights discourse.
19. For the purposes of this paper, I make no distinction between customary law and indigenous law instead I view them as being one and the same.

20. Additionally, when I refer to the common law, I am referring to *the system* of the common law found in the jurisdictions of England and Wales, Canada, Australia, New Zealand the United States. This system of judge-made or judicial-sourced law is based upon precedent (*stare decisis*) where traditional common law and equity principles have been fused together into a system.
21. The adoption by the United Nations of the Declaration of Indigenous Rights just last year, and barely a fortnight ago the apology by Australia to the lost generations of Aboriginal children, are examples of the tide flowing towards recognition of more and more indigenous rights as well as an acceptance that indigenous world-views are different to western world views.
22. With this sort of development in the political and social arena, the common law cannot insulate itself from this change.
23. The common law changes and it develops. It is flexible. It may change at a snail's pace or it may change at a horse's gallop. But mark my word, change it will.
24. And that is why I made a reference earlier to the common law in the twenty-first century. It is definitely different to the common law of the mid-twentieth century or mid-nineteenth and seventeenth centuries.
25. If traditional common law and traditional equity principles are now reconciled with each other in the common law system, then surely there are ways to reconcile aboriginal law and the common law?
26. The answer to this posed question is yes there are ways? It is just like international law realities affecting the common law such as the concept of Parliamentary Supremacy for Great Britain has had to be modified by the political realities of the European Union.

### **Identification of indigenous law**

27. Now, the first task in reconciling Aboriginal law and the common law is more fundamental than what you think. One has to identify aboriginal law.
28. If we enter into a law library at any of the mainstream Universities in Canada, United States, Australia, New Zealand, England, we come across volumes of statutes, volumes of cases from the various provincial, state, Federal or the national courts.

29. I am quite sure that without too much effort you could locate in your own library the various treatises and works by Blackstone, the positivist HLA Hart and the legal realist Karl Lewellyn. It should take me 10 minutes to locate *Cheshire and Burn's Modern Law of Real Property*, *Phipson on Evidence* and Peter Hogg's *Constitutional Law of Canada*.
30. Unfortunately, it is not easy to locate treatises on indigenous or customary law. I have seen that the two volumes of the *Report of the Royal Commission on Aboriginal People's* (1996) is often referenced in modern Native cases or the works of Professor's John Burrows and Kent McNeill.
31. But apart from that Report, it more often than not requires an enquiry outside of the standard sources such as case law, regulation, statute, treaty or charter provisions.
32. You simply have to cast your net more wider which will involve dealing to an extent with aboriginal language itself. In doing so, one must always be aware that aboriginal language used to express indigenous concepts will have their own particular meanings and symbolism associated with such words, and many times there will not always be a perfect cross-cultural translation for such words.

#### **Written sources on indigenous law**

33. In terms of the written sources, you may wish to locate historical primary sources for indigenous principles and values such as reports and archival from the likes of the Hudson Bay Company or journals and diaries of the likes of missionaries or traders.
34. Alternatively, you may wish to consult past and present social commentators, anthropologists, ethnologists and linguists for identification of indigenous or customary law.
35. In the New Zealand context concerning Maori, it is simply incontestable that the writings of the anthropologists and academics Hirini Moko Mead, Joan Metge, and Pat Hohepa have had a huge impact in the humanities and social sciences of New Zealand academia.
36. New Zealand jurisprudence has not been immune from that impact. A look at the bibliography of any Waitangi Tribunal report or Law Commission work concerning Maori should show at the very-very least one or more of those academics as relevant sources.

#### **Oral sources on indigenous law**

37. Those are just examples of the written sources. The other fundamental sources of information for indigenous law which simply cannot be ignored are oral sources such as stories, songs, and genealogies.
38. If one is unfamiliar with working with these sources there is going to be quite a lot of apprehension. Don't panic, it is natural.
39. A way to try and understand these are by consulting the academics, social commentators and the linguists to try to give meanings to oral sources. One will have to try and identify the values and principles and the philosophical bases for the oral sources. This will require trying to understand the world view of the indigenous people's from where such oral sources originated.
40. Justice Morrow in the Northwest Territories case *Re: Paulette and Registrar of Titles No.2* (1973) 42 DLR (3d) 8 either wittingly or unwittingly did exactly this in trying to understand the issues of the case. Justice Morrow took the Court to Indian Settlements to record evidence of some of the old people of the various Indian bands. In three instances because of the age and illness of the witnesses, the Court even attended the home of a witness and took evidence there.
41. In *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 the Supreme Court of Canada made important statements about the legitimacy of indigenous oral history. The different oral histories in that case that were referred to were (1) the *adaawk* of the Gitksan, the *kungax* of the Wet'suwet'en; (2) the personal recollections of members of the appellant nations, and (3) the territorial affidavits filed by the heads of the individual houses within each nation.
42. Particular stories (*korero*) and genealogies (*whakapapa*) have long been used in the Maori Land Court in New Zealand to establish the range of rights to land. It was the use of these sources that helped early Native Land Court judges develop jurisprudence to land along the lines of Maori customary law.
43. The Maori Land Court's early minute books from the 1860s at least up to the 1940s simply contains pages upon pages of stories (*korero*) and genealogies (*whakapapa*) to legitimise tribal groups rights in various land blocks.

### **Indigenous customs and principles expressed as law**

44. Now in examining indigenous customs and principles and expressing them as law is going to involve an initial labelling of indigenous customary practises or social phenomena as in fact law for purely 21<sup>st</sup> century purposes.

45. For example, in traditional Maori society there was a range of customs relating to title and tenure to land. We may call this indigenous law or customary law. One example is given by the Reverend J. Hamlin opining that
46. Occupation gave a title to land in those early times, but occupation alone, without some other claim, subsequently did not. Conquest alienates the land but it has its quibbles. Conquest and occupation give a valid title to land. Conquest without occupation is doubtful... (Rev. J. Hamlin, Native Land Tenure: Appendix A to Governors dispatch of 4 December 1860, *Appendices to the Journals of the House of Representatives* (1861), E.1.)
47. When we identify a particular indigenous social phenomena and which we wish to label these as customary or indigenous law, then you are set with a particular law that needs to be *prima facie* recognised by legalists.
48. However, like all *prima facie* rules that become identified then there are further questions to be considered. This is where you really start the reconciling process of indigenous law concepts with common law concepts.
49. Here are some of the basic questions. Is the indigenous or customary law applicable on the facts? If this is the case, then are there other indigenous laws or common law concepts applicable on the facts? And if so, how are we to deal with any competing, conflicting or even consistency between them? None of this should come as anything profoundly new.

### **Reconcile indigenous law and the common law.**

50. Now, this is what the core thesis and crux of my paper is in regard to ways to reconcile indigenous law and the common law.
51. When one is faced with any competing, conflicting or even consistency between indigenous law and the common law. We must look towards the various principles, interests and values behind those indigenous laws and the common law rules.
52. This is to enable a proper weighing of principles, interests and values behind those indigenous laws and the common law rules. These are good old fashion judicial, academic and advocacy roles like the juggling of interests, between the parties concerned and the wider concerns. Certain principles will ascend others depending upon the facts and circumstances.

53. And how do you weigh the principles, interests and values behind those indigenous laws and the common law rules?
54. Well, the answer is that it is going to involve value judgments on the part of the examiner.
55. In doing this weighing exercise, this process is also going to involve a consideration of underlying values and the various world-views concerned with indigenous laws and the common law rules.
56. This is done all the time in the law. In defamation proceedings there are competing values and principles. On the one hand the principle of freedom of speech, and on the other hand the protection of a person's reputation
57. In *Attorney General v Ngati Apa* [2003] 3 NZLR 643 as previously mentioned Maori customary rights in land were said to continue to exist at common law as a burden on the Crown's radical title until properly extinguished.
58. The judges in that case, were weighing up various competing interests such as the Crown needing to theoretically own the underlying title to all land in New Zealand because that was the theoretical underpinning of most land law in New Zealand.
59. However, there also needed to be recognition that the indigenous population of New Zealand (Maori) were clearly owners of all the land in New Zealand before European settlement. So, the judges reasoned the two titles could co-exist in one form or another, in certain circumstances.

### **General Areas of Development**

60. So with all of what I have been saying. Indigenous law can operate with the common law at any level whether we are talking about substantive *prima facie* rules, substantive defences or at the remedies stage. It is to be noted that this is just in relation to the interface of indigenous law and the common law, and not adding the interplay of legislation or written constitutional provisions into the mix.
61. I am making some general suggestions here and this is designed to encourage academics, students, legal practitioners and indigenous peoples to try and develop these areas. At one time indigenous law was not recognised at all, and now the fact that I am presenting in Canada on this topic is testimony that the law has moved on from that position.

62. In regard to real property (land) we have already seen how it can be affected by customary law and indigenous title.
63. In terms of title to some chattels, indigenous law is definitely relevant for indigenous property. Possession at common law is often a sufficient form of title. The common law concept of *nemo dat* provides that one cannot get good title in goods from somebody that doesn't have good title.
64. Now if someone has stolen some indigenous property, then indigenous concepts ensures that you can get that thing back or be recompensed for the loss. This is certainly the case in Maori society where the concept of *utu* (recompense, balance) embraces this.
65. The Common law system too provides an appropriate remedy whether through the classic common law in the form of damages (compensatory, special, punitive, and exemplary) or whether through classic equity (injunctions, specific performance, constructive trust or tracing etc).
66. But what happens when there is a conflict as to who holds the title to the chattels itself? We must look towards the principles and values of both indigenous law and the common law to find such answers and weigh them up against each other? These are going to involve some deep philosophical arguments that involve consideration of values.
67. What about other arenas of law? In torts the Maori concept of *manaakitanga* (supporting, nurturing) can be adapted to develop principles around the concept of duty of care in negligence law.
68. I have already mentioned above about the Maori concept of *utu* (recompense, balance). It is submitted that it can be employed to assess the extent of damages for the breach of the torts whether in negligence, nuisance, and the rule in *Rylands v Fletcher* or defamation.
69. And what about the arena of contract? Now what happens when you have tribal and indigenous legal entities enter into contractual relationships with clauses purporting to rely on indigenous or customary substantive law or procedures?
70. The courts are going to have such fun won't they giving expression to these clauses. And am tantalising at the thought of what is going to become of *the parole evidence* rule under those circumstances?

71. And what about family law? There is room to develop arguments in custody and guardianship issues based upon indigenous and customary law for considerations of ‘what is in the best interests of the child’.
72. In the area of evidence law and procedural law the common law has already evolved, or to use a Star Trek terminology “shape shifted”. The decision of *Delgamuukw* and *Re Paulette* are examples of this.
73. And the last area that I wish to just point out and which is an area just ripe for development is in the area of equity, trusts and fiduciary relationships.
74. There are indigenous concepts that exist with extremely close relationships to the words stewardship or trusteeship. These concepts will have an impact in the role of trustees and not just in regard to relationships to beneficiaries but directly to the environment as well.

## **Conclusion**

75. Now I don’t want to look at these areas with rose tinted glasses. There will be massive resistance to these approaches fuelled in part by ignorance of indigenous principles, but also down and outright prejudice.
76. Now when you are trying to identify indigenous and customary law and then trying to reconcile it with the common law by reverting to the principles and values which they are based upon, don’t worry about whether you are going to get it right all the time.
77. Most probably you may get it wrong a few times, and you will get criticised. You will get criticised from indigenous people because you don’t get it right. You will get criticised by academics because that is our job to critique and publish. Western legal purists and legal positivists will criticise you because this approach will be seen as infecting the law with much uncertainty and because they feel uncomfortable with concepts that they are not use to dealing with.
78. But don’t be discouraged. Because as long as indigenous peoples continue to live, and continue to call for the recognition of aboriginal law, the common law will change.
79. And once again mark my words, change it will.