

CUSTOMARY LAW, THE CROWN AND THE COMMON LAW:
ANCIENT LEGAL ISLANDS IN THE POST-COLONIAL STREAM

by

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Abstract

This thesis is a cross-disciplinary study of legal history and customary law. Respect for, and accommodation of local customary law has been a constant and integral feature of law in Britain since Anglo-Saxon times. It guided the emergence of the common law, and continues as a rule of law to the present day. Such respect and accommodation was an essential principle that permitted the peaceful consolidation of the British realms from its constituent parts. Continuity of law is a legal presumption whether territories have been added by conquest, cession or annexation. The principle respect for local legal custom was one of two schools of thought carried to Britain's overseas colonies; the other was a theory that local customary law could be extinguished by non-recognition on the part of the British sovereign or his/her delegates. Nevertheless, customary laws and institutions were explicitly and implicitly recognized in the colonial period. The doctrine has modern application with respect to the customary law ways of indigenous peoples wherever the common law has been extended overseas. Rights under customary law are distinguished from Aboriginal rights, though there is some overlap between the two. Customary law can only be extinguished by an express statute, or by clearly unavoidable implication. Legal customs are not invalid merely for being contrary to the common law. Common law defers to valid customary law as a matter of constitutional common law. But the common law provides tests by which courts can identify valid legal custom. Where a valid, unextinguished legal custom is found, courts are bound by the common law to apply it. Where customary law can be identified, it binds the servants and agents of the Crown, except when it is inconsistent with Crown sovereignty itself.

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Chapter 1 – Introduction to the topic

Legal customs of Aboriginal peoples have been recognized as a source of applicable legal principles in Canadian courts since at least 1867,¹ and in pre-Confederation Canadian statute since 1850.² Moreover, both explicit and implicit recognition of their customary laws appears in treaties and government documents from the earliest days of the overseas colonial expansion enterprise. All of this accords with both ancient and modern common law constitutional principles that the assertion of sovereignty does not create a legal desert, but rather introduces *inter alia* a guarantee by the monarch, as font of justice, that the rule of law will prevail. The presumption that local law continues has been a cornerstone of constitutional law since the first Anglo-Saxon tribal communities began to coalesce into what later became England. That presumption has continued, uninterrupted in law to this day, notwithstanding that on occasion political actors have disregarded it under pretense of royal or other authority. The validity of customary marriages and adoptions has recently been upheld in a number of Canadian provinces and territories – even without statutes to that effect. Canadian courts have repeatedly held that the substance of Aboriginal rights should be determined according to the customs of the particular Aboriginal people being considered. The courts in Canada and other former colonial outposts, however, have not applied a principled approach to identifying local legal custom or determining its legal validity. Superficial classifications, such as whether they are/were “customs in relation to internal matters”³ do not distinguish valid legal customs from non-binding practices, though

¹ *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75, 11 L.C. Jur. 197 (Que. Sup. Ct.) [cited to R.J.R.Q.], aff'd *Johnstone v. Connolly* (1869), 17 R.J.R.Q. 266, 1 R.L.O.S. 253 Que. (Q.B.) [cited to R.J.R.Q.], in which local custom was recognized in principle as the basis for a legally valid marriage.

² *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, S. Prov. C. 1850, c.42 [hereinafter *Indian Lands Protection Act, 1850* (Lower Canada)]. S. 5 provided that “Indian” included all persons “adopted in infancy by any such Indians”. Since adoption was not known to the common law, and was not the subject of general statute for others until 1873 (New Brunswick) the inescapable inference is that such adoption must be according to the legal customs of the band involved.

³ *Per* Lambert JA in *Delgamuukw v. British Columbia*, (1993) 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97, (1993) 30 B.C.A.C. 1, [1993] 5 C.N.L.R. 1, online: QL (BCJR) at 289 [cited to W.W.R.]. The internal/external distinction is unhelpful because while most customs will, by their own nature, relate to matters within a community, this factor is not a criterion of a valid custom. Lambert had hypothesized that a postulated “right to make war” had been extinguished as incompatible with the Crown’s sovereignty, and therefore “the laws and customs of the Gitksan and Wet’suwet’en in relation to affairs external to the Gitksan and Wet’suwet’en peoples were abrogated.” I suggest the posited link between local legal custom and internal matters is ill-conceived. Although making war with others of the Crown’s subjects would challenge the peace of the realm – and therefore the Crown’s sovereignty – the maintaining of good relations or the settling of disputes between neighbouring peoples is no such challenge. It should not matter that the persons in question might be on opposite sides of a group’s social or membership boundary. Surely Lambert JA did not suggest that customs that promote social cohesion and harmony pose a threat to law and order. The common law simply asks whether the alleged custom has the required attributes of certainty, immemorial origin, continuity and legal reasonableness. The internal/external distinction is none of these. See chapter five for discussion of the criteria in depth.

mores that are internal to any culture are important in their own right, in a multicultural society.

Today's common law doctrine⁴ of local legal custom was remarkably well developed long before the overseas colonial expansion period began, and has continued to be applied in the home of the common law in local matters to this day. So also in appeals from present or former colonies and other dominions to British courts. Yet the doctrine is relatively unknown overseas. Reasons for this lacuna are explored in chapter four. Nevertheless, I would argue that wherever the common law has been introduced, the doctrine of custom accompanied it. The argument is untenable that parts of the common law can be dismissed on the mere ground of inconvenience, especially where it results in infringement of vested legal rights. It is generally established that English laws may not be applicable to situations in a colony in its formative years, yet become applicable as circumstances require.⁵ My central argument is that the common law doctrine of legal custom remains as valid and compelling today as it was when the common law first emerged. I will show that the common customs of the realm⁶ have consistently deferred to local legal custom since before William the Conqueror, through to the year 2001.⁷ The doctrine is eminently reasonable in that it serves important social, political and legal functions. It has facilitated the incorporation of new peoples and lands into the Crown's dominions while ensuring an orderly maintenance of prior legal rights with a minimum of social, political and economic disruption.

Yet modern attention to local legal custom in the former British colonies has for the most part been only superficial. Colonial practitioners and jurists have displayed little awareness of the common law doctrine of custom. And the rules governing the application of the common law to legal custom in colonial situations has been irregularly applied. Common law has been applied in a discriminatory way, based on the personal identity of the

⁴ The word "doctrine" is used advisedly because the common law rules around the identification and application of local legal custom is a coherent, integrated body of inter-related and mutually supporting legal principles, as distinct from a handful of disjointed rules.

⁵ Blackstone noted that colonists carry English laws as their birthright, but only so much as is applicable to the condition of the infant colony: Sir William Blackstone (1765) *Commentaries on the Laws of England* (reprint, Philadelphia: Rees Welsh and Company, 1897) [hereinafter *Blackstone's Commentaries* cited to Philadelphia edition] book 1 at 93. In 1889 Lord Watson *per curiam* endorsed Blackstone on this point, but observed that the conditions in the colony may change, in which case more of the common law may find ear: "[A]s the population, wealth, and commerce of the Colony increase, many rules and principles of English law, which were unsuitable to its infancy, will gradually be attracted to it": *Cooper v. Stuart* (1889), 14 A.C. 286 (PC New South Wales) at 291-92.

⁶ Later known as the common law.

⁷ Although the common law did not arise as a discrete legal concept until the reign of William's grandson, efforts had been made by a number of William's predecessors to extract from the matrix of local legal customs those laws that happened to prevail throughout their dominions.

person before the court, with no basis in law for such discrimination. On those infrequent occasions where customary law was at issue before Canadian courts, the legal customs of indigenous peoples have not been examined as laws in their own right. Instead, the usual test has been whether the custom as alleged is contrary to the common law. The prevailing – though flawed – approach in Canadian courts has been that “custom” as law can exist only as a quaint and exotic local variation or analog of some common law rule. The working assumption has usually been that if the alleged local custom is contrary to the common law, then it cannot be given effect. This, however, is not what the common law itself says about local custom. The common law says that a local custom is not unreasonable merely because it is contrary to the common law. Indeed, local custom by its very nature varies from the common law: if it were the *same* as the common law, then it would in fact *be* the common law, in the sense that the common law is that unwritten law which is *presumed* to be common to all the Crown’s subjects. Courts in Britain continue to hold that presumption to be rebuttable by proof that local legal custom is otherwise, in which case the local custom governs that particular legal issue.

Some objections to differential treatment of Aboriginals in law

Many modern commentators, particularly those opposed to Indian interests or to their claims of a right to govern themselves, have said that no rights should be conferred on one racial group and not on others, and that there should be one law for all people. This position has much in the common law tradition to support it. The Crown, as font of justice, must not act to the detriment of any subject’s legal interest, as a matter of common law, nor confer a benefit on a subject that has the effect of legally disadvantaging the rest. Preferred access to a scarce resource has the effect of denying opportunities to others. But while the complaint is superficially attractive, it reflects a misunderstanding of the concept of equality before the law. One can list countless examples of neighbours or even people in the same room having different rights from each other. The right to equal treatment before the law does not mean that everyone should be treated identically where they are not similarly situated – only that they should be treated fairly and according to the applicable law, rather than according to irrelevant personal characteristics or according to the whim of the adjudicator. Where some persons have a vested legal right that others lack, legal fairness does not require those legal rights to be stripped in order to make the parties equal. Justice requires that where a person has a legal right, then it should be given practical effect. Landlords, for instance, have certain rights that are denied to tenants, such as the right to choose who may be the next tenant. And both landlords and tenants have rights that are denied to mere guests. The suggestion by analogy that a non-Aboriginal landowner should forego his rights of ownership in order to equalize his rights with those of his tenants or guests would be rejected as patently absurd. Yet critics of Aboriginal rights argue precisely that – that Natives should abandon their rights because their non-possession by Natives is an inequality.

Critics of Aboriginal rights often claim that such rights are conferred on the basis of race. But the rights are not *conferred*. And possession of them is not determined by race. Membership in a First Nation is based not on race, but on kinship. And the rules governing kinship are peculiar to each particular group, according to that group's own legal customs. While it is true that the race of a child is genetically determined, kinship sometimes depends on actual parentage (as by birth) and sometimes on notional parentage (as by adoption). An adopted child, for instance, gains kinship relations that do not depend on genetics, as when a Caucasian couple may adopt a black child, or when a numerically depleted clan adopts outsiders to bolster its population to above a critically minimum level necessary to sustain its kin-based social institutions. The mere coincidence of race and specific rights does not mean that one is dependant on the other. For instance, it is incorrect to say that since no black person or Chinese or Inuit has held the Crown, descent of the Crown was (before the union of England, Scotland and Ireland) based on Englishness or is legally confined to western European Caucasians. Instead, the Crown's descent is determined by *sui generis* customary laws and statutes peculiar to itself. As a case in point, James I (reigned 1603-1625) was born a Scot, and was therefore an alien to English persons and to the English Queen Elizabeth. But he gained the English throne upon Elizabeth's death because he was legally qualified on the basis of kinship, according to the legal customs governing the British royal succession. If race determined Aboriginal rights, then a Blackfoot from Alberta, or an Ojibwa from Ontario would have the same Aboriginal rights in Haida Gwaii as a Haida does. But race does not determine Aboriginal rights. Members of particular Aboriginal groups do not have any generic claim to Aboriginal rights in each others' territories.

A variation on the race-based argument is the objection to Aboriginal people having a distinct status in Canadian law on the basis of ancestry. Tom Flanagan's reasoning is that Indians did not do anything to achieve their status except being born, and that no one else can join them in that status because one's ancestry is beyond one's control.⁸ He evidently overlooks that an important factor in Canadian identity – citizenship – is usually based precisely on accidents of birth. Children of Canadian parents are automatically Canadian citizens. Does he suggest that children of Canadians should be denied automatic citizenship? Should Canadian law forbid one's children from inheriting his estate since to do so would deny the same privilege to others because of their accident of birth? Of course not. That approach would undermine fundamental common law rules of citizenship, inheritance, insurance, real estate and more.

Recognizing a right does not create a new one

The second weakness in the argument is the mistaken belief that Aboriginal rights are "conferred" or "created." The argument flows from the colonialist world view that *all* legal

⁸ Tom Flanagan, *First Nations, Second Thoughts* (Montreal and Kingston: McGill-Queen's University Press, 2000) at 22.

rights derive from the will of an irresistible and absolute monarch – that is, unless the monarch confers such rights, they do not exist. This view is inconsistent with either the common law or history. In truth, the monarch has never in the history of the English/British monarchy been competent to create, alter or extinguish legal rights except as provided by law. As noted above, there are countless rights that are not distributed universally among all subjects, although many others are ubiquitous. And while the Crown cannot create legal rights for one group of subjects in preference to others, the Crown as font of justice is required to recognize and protect whatever legal rights that any of its subjects are found to possess.⁹ Existence of legal rights in a subject or a sovereign are questions of law, and are therefore not contingent on any monarch's personal will. The Crown and its servants are bound by the common law, by numerous statutes, and by the coronation oath to abide by local legal custom except where provided otherwise by statute. Recognizing or acknowledging vested legal rights is quite a different thing from conferring or creating them.

The Crown and colonization

Commentators on both sides of Aboriginal rights issues often hold the same mistaken view of the nature of sovereignty and the theoretical powers of the Crown – at least the powers at the beginning of the overseas colonial period. Under the absolutist view of the monarchy and law, all rights within the common law model derive from commands (or at least the tacit consent) of an absolute monarch, having irresistible powers. Proponents of that view acknowledge that in modern practice the monarch has no such authority beyond the mere formality of confirming enactments by legislatures. The detractors explain modern limitations by saying such irresistible authority has been *extinguished*¹⁰ by Parliament. This presupposes that the authority existed previously, which it did not. On that superficially plausible but legally false premise, they argue that without a royal grant, no Aboriginal rights or title to land can exist. It is wrong, they add, to create them now. Many advocates of Aboriginal rights also implicitly accept the premise, but rely on the presumption of

⁹ This one of the reasons why people are usually treated as individuals before the law – as individuals they have rights that other individuals may not, and their respective situations give rise to circumstance that pertain in one case and not in another.

¹⁰ A more accurate account is that Parliament, in its customary legal role as the ultimate legal court of the realm, confirmed ancient constitutional limitations on the power of the monarch, and set them out in the form of statutes. It is decidedly not the case that before such statutes there were no legal limitations, or that they were not enforced. Confrontations such as between King John and his barons, or between Parliament and the Stuart kings, were demands that the monarch abandon the pretense of irresistible power and confine himself to such royal prerogatives as was/is given by the common law and constitutional custom. Actually, very few of the royal prerogatives have been taken away.

continuity to argue that extinguishment requires an explicit act.¹¹ Colonial historians generally accept uncritically the assertion that whatever the sovereign wished or commanded was automatically law. A proclamation of the monarch with respect to a colony automatically becomes, in their view, an act of state. And against such a presumed act of state, the only defence can be simply a favourable interpretation of its terms. But such a view is inconsistent with the common law either before, during or after the period that such irresistible sovereigns are alleged to have existed. It is repugnant to the legal world view underlying the institution of the monarchy, and fails to take into account some critical aspects of constitutional law surrounding the monarchy and the Westminster model of government, both of which have prevailed through the entire colonial enterprise. For one, the monarch is and has always been, under and not above the law.¹² As such, (s)he cannot change the law with respect to any subject's interests. Second, the monarch is not the state, despite the protestations of a certain French king, "l'état, c'est moi".¹³ Divine pretensions aside, the English/British monarch has never been the highest authority of the realm or the state: rather, it the Crown *in Parliament* is supreme. In matters of purely executive discretion, it is the prerogative of the monarch to decide. But without Parliament, the Crown has no power to create, extinguish or modify any law or rights that flow therefrom. As the font/repository of justice, the monarch is presumed in law to never intend the infringement of any legal right. The relationship between monarch, subject and laws is explored more fully in chapter two.

Crown sovereignty and extinguishment of customary law

Alternative arguments are sometimes offered that where rights may have existed under the customary laws of indigenous peoples, such rights and laws were extinguished upon the assertion of sovereignty by the English/British monarch in colonial times, or by subsequent express or implied intent of the monarch. This fanciful notion is seductive, if simplistic. The difficulty is, there is no point in historical time where this has ever been true.

¹¹ The presumption of continuity is supported by the argument that, assuming the monarch had the authority to extinguish custom by mere will, the failure to exercise that alleged prerogative is evidence that there was an intention that local legal custom should continue. The alleged prerogative thus supports both the continuity of local legal custom and the extinguishment of it, and is therefore proof of neither.

¹² *Bracton De Legibus et Consuetudinibus Angliae* (attributed to Henry of Bratton, c. 1210-1268), George E. Woodbine, ed., trans. S.E. Thorne (Cambridge, Massachusetts: Harvard University Press, 1968), online: Bracton Project Homepage (Ames Foundation, the Harvard Law School Library, and the Legal Information Institute, Cornell Law School) <<http://bracton.law.cornell.edu/bracton/Common/index.html>> (last modified: 18 October 1999) [hereinafter Bracton] vol. 2 at 33, 110, 306; *Case of Proclamations* (1610), 12 Co. Rep 74 at 76 [cited to Co. Rep.], 77 E.R. 1352 (K.B.); *Blackstone's Commentaries*, *supra* note 5, book 1 at 211-214; Fritz Kern, *Kingship and Law in the Middle Ages*, trans. S.B. Chrimes (Oxford: Basil Blackwell, 1939) at 70, 199-200.

¹³ Louis XIV of France, reigned 1643-1715.

It is contrary to the world view that underlies the common law and the monarchy in the Westminster model of government.¹⁴ And those who profess the absolutist view understand neither their own history nor the common law, though their numbers are not few. If it were the case that mere pronouncements by the Crown or its ministers or agents were sufficient to make law, then we would find that every Crown grant or order would be upheld by the courts, and every purported proclamation would be given the force of law. In modern times such an assertion would be ridiculed. History and case law clearly reveal that such pretense of absolute power has been thoroughly and repudiated by the courts and by Parliament whenever the argument has been advanced, since long before William the Conqueror, and ever since. To address the absolutist argument, it is necessary to examine the history of the role and powers of the monarchy in the Westminster governance model. Before turning to that question, though, it is important to address an argument that critics of distinct Aboriginal rights have raised. Why, ask such writers as Mel Smith and Tom Flanagan, is it necessary to look at rights that may or may not have existed decades or centuries in the past.¹⁵

Why look to the past to ascertain current legal rights?

Aboriginal elders and writers often view time as cyclical in nature, and a reference to a past time is merely a reference to another point on the cycle: all time is one. I would add that it is possible to come to the same conclusion by a broad linear path because contact with “other” peoples is an ongoing process on many levels, rather than a discrete event – that is, cultures can come into contact and co-operation over centuries or more without their members losing their respective rights, or their identities as communities. The same principle that prevented the Danes from extinguishing the laws and customs of the Saxons, Angles or Jutes in the kingdoms they established in Britain, continued to protect peoples of the Channel Islands, the Welsh, the Manx, Scots, Irish, as well as in the Norman holdings in France for so long as the British Crown exercised sovereignty there. It is not necessary to view time as cyclical in nature in order to take a long-term view of historical processes or to consider the essential unity of events that occur over centuries. In addition, the contact of the Anglo-Saxons and Normans with “other” cultures did not begin with the realization in Europeans that the Americas and the peoples there existed. Rather, they had been colonizing “other” cultures in the British Isles for six or seven centuries before Columbus’ or Cabot’s voyages. And a comprehensive body of legal doctrine was already well established that both enabled and constrained the monarch with respect to “others” as subject peoples, as vassals or as allies, and with respect to their lands as Crown possessions, territories or dominions, etc. To understand the legal relationship of the English/British monarchy and “others”, therefore, it is necessary from a European viewpoint to take a long-term view of the development of that

¹⁴ The emergence of the common law, and the world view that fostered such emergence, will be examined in chapter two.

¹⁵ Melvin H. Smith, *Our Home or Native Land? What Governments' Aboriginal Policy is Doing to Canada* (Victoria, British Columbia: Crown Western, 1995), Flanagan, *supra* note 8, 15.

doctrine and its application – one more reason to examine the actual powers of the Stuart kings’ “noble Progenitors”. Chapter two examines the constitutional nature of the monarchy and its role in the coalescence of a unified realm from disparate, culturally heterogeneous communities, and the emergence of the common law from a matrix of diverse local legal customs. Chapter three explores the relationship between common law and local custom in the context of colonizing the British Isles.

Mere passage of time does not extinguish law

Another reason for a long-term approach to local legal custom is that a maxim of the common law provides that laws and legal rights never die by virtue of the mere passage of time. If that were true, then surely the rights and freedoms guaranteed in the *Magna Carta* would now be nothing more than historical curiosities. Such a general rule of extinction cannot be found in the common law or in any statute. By *reductio ad absurdum* the posited rule defeats itself: if it is an immemorial rule, then by its own terms the rule would repudiate its own validity because such a rule must lapse when its origin is forgotten. The principle of continuity allows that there may be no occasion to exercise a legal right or custom for many years, without disturbing its validity.¹⁶ Continuity is presumed if the legal custom or right can be shown to have existed at some definite time in the past. The onus then lies on the party seeking to disprove the alleged custom to show that it has since been legally extinguished. In *Scales v. Key* (1840) the enjoyment of a customary right was upheld despite the fact that there had been no occasion to exercise it for a century and a half – longer than Canada has existed as a country. At issue was an ancient custom governing the choice of leadership in the city of London. The custom itself can be seen as a vestige of pre-common law local governance, in which the fitness of an elected candidate could be challenged before he was installed as alderman, with the mayor and incumbent aldermen sitting as the court of jurisdiction. It was not a common law process, however. And such right to challenge had not been invoked though the reigns of seven successive kings and queens, since 1689. The court held on appeal that failure to invoke the custom did not extinguish it, especially where no occasion arose to use it, or where there was evidence that the use of it had been improperly interfered with. Its continuity is a legal presumption – rebuttable only by proof of a positive act of extinguishment, by Parliament, in a statute. The court expressed the principle thus:

The finding of the jury that the custom had existed till 1689, was the same in effect as if they had found that it had existed till last week, unless something appeared to show

¹⁶ The difficulty posed by passage of time is that proof of its existence may sometimes be made more difficult. But evidentiary difficulties do not extinguish legal custom any more than they extinguish other law, or the duty to consider it judicially. See chapter five for a discussion of proof of custom and of its extinguishment.

that it had been legally abolished.¹⁷

The relationship of the Crown to both its subjects and to “other” peoples also requires a long-term view because in law the Crown, as font of justice, becomes the guarantor of local law wherever the “king’s peace” has prevailed. And the common law doctrine is that the monarch in her political capacity never dies, though in her personal capacity she undoubtedly expires.¹⁸ The same monarchy exists today as when Henry VII issued Letters Patent to John Cabot in 1496, although different individuals have held the throne. And what was competent to the Crown in Henry VII remains to the Crown in right of Canada or British Columbia today, except where altered by statute in the interim. The difference is that the royal Henries were more directly involved in governing the realm, while nowadays the executive functions are performed by Ministers and civil servants in the name of the Queen or King. Virtually all of the royal duties persist. A number of statutes have, however, laid down the law for several monarchs who pretended more authority than constitutional common law allowed. For the most part, those statutes did not purport to be anything more than restatements of ancient constitutional principles. Indeed, Parliament relied upon those ancient customs for authority in reining in the out-of-control monarchs. Where legal means failed to keep monarchs within legal limits, force of arms by Parliament sufficed. It follows that whatever was beyond the reach of the royal prerogative in former times cannot validly be claimed as royal prerogative today. And acts that were unconstitutional at the time cannot be given retroactive sanction today, unless authorized by subsequent statute. If a proposition of modern law relies for its strength on the validity of acts alleged to have been done in the past, then they are relevant today because historical or legal fictions are no more than juridical devices in the service of justice – presumptions of convenience only. But fictions that operate to defeat justice and the rule of law have no rightful place in modern jurisprudence. It follows that the validity of actual or hypothesized grants or enactments are legitimate subjects of judicial inquiry, except where the court is otherwise barred by law from considering them.¹⁹

¹⁷ *Scales v. Key* (1840), 11 Ad. & E. 819, 113 E.R. 625 (K.B.) at 825-26 [cited to Ad. & E.] per Lord Denman C.J.. This case has been considered and affirmed as late as 1995 in *R. v London ex parte Matson* (March 16, 1995) (Q.B.); rev’d on other grounds (August 18, 1995), *The Independent* (27 September 1995) 20 (C.A.), online: QL (NLOR for trial, QL (INLR) for appeal) [hereinafter *Matson* (1995)].

¹⁸ *Calvin's Case* (1608), 7 Co. 1a at 10b, 77 E.R. 377, (K.B. and Exch. Ch.) [cited to Co. Rep.]. See also the discussion in Chapter two.

¹⁹ Notionally the term “within legal memory” is used in contradistinction to “time immemorial”. A law is said to be customary law if it dates from before A.D. 1189, the year in which Henry II died. It was in his reign that the common law began as a coherent body of law. That date was adopted by the statute *Several Limitations of Prescription in several Writs*, 1275 (England), 3 E. 1 c.39 for the purpose of barring new actions for injuries alleged before the earlier date. It has become accepted as the presumed date of limitation for most matters of the common law doctrine of custom, including the customs that ground and govern the royal prerogative. Later dates, however, can apply in territories acquired by the Crown since that time, such as with customary law in the Isle of Man. See *Isle of Man (A.G.) v. Mylchreest* (1879), 4 App Cas 294 (H.L.) [hereinafter

It is also a common law rule that statutes or other acts in derogation of the common law or custom must be construed narrowly/strictly.²⁰ This means that the claim of Aboriginal peoples to a remedy for infringement of a legal right cannot be denied unless a constitutionally valid statute or act of state can be shown that unavoidably limits them from legal action.²¹ The state of the modern law with respect to Aboriginal rights and customary law are legitimate concerns for modern relations. If Flanagan, Smith or others wish to deny Aboriginal rights in the modern context, then *they* must demonstrate that such rights have been extinguished, because the presumption in law is that they have not. They rely on alleged acts of extinguishment that are centuries in the past in order to sustain their point. I do not criticize their reference to such times – only the hypocrisy of relying on such ancient fictions, while at the same time decrying attempts to rebut them by examining those purported acts, and their legal effect, in light of the laws of the period.

It is not the case that the mere will of the monarch has ever had the force of law within the common law system, except within narrowly prescribed limits. The law is not what the monarch has done, but what (s)he ought to have done. Otherwise, courts would have had to uphold royal proclamations and executive acts without exception, but they have not done so. The royal courts would have been bound to uphold the king when, for instance, King James I tried to legislate by royal proclamation for the city of London,²² or for Wales²³, or tried to completely remove matters of state from the purview of the royal courts,²⁴ or when royal grants were disputed.²⁵ But the courts have not done it. Case law reveals that the royal courts have explicitly and repeatedly repudiated pretensions of absolute royal power. The common law places constitutional constraints on the use of the royal prerogative. It does not permit the monarch to alter common law, local legal custom or other law except with the advice and consent of Parliament. This principle also prevents the monarch from

Mychreest (1879)] below at 112. For further discussion see chapter five at 110 ff.

²⁰ Blackstone, *supra* note 5, "Introduction" at 68; *Smart v. Smart* (1881), 18 Ch.D. 165 [hereinafter *Smart* (1881)] at 170. But statutes that infringe either common law or custom must be strictly construed. See discussion below in Chapter 5, especially note 327 and associated text, and the discussion of *Mayor, Bailiffs, and Burgesses of the Borough of Leicester* against *Burgess* (1833), 5 B. & Ad. 246, 110 E.R. 783 (KB) [hereinafter *Leicester v. Burgess* (1833) cited to B. & Ad.] below at 130.

²¹ The doctrine of laches applies where there is unreasonable delay in bringing a claim in equity, and not for claims in law, especially where the reason for delay cannot be attributed to a fault in the claimant.

²² *Case of Proclamations* (1610), *supra* note 12. That judgment cited (at 75-76) numerous instances of royal proclamations that were "utterly against law and reason", and therefore void.

²³ *Justice in Wales Not to be by Commission* (1607), 12 Co. Rep. 48, 77 E.R. 1328 (K.B.) [hereinafter *Justice in Wales* (1607) cited to Co. Rep.].

²⁴ *Prohibitions del Roy* (1607), 12 Co. Rep. 63, 77 ER 1342 (K.B.) [cited to Co. Rep.].

²⁵ *Infra* note 213 and *Lerwick* (1903), *infra* note 210.

expanding the royal prerogative at will. The rule is that no prerogative exists except such as are provided by the common law or by legal custom.²⁶ And it must be proven wherever the Crown claims to stand on a different footing from subjects.²⁷ The authority to change law by royal prerogative was not claimed by British monarchs until James I asserted it as a divine right. But his highest courts unanimously and repeatedly denied its existence.²⁸ If the arbitrary authority to alter or abrogate law by royal prerogative did not exist in the James I, his predecessors or his successors, then it follows they could not have delegated it to its officers or delegates in the Americas or elsewhere. The legal effects of royal grants and actions under delegated powers must therefore be assessed in light of the limits imposed by existing common law at the time, or in the alternative, ratification by subsequent statute. An allegation that an act by an officer of the Crown is an act of state does not make it so. Although municipal courts cannot review a decision incorporated in an act of state, courts are competent to inquire into whether there indeed was an act of state as alleged, or whether it was an act of a different nature. If an act of state is found, then the court cannot question its propriety, wisdom or fairness. Nevertheless, the court can examine and pronounce upon the legal effect an act of state has on existing rights.

***Jura regia* – rights, privileges and prerogatives of the Crown**

To understand the authority and powers of the Crown, we must examine the nature of Crown sovereignty and its role in law and governance.²⁹ To fully appreciate that role it is necessary to understand the world view that generated the Westminster model of governance and the common law model of law. This in turn requires an understanding of the developmental history of its legal/governmental institutions, and of the cultural milieu from which they emerged. We will explore those matters in chapter two. In chapter three we will see how constitutional principles acknowledging local custom as law, and informing the powers and authority of the monarch, were reaffirmed and refined in the centuries in which the Anglo-Saxons and Normans colonized the British Isles. Chapter 4 will examine the

²⁶ *Case of Proclamations* (1610), *supra* note 12 at 76.

²⁷ *Attorney General to the Prince of Wales v. Crossman* (1866), L.R. 1 Ex. 381 [hereinafter *Crossman* (1866)] at 386.

²⁸ In *Justice in Wales* (1607), *supra* note 23, James I alleged in court that he had the same powers as Henry VIII, and could therefore legislate for Wales by proclamation according to his “most excellent will and discretion”. The court in that case ruled that such power as was given only by statute to Henry VIII, and terminated at his death, not continuing in his successors. It observed that in any event, Henry had never exercised such authority as he was given. (See discussion below accompanying note 191.)

²⁹ For discussion of the capacities and characteristics of the monarchy see *Lord Berkley's Case* (1561), *infra* note 213; *Calvin's Case* (1608), *supra* note 18; *Magdalen College* (1615), *infra* note 213; *Blackstone's Commentaries*, *supra* note 5, book 1 (especially chapters 3,6 and 7); Kern, *supra* note 12 at 69-79; Bracton, *supra* note 12, vol. 2 at 19, 33, 166-67, 305-06..

colonization enterprise in the overseas colonies, in which the continuity of local legal custom remained an applicable principle of law, but received mixed support from colonial officials. In that chapter I will argue that both of the leading theories of law and rights lead to the conclusion that local legal custom remains a valid source of law and powers of indigenous governance for indigenous peoples overseas, in the same way as it continues today as a source of law and governance in England, Ireland, Scotland, Wales and the Channel Islands. Chapter five will set out the common law doctrine of legal custom in modern form, showing the legal tests by which allegations of customary law and rights are assessed. We will also see the constitutional fit between legal custom, the common law, statutes, legislatures and customary governance, with particular application to the claims of Aboriginal peoples.

As mentioned, this study requires a long-term approach, using the disciplines of law, history, and anthropology. An understanding of law is required by the inherent nature of the inquiry. A historical study shows the modern situation as part of a flow of events and ideas that transcend the spans of living individuals. The interplay of social and legal forces may be imperceptible over the short term, but patterns emerge when tracked over generations or tens of generations. Anthropology/sociology can help us understand the functioning of legal institutions and rules in their social context, and therefore leave us better able to apply the law in a reasoned, principled way in a modern, multi-cultural society.

What is law?

Part of the problem of understanding where or when a practice or rule acquires the force of law lies in problematic definitions of "law". In looking at the question cross-culturally we must accept that the usual language of modern English institutions does not always fit traditional institutions in other societies, or even those same English institutions in ancient times. By using the language of contemporary English institutions we are prone to import preconceptions about the institutions of the "other" by analogy. There are particular dangers in applying contemporary, European-derived concepts to the study of the law ways of indigenous peoples. Whenever we use our own legal terminology, with all its implications and connotations, we must be careful not to distort the legal content of the institutions which we are studying. This is not to say that a new vocabulary is necessary. But we must not blindly force upon indigenous or ancient institutions the rigid meanings associated with our own, modern terminology.³⁰ We should also not allow the shifting course of colloquialism to divert us from the essential object of our investigation. The connotations associated with modern mainstream legal terminology do not always apply to the legal institutions of other societies, or even to the original mainstream institutions that generated the common law and the Westminster model of constitutional monarchy as a form

³⁰ E.A. Hoebel, *The Law of Primitive Man* (Cambridge, Massachusetts: Harvard University Press, 1967) at 19-20.

of government. Nevertheless, we should reject the notion that legal systems can be interpreted only in terms of their own folk concepts because that, agrees Leopold Pospisil, can only produce "a disjointed, noncomparable series of ethnographic reports".³¹

While complete cross-cultural understanding is illusive, and misunderstandings will inevitably occur, the effort to accommodate the legal rules and institutions of the "other" within a common realm has a tradition of more than 800 years in common law jurisprudence. Racism and unscrupulous individual interest have often sullied the tradition in practice – particularly in overseas colonies. But the core of the common law pertaining to such recognition has remained essentially unchanged. Part of the difficulty reconciling Crown sovereignty and common law with the continuity of customary legal rights stems from problematic views of what constitutes "law".

Many legal and anthropological scholars have attempted to derive a definition of law that is broad enough to encompass the legal rules of diverse cultures, yet narrow enough to distinguish it from other mechanisms of social control. Some early anthropologists conceptualized law narrowly as social control through the systematic application of force of politically organized society.³² But that approach disregards methods of social control other than force; and some societies may not be sufficiently "politically organized" to qualify, though they could not be characterized as anarchic. Dicey says in his *Law of the Constitution*³³ that a law may be defined as any rule which will be enforced by the courts. But defining law by reference to courts is circular and therefore problematic. The existence of laws should logically precede, not follow, the existence of courts because without laws to interpret, there would be no purpose for such courts? Courts exist for the purpose of interpreting laws and applying sanctions. Insistence on the prior existence of courts before there can be laws discounts the possibility that there might be socially recognized alternative methods of social control and dispute resolution, or that the locus of authority for applying sanctions might lie elsewhere. It is not disputed, however, that in many societies the rule is that it is the role of courts to interpret and apply the law, as in modern Canada.

Definitions of law that are based on state- or territorial sovereignty imply that peoples who were or are identified by their allegiance to monarchs or other forms of leadership, rather than to territories, had/have no laws; and self-governing peoples whose members identify themselves by their group relationship with each other must therefore be deemed lawless. This observation is equally valid, whether applied to Aboriginal peoples in

³¹ Leopold Pospisil, *Anthropology of Law: A Comparative Theory* (New York: Harper and Row, 1971) at 40.

³² E.g. Radcliffe-Brown, cited in *ibid.* at 13.

³³ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed, (London: MacMillan, 1959) at 39.

Canada, or to Britain before William I or several centuries after. Maine notes that territorial sovereignty was only very slowly substituted for tribal sovereignty in England.³⁴ In France the territorial sovereignty did not displace tribal sovereignty until centuries later.³⁵ Maine associates the transition with shift from designating and territory according to the identity of its inhabitants, to designating the inhabitants according to the name of the place.³⁶ But since law predates the emergence of the state, the state cannot be a precondition for the existence of law.

Fritz Kern also disputes the notion that the state must logically come before laws can exist. To the thinkers of medieval times such an idea would have seemed absurd. Rather, the state existed to serve the law. He says that in the minds of the Germanic peoples, including those in the south of what is now England,

The purpose of the State, according to Germanic political ideas, was to fix and maintain, to preserve the existing order, the good old law. The Germanic community was, in essence, an organization for the maintenance of law and order.³⁷

³⁴ Maine says that evidence of the substitution is reflected in changes to the official titles of early monarchs. King John (1199-1216), he says, was the first who always called himself King of England. His predecessors commonly called themselves Kings of the English. (H.S. Maine, "Kinship as the basis of society", in *Lectures on the Early History of Institutions* (London: John Murray Ltd., 1875) at 73. Anson associates it also with changes in the concept of treason:

In the period when tribal sovereignty prevailed, treason was a branch of the feudal tie binding a man [sic] to his lord the treason was an offense against the person of the monarch. Nowadays it is regarded as against the constitution of the state which the monarch represents. And allegiance is regarded as a test of nationality rather than an assurance of loyalty to an individual: Sir William R. Anson, *The Law and Custom of the Constitution*, 4th ed. vol. 2, part 1 (Oxford: Clarendon Press, 1935) at 19.

³⁵ In the 16th century the Kings of France were still called, in Latin, 'Reges Francorum. And French King Henry the Fourth (reigned 1589 - 1610) only abandoned the designation because it could not fit conveniently on his coins with the title of King of Navarre: Maine, *supra* note 34 at 74.

³⁶ *Ibid.*:

England was once the country which Englishmen inhabited. Englishmen are now the people who inhabit England. The descendants of our forefathers keep up the tradition of kinship by calling themselves men of English race, but they tend steadily to become Americans and Australians. Changes in notions of allegiance and treason did not exactly parallel the shift from tribal to territorial sovereignty. Even as late as the 17th century courts in England were holding that allegiance was due to the natural person (as opposed to her "politic body") of the Monarch and not to the country, as in *Calvin's Case* (1608), *supra* note 18 at 11b-12a:

[F]or no man will affirm, that England itself, taking it for the continent thereof, doth owe any ligeance or faith, or that any faith or ligeance should be due to it: but it manifestly appeareth, that the ligeance or faith of the subject is *proprium quarto modo* to the King, *omni soli et semper*.

³⁷ Kern, *supra* note 12 at 70-71.

E.A. Hoebel has offered a widely-cited cross-cultural definition of law that includes most of the generally accepted requisites of law:

A social norm is legal only if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting.³⁸

Hoebel and Llewellyn had written in *Cheyenne Way*³⁹ that "law has teeth for the case of breach or trouble". The main difficulty with this definition is that the "teeth" can be not only physical force, but also punishment of a social or psychological nature. Ostracism, shame or spiritual sanction can have an equally powerful effect.⁴⁰

With the foregoing in mind we can see that Hoebel's cross-cultural definition of law encompasses English law as propounded by English legal authorities over the last millennium. And if we include ostracism, shame or spiritual sanction as possible alternatives to physical force, his definition encompasses most systems of Aboriginal law as well. Many western legal commentators, however, would add other criteria, narrowing the definition so as to exclude the law ways of many non-European indigenous peoples. One of these extra requirements is that a law must be in the nature of a command. Legal writers of recent centuries, such as Thomas Hobbes,⁴¹ Jeremy Bentham and John Austin⁴², would refine this criterion so that the command must come from a supreme and irresistible "sovereign". In the 13th century, however, Bracton noted that such command could arise

³⁸ Hoebel (1967), *supra* note 30 at 28.

³⁹ K.N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way* (Norman: University of Oklahoma Press, 1941) at 128.

⁴⁰ P.R. Grant, "Recognition of traditional laws in state courts and the formulation of state legislation" in Bradford W. Morse and Gordon R. Woodman, eds., *Indigenous Law and the State* (Dordrecht, Holland: Foris Publications, 1988) 259 at 260.

⁴¹ Thomas Hobbes, *Leviathan or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil* (1651), ed. by Michael Oakeshott (Oxford: Basil Blackwell, 1957). Hobbes should be considered of little authority since he never studied the subject of law, and refused to examine history. But to Hobbes, his lack of legal training or historical study was no defect. In his *Leviathan* he asserted at 242 that the underpinnings of his legal theory lie elsewhere:

I have derived the rights of sovereign power, and the duty of subjects, hitherto from the principles of nature only; such as experience has found true, or consent concerning the use of words has made so; that is to say, from the *nature of men*, known to us by *experience*, and from *definitions of such words as are essential to all political reasoning, universally agreed on* [emphasis added].

Any conclusions based on such vague fundamental premises are dubious. One might ask: what is the "nature of men" of which Hobbes speaks? On whose experience does he rely; and is everyone's experience the same? Could he name even a single word that is "essential to all political reasoning" upon which there is universal agreement?

⁴² Austin disputes that customary laws can properly be called laws or rules because they have not been imposed by political superiors. John Austin, *Lectures on Jurisprudence*, 5th ed. vol. 1 (London: John Murray, 1885) at 101. In this matter he is flatly wrong.

from the practices of the very people that were governed by it.⁴³

There are several problems with the view of law by Hobbes, Bentham and Austin. One problem is factual: it is untrue that there has at any time in history existed in England an irresistible sovereign, such as they posit.⁴⁴ Without such a personage, it follows from their reasoning that England was and is lawless. Of course this conclusion is absurd. A second problem is that even if there was or is such a personage in England, there are many societies in which such does not exist -- whether in the form of a single individual, or an identifiable governing group. Even the heads of the Aztec empire were not absolute rulers: they ruled by consent of the governed. Ronald Wright says the "emperor" of the Aztecs was chosen from among Mexico's "princes". His title Tlatoani is literally translated as "Speaker".⁴⁵ When the Spaniards under Cortes held the Aztec leader Moctezuma, the people summarily chose another Speaker while Moctezuma was still in Spanish hands because they felt he was not serving them well.⁴⁶ The reasoning of Bentham and Austin would hold that such societies must therefore be lawless. And this conclusion is similarly absurd. The requirement that law can only originate in the command or consent of an irresistible sovereign must therefore be dismissed.

What is custom, for present purposes?

The term "custom" has a number of definitions that shift with the context. Some of them are colloquial, some are political, and some are legal definitions. It can mean, for example,

1. The habitual practice of a community or a people; established usage; convention: the *custom* of shaking hands.
2. An ordinary or usual manner of doing or acting; habit.
3. *Law* An old and general usage that has obtained the force of law. ...⁴⁷

⁴³ Bracton, *supra* note 12 v.2 at 22.:

We must see what law is. Law is a general command, the decision of judicious men, the restraint of offences knowingly or unwittingly committed, the general agreement of the res publica. Justice proceeds from God, assuming that justice lies in the Creator, [jus from man], and thus jus and lex are synonymous. And though law (lex) may in the broadest sense be said to be everything that is read (legitur) its special meaning is a just sanction, ordering virtue and prohibiting its opposite. Custom, in truth, in regions where it is approved by the practice of those who use it, is sometimes observed as and takes the place of lex. For the authority of custom and long use is not slight.

⁴⁴ Maine observed of Hobbes and Bentham, "No geniuses of an equally high order so completely divorced themselves from history": Maine, lecture on "Sovereignty and Empire," in *supra* note 34 at 396.

⁴⁵ Ronald Wright, *Stolen Continents: The "New World" Through Indian Eyes* (Toronto: Penguin Books) at 16.

⁴⁶ *Ibid.* at 41.

⁴⁷ Funk & Wagnall's Canadian College Dictionary, 1989 ed. s.v. "custom".

Canadian legal theorists and jurists have paid little attention to legal concepts of custom until recent decades. And what little that has been written is often inconsistent. In his *Constitutional Law of Canada* Peter Hogg suggests gradations between usage, convention, custom and law. A "usage" is a regularly followed governmental practice, but not considered obligatory. He equates "convention" with "custom", which he says is regarded as obligatory by the officials to whom it applies because the practice has been followed for a sufficiently long time. But neither "usages" nor conventions/customs (as Hogg defines them) are enforceable.

The most that can be said is that there is a stronger moral obligation to follow a convention than a usage, and that departure from convention may be criticized more severely than departure from usage.⁴⁸

A convention, says Hogg, could theoretically be transformed into law by either being enacted as a statute or into common law by being enforced by the courts (though, he says, "no court has ever done so").⁴⁹ Hogg's discussion of custom, usage, convention and law is confusing at first because he seems at odds with ancient writers on usages, custom and the law. Moreover, he is inconsistent in his own use of terms. A measure of sense emerges, however, when we realize his discussion centres on the political relations between different manifestations of the Crown in a federal and imperial context. His language is of *political* usages, *political* customs, and *political* conventions in a constitutional context. But Hogg simply does not engage the common law doctrine of local legal custom.

Canadian cases on law and custom do not follow any consistent definition of the terms. The Canadian Supreme Court drew distinctions between "law", "usage", "custom" and "convention" in *Ref re Amendment of Constitution of Canada* (1981). There the terms were characterized as comprising a spectrum, with "law" at one end, "usage or custom" at the other, and "convention" somewhere in between but closer to the "law" end.⁵⁰ In that case the SCC was referring to customs in a sense that does not have the force of law. The court was there referring to customs in a political, and not a legal, sense:

This constitution depends then on statutes and common law rules which declare the law and have the force of law, and upon customs, usages and conventions developed in political science which, while not having the force of law in the sense that there is

⁴⁸ P.W. Hogg, *Constitutional Law of Canada*, 4th student ed. (Toronto: Carswell, 1996) [hereinafter Hogg] at 20-21.

⁴⁹ *Ibid.* at 23-24. Hogg's observation that no court has ever "transformed" a political convention into a law is remarkable only for the fact that it is said in association with the suggestion that it might be proper for courts to do so. The notion that judges can create law is at odds with the separation of powers of the legislative and the judicial branches of government. As noted in *Ref re Amendment of Constitution of Canada*, [1981] 1 S.C.R. 753 at 856, 125 D.L.R. (3d) 1, 6 W.W.R. 1 [hereinafter *Ref re Constitution* (1981) cited to S.C.R.], it is our view that it is not for the Courts to raise a convention to the status of a legal principle. As pointed out above, courts may recognize the existence of conventions in their proper sphere. That is all that may be properly sought from the Court ... (per Laskin C.J. with Estey and McIntyre JJ.).

⁵⁰ *Ibid.* at 883 (per Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ.).

a legal enforcement process or sanction available for their breach, form a vital part of the constitution without which it would be incomplete and unable to serve its purpose.⁵¹

The “customs” of Aboriginal peoples in Canada have been acknowledged in principle, as an alternative to statutory provisions for selecting band councils under the Indian Act, as in customary elections. But this use of the term is far from a defined use: it is rather a non-definition, in that “custom” is often used as a catch-all phrase encompassing anything other than the provisions in s.74 of the Indian Act, that is acceptable to the Minister. Justice Strayer in *Bigstone v. Big Eagle* noted that the Indian Act provided “no guidance as to how that custom is to be identified”, and stated the following:

Unless otherwise defined in respect of a particular band, “custom” must I think include practices for the choice of a council which are generally acceptable to members of the band, upon which there is a broad consensus. With a newly re-established band whose circumstances are vastly different (e.g. the majority not being resident on the reserve) from those of the band dissolved some 90 years earlier, it is not surprising that innovative measures would have to be taken to establish a contemporary “custom”. The real question as to the validity of the new constitution then seems to be one of political, not legal, legitimacy: is the constitution based on a majority consensus of those who, on the existing evidence, appear to be members of the band? This is a question which a court should not seek to answer in the absence of some discernable legal criteria which it can apply. While there might be some other basis for judicial supervision if there were clear evidence of fraud or other acts on the part of the defendants which could clearly not be authorized by the Indian Act, there is no evidence of any such activities before me.⁵²

Clearly, the Court struggled to grasp the concept of “custom” in a legal sense, but failed to come to grips with it. The best effort of Strayer J. seems to allow that the whim of a transient majority, if it be substantial, is sufficient to identify Aboriginal custom. In his view, “political, not legal, legitimacy” is the test of “custom” as a means of selecting leaders. This flawed, ad hoc approach abandons the rule of law and casts legal custom to the winds of politics. A better approach is that where statute provides no guidance, the established common law tests ought to be applied. For more discussion on those tests see chapter 5.

Custom – the common law doctrine

For the purpose of this thesis, the term custom will be considered in its common law doctrinal sense, as applied in common law courts in Britain from time immemorial to the

⁵¹ *Ibid.* at 853 (per Laskin C.J. with Estey and McIntyre JJ.).

⁵² *Bigstone v. Big Eagle*, (1992), 52 F.T.R. 109, [1993] 1 C.N.L.R. 25 at 34 (F.C.T.D.) [cited to C.N.L.R.].

21st century. *Halsbury's Laws of England* characterizes "custom" in the following way:

A custom is a particular rule which has existed either actually or presumptively from time immemorial and obtained the force of law in a particular locality although contrary to, or not consistent with, the general common law of the realm. As regards the matter to which it relates, a custom takes the place of the general common law and, in respect of that matter, is the local common law within the particular locality where it obtains. Custom is unwritten law peculiar to particular localities. ... A custom exists in a particular locality only in respect of some particular matter or matters; other matters within the same locality are governed by the general common law.⁵³

This thesis will therefore consider legal custom to be a practice as of right having the legal attributes of immemorial existence, reasonableness, certainty and continuity, as discussed more fully in chapter five. It is not used in the colloquial sense of indicating merely the way things are usually done, even if that practice has been established a long time. The term "usage" is for the most part avoided in order to reduce semantic confusion. The Canadian use of the term has a different meaning from that assigned to it in legal doctrine. A "usage" is "a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life."⁵⁴ The enjoyment, or exercise, or continuance of a practice is called "user". User is distinguished from "custom", but may be evidence of it.⁵⁵ But mere user is insufficient to establish custom, no matter for how long it has continued, if other essential attributes are lacking.⁵⁶ Usages are distinguished from immemorial customs in that they lack some of legal custom's essential attributes. Customs will be sanctioned by courts if contrary to the common law, though usages will not.⁵⁷ In some direct quotations I have replaced the word "usage" with "user" (in square brackets) where it was evident that the colloquial term appeared in the original but the doctrinal term is required for clarity. Custom should also be distinguished from prescription. The chief difference is that prescription is a right that attaches to a certain person and her ancestors (or to a corporation and its predecessors), whereas a custom attaches to a locality and affects the rights of those

⁵³ *Halsbury's Laws of England*, vol. 12, 4th ed., (London: Butterworths, 1975) at 2, para 401.

⁵⁴ *Ibid.* at 28, para 445.

⁵⁵ *Brocklebank v. Thompson* (1901), [1903] Ch. 344; *Hammerton v. Honey* (1876), 24 W.R. 603 at 603 (Chancery Div. M.R.); *Mercer v. Denne*, [1904] 2 Ch. 534 at 552; aff'd [1905] 2 Ch. 538 (C.A.).

⁵⁶ *Hammerton v. Honey* (1876), *supra* note 55 at 603.

⁵⁷ *Halsbury's* vol. 12, *supra* note 53 at 4, para 405. Although legal custom will prevail against the common law, it cannot prevail where it is utterly repugnant to a statute. However, if there is any way that it is possible to comply with both the local custom, and the statute as strictly construed, then courts are bound by the common law to give effect to such construction and uphold the custom.

within the locality who are members of a legally certain category of persons.⁵⁸ And prescription can be invoked upon a shorter time period than “time immemorial”. For a closer analysis of the terms see chapter five. Finally, custom should be distinguished from the cultural *mores* of a people. These are the established, traditional practices and folkways of a social group that they regard as essential to its preservation and welfare, but which have been carried with them to their new place within legal memory. Although the practices may (or not) have been of legal force in the people’s place of origin, they will not be enforced by courts without other legal underpinnings.⁵⁹

The common law doctrine of local legal custom does more than merely explain a few historical curiosities from centuries ago. Rather, it shows a continuity of the very rules that have guided the relations between cultures in contact, from Europe in ancient times, through the colonial period and the state of the common law today. As legal custom has legal effect, it can sometimes guide the application of the common law or, in some cases, statutes. The legal duties and legal rights embedded in customary law can give rise to legal liabilities and defences. And as the Crown and its ministers and agents continue to be under and not above the law, local legal custom contributes to the legal parameters within which the executive or administrative discretion or prerogative must legally be constrained. The same rule that requires executive decisions to comport with the common law requires that customary law be respected also. This means, for instance, that a municipal government may and ought to consider the requirements of Aboriginal customary law, where known, in making its decisions on zoning within its jurisdiction for the layout of proposed roads or residential subdivisions. A generally worded enabling statute cannot authorize infringements of customary law any more than it authorizes infringements of common law. The doctrine of custom can also buttress claims of an Aboriginal right to self-government. Precedents abound in which local governments have been empowered to legislate locally pursuant to local legal custom, even in some cases where the legislation itself has been contrary to what the common law would have allowed.⁶⁰ Common law courts have upheld such governments as that of the City of London⁶¹

⁵⁸ *Ibid.* para 404.

⁵⁹ Cultural mores may provide a context for the application of other legal principles, such as when a contract is interpreted in light of the reasonable expectations of the parties. And section 27 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter of Rights and Freedoms*] provides, “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” But it is doubtful that cultural mores can prevail where repugnant to the common law, though legal custom does prevail.

⁶⁰ E.g. *Leicester v. Burgess* (1833), *supra* note 20; *Simson v. Moss* (1831), 2 B & Ad 543, 109 ER 1244 (KB). A bylaw cannot be in constraint of trade, or contrary to other aspects of the common law, except where it supports a local legal custom. *Leicester* is discussed below at 130.

⁶¹ *Case of the City of London* (1610), 8 Co. Rep 121b, 77 E.R. 658 (K.B.) [hereinafter *City of London* (1610) cited to Co. Rep.].

by the authority of legal custom, despite there being neither statute nor royal grant to ground the authority. Legal custom can also ground the authority for courts, both conferring jurisdiction and providing limits within which its jurisdiction must be exercised. Chapter six will explore implications of the doctrine in modern Canada. There I will discuss the intersection of legal custom with modern statutes, including the Criminal Code and provincial family law regimes. I will also attend to the relationship of customary courts with mainstream courts, and relations between Aboriginal governments and the levels of government in the modern Canadian context.

Chapter 2 – Customary law and the emergence of the common law

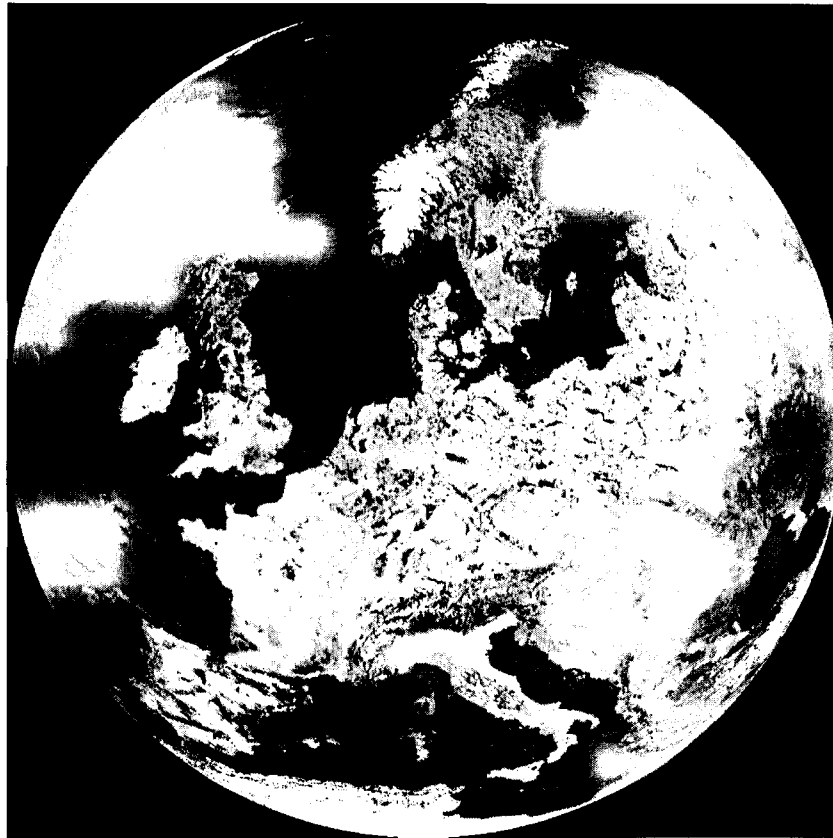


Figure 1 - Original homelands - This view is from 750 km above the homelands of the peoples that constituted the Anglo-Saxon/Danish/Norman invasion of Britain in the 5th to 11th centuries. They and ethnically-related Gothic/Germanic tribes from their homelands on or near the Jutland Peninsula (centre of image) conquered virtually all of the territories visible from this vantage point, except in the extreme south and southeast, and the icy north. All shapes shown are true to perspective, from the centre looking in any direction. Greenland is just visible in the top left corner (northeast, Africa in the south, and Asia Minor in the southeast. Original image online: John Walker's Earth & Moon Viewer website

<[http://www.fourmilab.ch/cgi-bin/uncgi/Earth?imgsize=1024&img=learth.evif&daynight=-d&opt=-l&lat=53&ns=North&lon=9&ew=East&alt=750&bird=From+elements+below&tle=EUTELSAT+II+F2++++++%0D%0A1+21056U+91003B+++95321.17125000++00000075++00000-0++10000-3+0++6547%0D%0A2+21056+++0.0559++22.7612+0004384+197.5940+267.1098++1.00274476++5301%0D%0A](http://www.fourmilab.ch/cgi-bin/uncgi/Earth?imgsize=1024&img=leearth.evif&daynight=-d&opt=-l&lat=53&ns=North&lon=9&ew=East&alt=750&bird=From+elements+below&tle=EUTELSAT+II+F2++++++%0D%0A1+21056U+91003B+++95321.17125000++00000075++00000-0++10000-3+0++6547%0D%0A2+21056+++0.0559++22.7612+0004384+197.5940+267.1098++1.00274476++5301%0D%0A)> (date accessed: 13 November 2001).

To fully appreciate the fabric that local custom weaves with Crown sovereignty and government, and the common law, it is necessary to understand the Anglo-Saxon legal world view that shaped their fundamental institutions. The kingdom in which the common law arose was a cultural and legal mosaic, composed of distinct though ethnically-related populations,

each functioning within its own social institutions according to its own inherited customs, legal procedures and principles. The Anglo-Saxons were not a discrete ethnic or social group. They were a series of ethnically-related distinct peoples – primarily the Angles, Saxons, Jutes and (later) Danes – who originated in a relatively small area in northern Europe.⁶² They spoke more or less mutually-intelligible languages.⁶³ This fact suggests many elements of their cultures shared common roots in earlier times. In the 1st century A.D. they occupied neighbouring territories on or near the Jutland Peninsula (centre, figure 1) in what is now northern Germany and Denmark, and adjacent coastal regions, near the northern border of the Roman Empire. At that time their combined territories encompassed an area about the size of Vancouver Island, in British Columbia. History reveals that for the most part they took their customs and social institutions with them as they eventually colonized or conquered the British Isles in later centuries. Related tribes did similarly to virtually all of the rest of Europe.

A Legal Anthropologist Goes to London: Early this Millennium, Isn't He?

In the first century the peoples were primarily agriculturalists, measuring their wealth in the size of their herds.⁶⁴ At that time they would have possessed iron age technology for about 600 years. Private holding of land was unknown among them. They tilled fresh fields every year, and had more land than they could use. Land was held communally, and allocated annually through local councils. Diet was supplemented by hunting and fishing.

⁶² Angles (Latin *Angli*) occupied the region still called Angeln in what is now northern Germany. Together with the Saxons and Jutes, they invaded Britain during the 5th century AD. With their kindred ethnic groups, they formed the people who came to be known as the English. The name England is derived from them. Saxons were known to have dwelt in the south of the Jutland Peninsula (centre of figure 1) from the second century A.D., in the north of what is now Germany. The name Jutland comes from the Jutes, neighbours of the Saxons. They and other Germanic peoples of note – including the Goths, Vandals, Visigoths Franks and the Danes/Vikings/Normans – originated on or near the peninsula, the islands or nearby coastal areas and spoke more or less mutually-intelligible languages. The similarities in their basic belief systems and legal systems in large measure accounts for the ability of royal judges in the time of Henry II to “find” commonalities among the disparate legal customs of their descendants in Britain, and express those commonalities as the common law. It also helps explain the closeness of fit between the English common law and international law as expounded by Hugo Grotius in 1646: *De Jure Belli ac Pacis Libri Tres* (1646), James Brown Scott, ed., trans. Francis W. Kelsey *et al.* (reprint New York: Oceana Publications, 1964) [cited to New York edition]. The objects of Grotius’ attention were the larger constituency of Germanic peoples; and international law as he saw it was comprised of the commonalities among those groups of their legal customs governing inter-group relations.

⁶³ The Danes spoke a variant from among the Germanic sub-family of languages.

⁶⁴ Tacitus (circa A.D. 98), *Germania*, trans. Thomas Gordon, in *Voyages and travels : ancient and modern, with introductions, notes and illustrations*, C. W. Elliot, ed., The Harvard classics, vol. 33 (New York: P. F. Collier, c.1910) [hereinafter Tacitus (Gordon translation)], online: Internet Sourcebooks History Project <<http://www.fordham.edu/halsall/basis/tacitus-germanygord.html>> (last modified: 24 September 1998).

Social control was based on responsibility to one's kin-group for one's own actions and for those of other kin-group members. Individuals were bound either in enmity or friendship by the bonds of kinship, it being a duty to adopt both the feuds and the friendships of kinfolk.⁶⁵ This duty continued for the centuries that the named tribes remained in northern Germany, and continued as sub-groups entered Britain. But mitigating the prospect of extensive bloodshed was a formalized system of blood-money payment (the *wergeld*) that was widespread in Britain and northern Europe. Feuds could be settled through the payment of a certain number of cattle and/or sheep. Acceptance of the payment was by the entire aggrieved kin-group.⁶⁶ Payment was the collective responsibility of the offending kin group, if it was to be paid, because the penalty for serious offences was so high as to be far beyond the ability of most individuals to pay.⁶⁷ Inter-group and intra-group legal customs thus reinforced each other, and helped maintain social boundaries between groups while at the same time mitigating friction and strife.

Over the next few centuries the northern European peoples and their cultures could not escape entirely the effects of tribal border wars with the Roman Empire. There was ample opportunity to fight for- or against the Romans, find employment as mercenaries, and raid for plunder. The tribes gained a certain military prowess as a result, and their cultures acquired military aspects. Their economy remained agrarian however, and they remained essentially farmers – fighting farmers.

Foreign employment

In the fifth century political, social and natural circumstances presented an opportunity for these fighting farmers to advance their own interests abroad. In that century the Roman Empire withdrew military protection from its British province, leaving its villas vulnerable to Pictish raiders, and Gaelic speaking Celts from Ireland and Scotland. Not long afterward the south of Britain was hit by a bubonic plague, from which so many people died that Bede says there were scarcely enough left living to bury the dead. This plague was followed by another

⁶⁵ *Ibid.*; Tacitus, *The Agricola and Germania*, A. J. Church and W. J. Brodribb, trans., (London: Macmillan, 1877) at 87 ff. [hereinafter Tacitus (Church and Brodribb translation)], online: Internet Sourcebook Project <<http://www.fordham.edu/halsall/source/tacitus1.html>> (last modified: 16 August 1998).

⁶⁶ Tacitus (Gordon translation), *supra* note 64; Tacitus (Church and Brodribb translation), *supra* note 65.

⁶⁷ Seebohm points out that the fine for murder, for instance, was so large that it was far beyond the means of an individual to pay, and possible only as a payment from one group of kindred to another. Through most of Europe the murder fine was 100 head of cattle, or the equivalent in gold: Frederic Seebohm, *Tribal Custom in Anglo-Saxon Law* (London: Longmans, Green, 1911) (reprint, South Hackensack, New Jersey: Rothman, 1972) [cited to Rothman] at 497.

one, even more severe.⁶⁸ By then, southern Britain was largely under the sway of Briton king Vortigern ('Vawr Tigherne' - the Great Leader) who invited Angles, Saxons and Jutes some time between 443 and 449 to fight as mercenaries for his depopulated kingdom.⁶⁹ Bede says that those were the most powerful nations of Germany at that time. The mercenaries were promised land to farm, and payment for their services as warriors. The land would presumably be that which had been left vacant by the plagues.⁷⁰ The mercenaries found the land in Britain much to their liking. The farming was good and the climate warmer than their home, due to a favourable ocean current. Soon the newcomers were recruiting large numbers of their kin, and with them came their wives, children, in-laws, dogs, oxen, minstrels and priests, as well as social institutions and legal customs. After a short time the imported mercenary groups fell out with- and battled against their former employers, later forming an alliance with the Picts.⁷¹ The ability of the Britons to resist the influx was severely reduced in 467, when King Riothamus led 12,000 Brittonic soldiers to destruction overseas in aid of Roman emperor Anthemius. In time the Britons were driven westward, and confined to the western part of the island, in what is now Wales.

The Angles, Saxons and Jutes initially settled mostly in ethnically delineated territories, as in figure 2.⁷² By maintaining its geographic and social boundaries according to

⁶⁸ The peoples of Europe would have suffered depopulation on a similar scale as experienced by the peoples of the Americas when European diseases were introduced.

⁶⁹ The *Anglo-Saxon Chronicle*, written by generations of anonymous clerics from about 890 to the middle of the 12th century, says of the year 443:

This year sent the Britons over sea to Rome, and begged assistance against the Picts; but they had none, for the Romans were at war with Atila, king of the Huns. Then sent they to the Angles, and requested the same from the nobles of that nation. (*Anglo-Saxon Chronicle*, Rev. James Ingram (London, 1823) and Dr. J.A. Giles (London, 1847), trans., (London: Everyman Press, 1912), online: Berkeley Digital Library SunSITE <<http://sunsite.berkeley.edu/OMACL/Anglo/>> (date accessed: 11 October 2001)).

⁷⁰ The Venerable Bede (673-735), *Ecclesiastical History of the English Nation*, L.C. Jane's 1903 Temple Classics translation, (London: J.M. Dent, 1910), [hereinafter Bede] book 1, chapters 14, 15, online: Internet Medieval Sourcebook, Fordham University Center for Medieval Studies, <<http://www.fordham.edu/halsall/basis/bede-book1.html>> (last modified: 6 March 1999); *Anglo-Saxon Chronicle*, *supra* note 69 Part 1, entries for AD 443 and 449.

⁷¹ In the same chapters, Bede discusses where the various peoples ultimately settled.

⁷² *Anglo-Saxon Chronicle*, *supra* note 69 Part 1, entry for A.D. 449, briefly describes part of the early settlement pattern of the earliest Anglo-Saxon tribes in Britain:

From the Jutes are descended the men of Kent, the Wightwarrians (that is, the tribe that now dwelleth in the Isle of Wight), and that kindred in Wessex that men yet call the kindred of the Jutes. From the Old Saxons came the people of Essex and Sussex and Wessex. From Anglia, which has ever since remained waste between the Jutes and the Saxons, came the East Angles, the Middle Angles, the Mercians, and all of those north of the Humber.

its own rules, each community was able to maintain its own identity and cultural distinctness. In effect, the Anglo-Saxons transplanted or cloned their originating societies in a new environment in Britain. Some villages relocated from the continent in their entirety. The people carried with them their kinship structures and institutions, their language(s), customary laws and penalties, and their collective responsibility for social control.⁷³ Their British outposts were therefore reproductions of their originating village societies on the Continent.

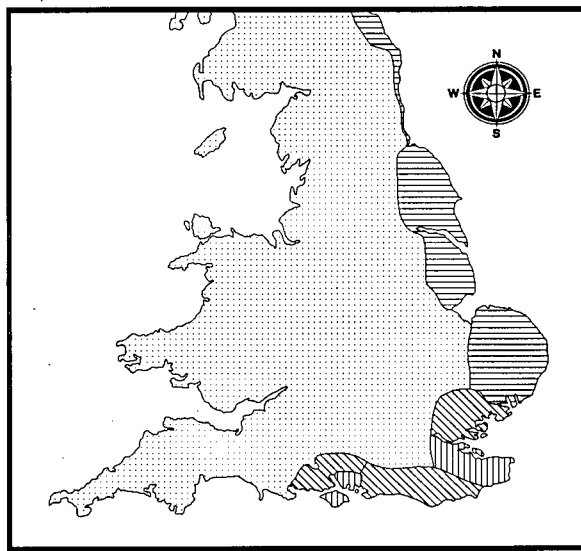


Figure 2 -- A.D. 550 Ethnic distribution of peoples in Britain. Illustration by author, following Samuel Rawson Gardiner, ed., *A School Atlas of English History* (London: Longmans, Green, and Co., 1892) at 3, online: Memorial On-Line Library homepage <<http://www.LivGenMI.com/gardiner3.htm>> (last modified 6 January 2002).

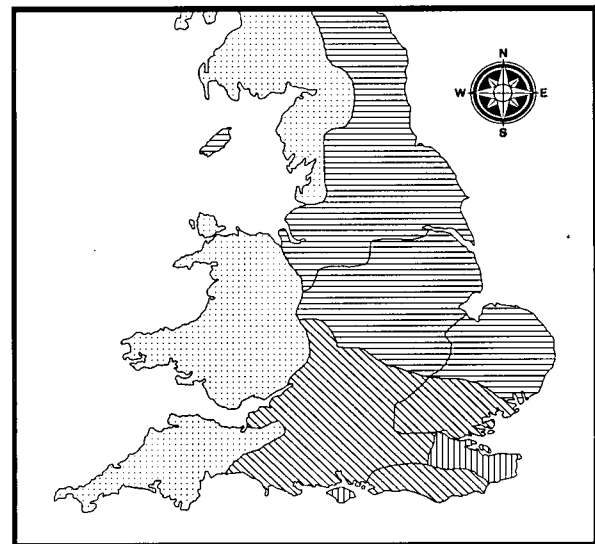
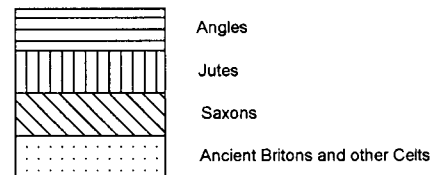


Figure 3 - A.D. 626 Ethnic distribution - Inexorably the ancient Britons were driven westward. The boundaries of the Anglo-Saxon Heptarchy are also shown here. Illustration by author, following Gardiner, *supra* figure 2 at 5, online: <<http://www.LivGenMI.com/gardiner5.htm>> (last modified 6 January 2002).

Military units of the Germanic mercenaries were, in large part, extended groups of male kinfolk. Not surprisingly, their military organization tended to reflect the social organization observed in their home villages. And the patriarchs of the early settlements in Britain were the warrior chiefs who led the fighting forces. This coincidence of military, civil and familial leadership continued as the customary governance of the fifth century gradually

⁷³ Seebohm, *supra* note 67 at 495.

evolved into primitive Anglo-Saxon monarchies. The nobility that subsequently emerged/evolved were in theory the descendants of the leaders/founders of their communities in Britain. The claim of such descent identified in theory the category of "noble" persons from whom the local common council could select or recognize their leader. In this way collective lands could be held in collective hands, tending to concentrate wealth and power over generations. Historians accept that by about A.D. 586 there were eight Anglo-Saxon monarchies established in Britain,⁷⁴ with waves of Danes to follow in the next centuries. (See figure 3 above.)

Kin-based social control and kin-based community organization helps explain the persistence of myriad local customs in law and governance. Nevertheless, the fact that neighbouring communities tended to be originally cloned from the same Germanic tribe or its regional neighbours helps explain how in spite of local variations, three broad systems of laws had become evident for several centuries before the arrival of the Normans, and lasting into at least the 12th century. Moreover similarities on a broader level, when combined with cultural diffusion of practices, helps in turn to explain the later emergence of the common law despite the continued rule to the present day that when local custom is proven, it is presumed to continue in the face of all contrary law except statute. In order to understand the interplay between custom, common law and statute, it is necessary to understand the emergence of common law and statute from an array of custom-based legal systems. And that in turn requires an understanding of the role of the monarch in governance. We will now turn to the history and the legal world view underlying the theory of the monarchy in the British tradition because it informs the resistance of legal custom to extinguishment, the emergence of the common law, and the role of legal custom in both ancient and modern governance.

Germanic and Anglo-Saxon government

While kings and queens, broadly defined, have been part of history for millennia, the nature of their "monarchies" are as different as the social cultures in which they were expressed. They had as many different characteristics and attributes respecting duties, authority and constraints. A small few have possessed virtually absolute authority; others have ruled by the sufferance of their subjects.⁷⁵

⁷⁴ Collectively they were called the Anglo-Saxon Octarchy, though they are also commonly (and less accurately) called the Anglo-Saxon Heptarchy, from the practice of deeming Deira and Bernicia to be the single kingdom of Northumberland.

⁷⁵ Grotius talks of various different types of leadership, in terms of their possessing different powers. While some kings have/had power even over the laws, others do/did not have the same powers. Theseus of Athens, for example, was not properly called a king, says Grotius, because he was subject to the people. "[Theseus] was only a military leader and guardian of the laws; in other respects he was on a level with the mass of citizens." Grotius, *supra* note 62, book 1 at 108.

First century kings, among those Germanic peoples who had them, did not hold unlimited or arbitrary authority. They held office on sufferance and power of persuasion rather than by authority to command. Neither king nor general could demand physical submission from subjects or soldiers. Only the priests could reprimand or flog persons, and even this was not as a punishment or at the command of the king: such was considered as being from the mandate of God. The choice of kings was at least partly hereditary.⁷⁶ The notion that leaders – whether local chieftain or monarch – among the Germanic peoples should be chosen from among candidates having a particular blood line continued through the middle ages.⁷⁷ But early medieval kings did not take the throne merely by right of inheritance. It is true that the king possessed a throne-worthiness by virtue of royal descent. But it was the people who summoned him to the throne with the full force of law. The role of the people or their representatives in making such selection varied between actual election and mere recognition of a *de facto* choice.

But at least the community gave legal assent to the prince's accession to the throne, and solemnly installed the new king in power. ... Thus, the difference between the medieval king and the head of a smaller community, ... was one of degree rather than of kind, even in the method of obtaining the throne.⁷⁸

The patriarch, chief or monarch was the focus of the mechanism by which Germanic peoples expressed both their collective interests and their private rights. And (s)he has been the conduit for expressing their collective interest in dealings with other peoples. In ancient times the chief or monarch presided personally at assemblies in which communal decisions were made. Sub-groups of the community might meet to make decisions that affected only them. But for decisions of the community as a whole the presence, or at least the sanction, of this person was necessary in order to make the decision official. Anglo-Saxon monarchies and governments conformed to the general Germanic model.

⁷⁶ Tacitus (Church and Brodribb translation), *supra* note 65; Tacitus (Gordon translation), *supra* note 64.

⁷⁷ Kern, *supra* note 12 at 13-14 notes that the word 'king' itself reflects the notion that the ruler should be chosen from within a select group. In Old English it means 'kin-right,' or 'son of the king'.

It seems to derive from old religious beliefs no less than from sound political insight. ... But the Germanic peoples normally attached this inviolable sanctity not to a single lord but to his whole kindred; it was an inheritable commodity. The kin might trace its genealogical tree back to the gods, or might be qualified only by ancestral merit and divine grace to reign on a plane partly human and partly superhuman; but the special claim to lordship possessed by the noblest kin among the folk always rested upon some distinctive inner virtue – a virtue which could be seen in the beaming eye of a prince of royal blood. ... The family's possession of the throne was as inviolable as the right of any individual prince to succeed to it was insecure.

Hereditry remains a criterion in modern times. But the customary underpinnings of the method and criteria of such choice have been augmented by statute.

⁷⁸ Kern, *supra* note 12 at 12-13.

What is so special about the Queen's hat? – The Anglo-Saxon world view underlying the legal institution of the Crown.

By custom the Crown or monarch is said to personify or symbolically embody, in perfect form, the customary rights and privileges of all subjects⁷⁹, and has been bound from the beginning to promote their well-being. In the monarch is vested no more than what is in every subject, except the rights and privileges that derive from the attributes of the monarchy itself, as an institution to promote their interests.⁸⁰ Through the monarchy the Germanic peoples of Europe and England created a legal theory and a device by which they could govern themselves on a national level. Because of the high value placed on the rights which the monarch embodies, both the office (i.e. the monarchy) and the office holder (i.e. the monarch in both her political and her personal capacity) possess a royal dignity. The special attributes of the monarch/monarchy derive from that royal dignity. The monarch has a pre-eminence, sovereignty, or prerogative⁸¹ before any other person, but must exercise royal authority in the service of the subjects and not to their detriment. As the perfect embodiment of subjects' rights, she is deemed to possess the attribute of perfection. And since the law upon which the rights of subjects endures, the monarch in her "political capacity" is perpetual because there can never be a time when the rights of subjects are unrepresented. That is, while the person of the monarch will undoubtedly die, the monarchy continues immediately in her successor – there is no interregnum.⁸² In the legal theory of the Anglo-Saxons and the modern common law, the monarch possessed(es) three essential attributes: sovereignty, perfection, and perpetuity. This is the model of the ideal monarch in the Anglo-Saxon world view, as well as in modern legal doctrine, though the reality may be questionable.

⁷⁹ In *Calvin's Case* (1608), *supra* note 18 at 11b Lord Coke C.J. discusses allegiance of subjects, the rationale behind the monarchy, and the duties of the monarch to subjects:

And therefore a King's Crown is an hieroglyphic of the laws, where justice, &c. is administered ...
Therefore if you take that which is certified by the Crown, that is, to do justice and judgment, to maintain the peace of the land, &c. to separate right from wrong, and the good from the ill: that is to be understood of that capacity of the King ...

The word "hieroglyphic" should be interpreted as a symbol, in the sense that the Crown is a symbol of law, justice, etc.

⁸⁰ There is a legal presumption against any special rights in the Crown that do not vest in subjects in general. That is, the royal prerogative must be proven by reference to common law or legal custom. "[I]t is for the officers of the Crown to make out clearly the Prerogative, in any case, where they claim to be on a different footing from the subject" *Crossman* (1866), *supra* note 27 at 386.

⁸¹ *Blackstone's Commentaries*, *supra* note 5, book 1 at 216:

By the word prerogative we usually understand that special pre-eminence, which the king hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. ... [I]t can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects.

⁸² *Blackstone*, *supra* note 5, book 1 at 224; *Chitty*, *supra* note 103 at 5; *Ball v. R.*, [2000] E.W.J. No. 4174 (England and Wales Court of Appeal, Civil Division) at para 24, online: QL (EWJ).

The monarch is under, not above the law

The royal dignity means that the monarch is sovereign in the sense that she is under no other person, but under God and the law.⁸³ This does not mean that she rules absolutely, or that her powers are unlimited or uncontrollable. Neither the monarch nor parliament alone has ever been supreme in that sense, in all the history of the English governmental system. It is a prerogative of the Crown to call Parliament into session. But Parliament determines the rules by which the monarch is chosen, and Parliament has repeatedly affirmed or altered rules of royal succession. But as Grotius pointed out, the power to select the holder of an office, or set the rules of such selection is a quite different matter from controlling the use of the powers that go with it.⁸⁴ If such were the case, then the prerogative of selecting persons as judges, for instance, would mean that the Crown is free to disregard their rulings, and that would be absurd. Neither Parliament nor the monarch nor the judiciary can control the exercise of the other's powers.⁸⁵ Courts have held that each has some unique privileges and powers. Some powers are "inherent" in the nature of the institutions and their responsibilities, some derive from custom,⁸⁶ and the remainder from statute. But neither the monarch nor parliament alone can make, change or abolish a law, though some monarchs have tried and failed, as will be shown below.⁸⁷ The true legal

⁸³ Bracton, *supra* note 12, vol. 2 at 33; *Blackstone's Commentaries*, *supra* note 5, book 1 at 212, 217-218.

⁸⁴ Grotius takes issue with the assertion that one who confers power or authority must necessarily be superior to the one upon whom such authority is conferred:

For, in the first place, the assertion, that he who vests some one with authority is superior to him upon whom the authority is conferred, holds true only of a relationship the effect of which is continually dependent on the will of the constituent authority; it does not hold true of a situation brought about by an act of will, from which a compulsory relationship results ... (Grotius, *supra* note 62, book 1, chapter 3, at 109).

And again:

For the sovereign power, as we have said, is one thing, the manner of holding it is another; and a people can oppose a change in the manner of holding the sovereign power, for the reason that this is not comprised in the sovereign power itself. (Grotius, *supra* note 62, book I, chapter 4 at 157).

⁸⁵ They can, however, have a role in the selection of each others' office holders, as when Parliament established rules for the descent of the Crown in 1689, or when a judge rules on a modern election irregularity. In addition, the Parliament at Westminster has the authority by right of custom to sit as a judicial body, in addition to powers that are inherent in the nature of the institution. Colonial legislatures on the other hand have essentially the same inherent powers as at Westminster, but have no customary authority to sit as a judicial court: *Kielley v. Carson* (1842), 2 Nfld. L.R. App. 10 (P.C. Nfld.).

⁸⁶ "Common law" might be used here in place of "custom". But as will be shown below, the common law has its basis in custom, and from custom derives its force.

⁸⁷ Note the near-exception in the last years of Henry VIII, in which a statute of Parliament assigned to certain royal proclamations the equivalent status of a statute. But that statute specifically precluded that royal proclamations might alter or revoke old laws or customs, or create new ones. See the statute 31 Hen. 8. C. 8

position is that the *monarch in parliament* is supreme. Custom and statute constrain them both,⁸⁸ though together they can make, alter or abolish domestic law.

In the Middle Ages kings frequently acknowledged that they were bound by the law. It was an essential condition by which a prince was raised to the throne, and for continuing to reign once a reign was begun.⁸⁹ Examples abound in English history. For instance, there was the *Charter of Liberties* confirming the laws of Edward the Confessor by Henry I at his coronation in 1100.⁹⁰ There are the numerous statements in coronation oaths, the famous *Magna Carta*, and the various subsequent Confirmation Charters. Edward I (Longshanks) guaranteed in his *Confirmatio Cartarum* (Confirmation of the Charters) of November 5, 1297 that the *Charter of Liberties* and the *Charter of the Forests* (1217) made by his father Henry III “by common assent of all the realm” should be kept “in every point without breach”.⁹¹

Royal duty to govern according to law

Blackstone acknowledges that the inclusion of the promise to govern according to law is older than the common law itself, and originated in “the constitution of our German

[hereinafter *Statute of Proclamations* (1539)] in G.B. Adams and H.M. Stephens, eds., *Select Documents of English Constitutional History* (New York: Macmillan, 1933) [hereinafter *Select Documents*] at 247.

⁸⁸ Custom constrains some of the powers of parliaments, though some powers are inherent. The case of *Kielley v. Carson*, *supra* note 85, illustrates the difference between inherent powers and customary powers of legislatures. In that case it was ruled that legislatures in general have the legal authority to maintain order, and to discipline members for contempt for breaches of order committed within their confines. But whereas Westminster might discipline members for contempt committed outside the House, the legislature in Newfoundland could not. The difference is that at Westminster there had been a custom since time immemorial to sit in judgment as a court of law, in addition to its authority to legislate. On the other hand, the Newfoundland legislature could not meet the “time immemorial” requirement, and could therefore rely only on its inherent powers.

Powers of the monarch under the heading of royal prerogative are limited to those which derive from general immemorial custom – the common law: *Case of Proclamations* (1610), *supra* note 12 at 75. These powers are distinct from executive powers that derive from statutory authority.

⁸⁹ Charles I and James II, for instance, were deposed for placing themselves above the law.

⁹⁰ *Charter of Liberties* (1100) translated in Albert Beebe White and Wallace Notestein, eds., *Source Problems in English History* (New York: Harper and Brothers, 1915) ss. 9, 13, online: Internet Medieval Sourcebook: Medieval Legal History, Fordham University Center for Medieval Studies <<http://www.fordham.edu/halsall/source/hcoronation.html>> (last modified 25 April 1996).

⁹¹ *Confirmation of the Charters* (1297), translation in Albert Beebe White and Wallace Notestein, eds., *Source Problems in English History* (New York: Harper and Brothers, 1915), online: Internet Medieval Sourcebook: Medieval Legal History, Fordham University Center for Medieval Studies <<http://www.fordham.edu/halsall/source/conf-charters.html>> (last modified 27 February 2001).

ancestors on the continent”.⁹² Kern says that formal acknowledgment of the supremacy of law, by Germanic kings, began to appear in the ninth century, as the ceremonies for the inauguration of the king came under ecclesiastical influence in the Frankish kingdom. The solemn undertakings, with appropriate modifications, set the standard for Western monarchy.

The form and content of this royal vow varied; in particular, the duty of the monarch to maintain customary law, to uphold the legitimate rights of individuals, and to safeguard the possessions of the State, was frequently enjoined in more detail and definition. ... Although the obligations imposed upon the king rarely entered into details and specifications, the custom of exacting a coronation-oath was itself evidence of an attempt to preclude absolutism, and this purpose was emphasized by the place that was usually assigned to the oath in the coronation proceedings.⁹³

The model of the coronation oaths sworn by king after king after the Norman “conquest” followed that of Ethelred the Unready (reigned 978-1016). Maitland claims that the oath of Henry I (reigned 1100-1135) seems to have been precisely that of Ethelred. The substance of those oaths was essentially in three parts. First, the king was to honour God and maintain the Christian church. Second, he was to forbid anarchy and injustice to all subjects. Third, he promised to deliver justice with Mercy in all judgments. Over the centuries the substance of such oaths did not change greatly, but the provisions became progressively more detailed. For instance, the oath of Edward II (reigned 1307-1327) contained the promise to confirm “the laws and customs granted to [the English people] by the ancient kings of England ... and especially the laws, customs and privileges granted to the clergy and people by the glorious [Saxon King Edward the Confessor] ...”⁹⁴ It is notable that almost three centuries after the Confessor’s death, monarchs of England continued to swear by that king’s laws and customs. This speaks strongly to the presumed continuity of established laws, and to the constraints against monarchs changing them. After more than a thousand years, the modern coronation oath still includes a promise to uphold local law wherever the queen or king reigns, in the undertaking

to govern the peoples of the United Kingdom of Great Britain and Northern Ireland, and the dominions etc belonging or pertaining to them according to their respective laws and customs.⁹⁵

The monarch as font of justice

In order to fill her duties of office, the royal attributes and the common law provide the monarch with both legal powers and legal constraints upon those powers, as expressed

⁹² *Blackstone’s Commentaries*, *supra* note 5, book 1 at 212.

⁹³ Kern, *supra* note 12 at 76-77.

⁹⁴ F.W. Maitland, *The Constitutional History of England* (Cambridge: University Press, 1913) at 98-100.

⁹⁵ *Halsbury’s Laws of England*, vol. 8(2), 4th ed. reissue (London: Butterworths, 1996) at 40, para 28.

in maxims of law. The royal dignity renders the person of the monarch sacred, and therefore no action by right of common law can be brought against her, because the common law gives no court jurisdiction over her.⁹⁶ On the other hand, as the embodiment of law and legal rights, the monarch is seen as the font of justice⁹⁷ – not as the source of justice, but as its repository or reservoir.⁹⁸ From this it follows that the king is under the law, and not above it because, as Bracton says, the law makes the king.⁹⁹

Law and the royal prerogative

Blackstone believes that being the font of justice is the source of the royal prerogative of issuing proclamations. He points out that the issuing of proclamations is distinctly different from the making of law, which is the work of the legislative branch. Yet the manner, time, and circumstances of putting those laws into effect must, of necessity, be left to the executive branch. He says proclamations only have binding force when they are grounded upon and enforce the laws of the realm.¹⁰⁰ Proclamations to the prejudice of a

⁹⁶ In modern times jurisdiction over the Crown is conferred by statute, though formerly suits could also be brought against the Crown by the Crown's consent.

⁹⁷ Bracton, *supra* note 12, vol 2, at 305:

To this end is a king made and chosen, that he do justice to all men that the Lord may dwell in him, and he by His judgments may separate and sustain and uphold what he has rightly adjudged, for if there were no one to do justice peace might easily be driven away and it would be to no purpose to establish laws (and do justice) were there no one to enforce them. ... He ought to have no peer, much less a superior, especially in the doing of justice, that it may truly be said of him, 'Great is our lord and great is his virtue etc.,' though in suing for justice he ought not to rank above the lowliest in his kingdom.

⁹⁸ *Blackstone's Commentaries*, *supra* note 5, book 1 at 239-40:

Another capacity, in which the king is considered in domestic affairs, is as the fountain of justice and general conservator of peace of the kingdom. By the fountain of justice, the law does not mean the author or original, but only the distributor. Justice is not derived from the king, as from his free gift, but he is the steward of the public, to dispense it to whom it is due. He is not the spring, but the reservoir, from whence right and equity are conducted by a thousand channels to every individual. The original power of judicature, by the fundamental principles of society, is lodged in the society at large; but, as it would be impractical to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints; and in England this authority has immemorially been exercised by the king or his substitutes. He therefore has the alone the right of erecting courts of judicature. ... And hence it is that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers.

⁹⁹ Bracton, *supra* note 12 at 33, 110, 306. See also *Blackstone's Commentaries*, *supra* note 5, book 1 at 212-213.

¹⁰⁰ *Blackstone's Commentaries*, *supra* note 5, book 1 at 243.

subject are not permitted.¹⁰¹ Royal proclamations are binding on the subject where they neither contradict established laws nor tend to establish new ones, but only enforce laws already in being. The common law recognizes no royal prerogative unless it can be traced to a common law or customary law source. Although many modern statutes give authority to various branches of the executive to make rules of similar effect as statutes, those rules derive their validity from the statute creating the power, and not from the executive body by whom they are made. Otherwise, there is no authority to make or change law, and executive discretion must be exercised according to existing law, including not only statute, but also both common law and custom.¹⁰² That is, unless the enabling statute itself extinguishes or otherwise infringes common law or legal custom, then it does not authorize any violation of it by executive discretion. Chitty believed that proclamations originally were adopted for the purpose of giving additional weight and dignity to the laws.¹⁰³ They could therefore also be vehicles for the expression of government policy. But since government policy must not be contrary to law, mere proclamations cannot change law. As the font of justice, the monarch is ultimately responsible for the administration of justice, though not for the making of law. And where there was¹⁰⁴ need for a court where none existed, the monarch could create one

¹⁰¹ *Warram's Case* (1587), Moore K.B. 238, 72 E.R. 553; *Case of Alton Woods* (1600), 1 Co. Rep. 40a at 44b, 76 E.R. 89 [hereinafter *Alton Woods* (1600) cited to Co. Rep.]; *Ex. Parte Barnsley* (1744), 3 Atk. 168, 26 E.R. 899; *Blackstone's Commentaries*, *supra* note 5, book 1 at 216.

¹⁰² *The Zamaro*, [1916] 2 A.C.77 at 90:

The idea that the King in Council, or indeed any branch of the Executive, has the power to prescribe or alter the law to be administered by the Courts of Law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made.

¹⁰³ Joseph Chitty, Jun. Esq., *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* (London: Joseph Butterworth and Son, 1820) (Republished Gregg International: Farnborough, Hants., England: 1968) at 104 [hereinafter Chitty (1820) cited to Gregg International]. It may be observed that for a very brief period royal proclamations were given the force of Acts of Parliament by the *Statute of Proclamations* (1539), *supra* note 87. Nevertheless, the statute restricted the application of such proclamations, through a clause that no such proclamations should be prejudicial to any person's inheritances, offices, liberties, goods, chattels, or life. Such restrictions were (and remain) precisely the same restrictions imposed by the common law of that period. This enabling legislation was repealed in the first year of the reign of Henry's successor, by the statute 1 Ed. 6 c.12, s.5. But when Henry 4 ordered by proclamation that a statute not be executed, and that it be suspended until the next parliament, it was held against the law: *per* Lord Coke in *Case of Proclamations* (1610), *supra* note 12 at 75.

¹⁰⁴ The past tense is used here because the prerogative of establishing courts has since been limited by statute. The need for such limitations was the political pretensions by the King James I and his son Charles I that they ruled by divine right, by grant from God, and that it was treason to hold that the king was under the law and not above it. The court, known colloquially as "Star Chamber", consisted of the monarch and a few personally chosen ministers, purporting to sit as a court of law, giving effect *inter alia* edicts by mere royal proclamation, sometimes contrary to the law as recognised by common law courts. But the nation's highest judges were unanimous in ruling that such edicts as were contrary to the established laws were no laws at all. And

by proclamation, and nominate judges. But establishing courts or naming judges is not the same as making law: those acts implicitly direct that the existing law be applied.

The king can do no wrong

Being the perfect embodiment of justice and the law, the monarch could in principle never be the source of injustice: "the king can do no wrong". Since the royal prerogative was created for the benefit of the people, it must not be used to their prejudice or the prejudice of any subject. Moreover, the monarch is deemed to be incapable of even intending to cause an injustice. How are the seemingly conflicting principles to be reconciled? Does this mean that there is no limit on what the monarch might do? Not at all. In order to prevent a monarch from perpetrating injustice by her own hand, the principle gradually emerged that the law will not permit her to be in a position where injustice may result.¹⁰⁵ Not everything that receives the monarch's sanction is just or legal. Rather, it means that where a government act results in injustice, the law will attribute it to the monarch's advisors rather than to the monarch. In the words of Bracton, the deed of the king "must not be questioned, it may not be judged nor revoked by anyone when it is rightful, but if it is wrongful it will not then be the deed of the king."¹⁰⁶ This rule is older than the common law itself. In ancient times, both the leader of the community and the leader's advisors were related at least notionally by kinship; and the kin group was collectively responsible for injustices, and for remedying injustice to any of the group's members. But the monarch personally escaped personal responsibility by virtue of the royal dignity and the attribute of perfection. The rule was carried forward into the common law by assigning responsibility to the royal advisors. Attributing the fault to the monarch's advisors means

Parliament took away the king's personal "courts" by statute when those bodies persisted in disregarding the law in favour of giving effect to the king's will. It has never been true in the common law system that the law is what the sovereign wills, or that the monarch has a prerogative of infringing any law or any subject's right. Such a position is utterly repugnant to the common law, and a legal nullity, in default of alternative legal authority such as statute or local legal custom. Of course, the legal rightness of their cause would have been little comfort to those who lost their lives, estates or freedom by such courts. Nevertheless, political views that are put into operation by arbitrary force cannot give rise to any legal fiction, by the same principle that a usage that is contrary to the law cannot make a practice legal.

¹⁰⁵ For instance, the monarch may not personally judge between parties in her royal court, nor personally arrest anyone: (*Prohibitions del Roy* (1607), *supra* note 24). Further, legislation may be enacted only with the advice and consent of the legislature. And executive discretion may be exercised only on the advice of the privy council.

¹⁰⁶ Bracton, *supra* note 12, vol. 4 at 159:

And whatever may be said of the king's deed, that he is king and accordingly his deed must not be questioned, it may not be judged nor revoked by anyone when it is rightful, but if it is wrongful it will not then be the deed of the king. And since it is not his deed, because wrongful, it may be questioned and judged, but it cannot be amended or revoked without him.

that abuse of power in the executive is not beyond punishment or redress.¹⁰⁷ Where a proclamation restrains a subject in a matter on which the laws are silent, it will not be obligatory or effective, even if it is in the public interest.¹⁰⁸ It follows that courts need not be bound by legal fictions that have the effect of depriving subjects of legal rights, whether their source be in customary law, common law or statute.¹⁰⁹ Nor are they bound to give effect to royal grants that purport to have reserved the right to extinguish customary laws or rights that derive from them.¹¹⁰ In short, the law is not what the king did if what he did was unlawful, but what he ought to have done.

Sovereignty and subjection entail duties on both the monarch and the subject.

The duty of the monarch is to reign according to law and in the subjects' interest, and the corresponding duty of the subject is to obey. But the duty of obedience is not absolute. Rather the governmental model, of which the British monarchy is a part, is a constitutional monarchy. The subject's duty of obedience does not unfetter the monarchy from the constitutional limits that the rule of law imposes. Of those limitations Blackstone says in his *Commentaries*:

one of the bulwarks of civil liberty, or (in other words) of the British constitution, was the limitations of the king's prerogative by bounds so certain and notorious that it is impossible he should ever exceed them, without the consent of the people on the one hand; or without, on the other, a violation of that original contract which, in all

¹⁰⁷ Blackstone's *Commentaries*, *supra* note 5, book 1 at 219-20:

[A]s to cases of ordinary public oppression, where the vitals of the constitution are not attacked, the law hath also assigned a remedy. For, as the king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land. But it is at the same time a maxim in those laws, that the king himself can do no wrong: since it would be a great weakness and absurdity in any system of positive law to define any possible wrong, without any possible redress.

¹⁰⁸ See, for instance, the *Case of Proclamations* (1610), *supra* note 12 at 76; Chitty (1820), *supra* note 103 at 106. This fundamental principle is one and the same with section 1 of the *Canadian Charter of Rights and Freedoms*, *supra* note 59, that legal rights and freedoms are protected against infringement by the Crown, except for reasonable limits prescribed by law.

¹⁰⁹ "Fiction yields to truth. Where there is truth, fiction of law exists not.": *Black's Law Dictionary*, 6th ed., s.v. "*Fictio cedit veritati. Fictio juris non est ubi veritas.*"

"A legal fiction does not properly work loss or injury. Fiction of law is wrongful if it works loss or injury to anyone.": *Ibid.* s.v. "*Fictio legis inique operatur alicui damnum vel injuriam.*"

¹¹⁰ Of course, even where the Crown had no authority in its own right to extinguish laws or rights, the defect of authority may in some cases have been remedied by prior or subsequent statute. Proof of such remedy, however, lies on the person alleging it because the law presumes the infringement to be unlawful, and the extinguishment not to have occurred.

states impliedly, and in ours expressly, subsists between the prince and the subject.¹¹¹

While Blackstone expresses admirably the rule of law as a constraint against wilful misuse of the royal prerogative, his use of the contract analogy is unfortunate. First, it is anachronistic because the customary legal constraint on the Crown's powers predated the feudal notion of contract by centuries. Second, a fundamental breach of duty by one party could not free the other from his obligations, as with a contract. Even where the ruler was unsuitable, the duty of the subject remained because it was not a duty to the ruler *per se*, but to the proper legal order which the unsuitable ruler had disturbed. The duty in that legal order thus became a duty to resist the encroachments on the law by the delinquent ruler.¹¹²

The ancient Germanic right of resistance later found expression in England not only in the common-law¹¹³ but also in formal enactments. King John's *Magna Carta* (1215) contained specific provision for his barons to bring him to account, should he be found delinquent.¹¹⁴ In his *Confirmation of the Charters* (1265) John's son Henry III provided similarly: if he or his son after him should breach his kingly duties, his people had the right to oppose him by force:

We will and expressly agree that, if we or the said Edward our son shall have presumed to go in any way contrary ... to the said ordinance, or our provision, or oath, or to disturb the peace and tranquillity of our realm, or to molest ... or do or procure the doing of injury to any of them, it shall be lawful for every one in our realm to rise against us and to use all the ways and means they can to hinder us ... notwithstanding the fealty and homage which he has sworn to us until that in which we have transgressed and offended shall have been by a fitting satisfaction brought

¹¹¹ Blackstone's *Commentaries*, *supra* note 5, book 1 at 214.

¹¹² Kern, *supra* note 12 at 78.

¹¹³ The Crown can effect no change in the law within its dominions without the consent of the constitutionally relevant legislature. In the event of infringements of this rule, Parliament (i.e. at Westminster) can by lawful right of ancient custom sit as a court of law in judgment. Note that colonial legislatures do not have such jurisdiction (see e.g. *Kielley v. Carson* (1842), *supra* note 85 because their authority derives merely from either royal grant or statute. No statute has conferred such authority; and the Crown has never been competent to grant it.

¹¹⁴ *Magna Carta* (1215) s. 61:

If we, or in our absence abroad the chief justice, make no redress within forty days, reckoning from the day on which the offence was declared to us or to him, the four barons shall refer the matter to the rest of the twenty-five barons, who may distrain upon and assail us in every way possible, with the support of the whole community of the land, by seizing our castles, lands, possessions, or anything else saving only our own person and those of the queen and our children, until they have secured such redress as they have determined upon. Having secured the redress, they may then resume their normal obedience to us.

Online: Internet Medieval Sourcebook (Medieval Legal History) Homepage
<<http://www.fordham.edu/halsall/source/magnacarta.html>> (last modified: 25 April 1996).

again into due state. ... this having been done let them be obedient to us as they were before.¹¹⁵

Note the included principle of restorative justice that is included in the *Magna Carta* and the *Confirmation*: resistance and hindrance should continue only until the “due state” of justice had been restored. The references to the right of resistance in both documents are in the nature of acknowledgements of existing royal duties, rather than grants of a new right.

Origins of “common law”

In order to understand the emergence of the common law from the multitude of varying local legal customs it is necessary to reconcile competing principles/trends. On the one hand, the prevailing legal view was that true law was essentially immutable – to change it was unthinkable. Even though small communities might merge with others, their local customs/laws were presumed to continue to apply locally. It was inconceivable to the legal minds of the day that a monarch or judge, with or without the council of the realm, could legitimately create new law. The medieval conception of law and the state was in complete contrast to that of today. In those times, says Kern,

the law is sovereign, not the State, the community, the magistracy, the prince, or any other person or body which we should contrast with the law. The State cannot change the law. To do so would be to commit something like matricide.¹¹⁶

On the other hand, the historical record shows that differences between local legal practices did indeed dissolve in large part, though not the theory and principle that local customs ought to persist. And we know that the notion of “remedial statutes” to correct perceived defects in the law entered practice only gradually, centuries later. How then did the common law emerge as a concept during the adult years of a single king, without resulting in major social, economic disruption, and political resistance? The fact is, the emergence of the common law was an instance of a process that had already been in effect for several centuries. The acceleration of that process during the reign of Henry II was preceded and precipitated by two decades of anarchy and social, political, economic and military turmoil, to which we will turn our attention below.

Early codifications of law

Before the common law emerged in Britain there had been a trend on the continent away from customs as carried in the minds of local inhabitants and toward compilations of customs in formal codes – in effect, from unwritten customs to customs as written. The famous code of Justinian was a collection of customs that were found to prevail generally

¹¹⁵ *Confirmation of the Charters*, 1265 (March 14, 49 H.3) in *Select Documents*, *supra* note 87 at 68.

¹¹⁶ Kern, *supra* note 12 at 154-5.

over the Holy Roman Empire of Justinian's period. In a later time Charlemagne similarly caused the unwritten laws of all the tribes that came under his rule to be compiled and reduced to writing.¹¹⁷ Still later, the *Coutume de Paris* (1580), which governed Quebec at the time of its cession to the British, was essentially a comprehensive codification of customary law.¹¹⁸ There was not such a clean break from custom as the existence of the civil codes might suggest. The emergence of the civil codes was rather a translation of legal custom from oral to written form. Britain did not come under the so-called civil codes of continental Europe because of an important historical factor: at no time was Britain subject to the Holy Roman Empire. This helps explain the separate streams of development of the common law system from the civil code system. But the mere fact of physical and political separateness across the English Channel did not entirely prevent some codification of general customs on the island, as was the trend on the continent.

Some early Anglo-Saxon kings collected and published realm-wide customs as a means of promoting the rule of law, and clarifying law where it was confused or in dispute. While those kings maintained their collections, they recognized custom as the basis of their laws. The dooms of King Wihtræd, (690-725 A.D) of Kent, decreed by the great men (including the king) of that kingdom in a deliberative convention, were declared to thereafter added to the "lawful customs".¹¹⁹ Alfred the Great (reigned 871-899) continued the practice. After a period of warfare between the English under Alfred, and the Danes under King Guthrum, the two rulers concluded a treaty under which English and Danes in adjacent communities in a region between their two respective territories were held "equally dear," and would continue to live side by side, each under their own laws.¹²⁰ Other such collections were made in early England by Kings Edward the Elder, Edgar, and Edward the Confessor (reigned 1042-1066) and others.¹²¹ Nevertheless, the collections could not be considered as having been

¹¹⁷ Einhard, *The Life of Charlemagne* (written c. 817-830), Samuel Epes Turner, trans., (New York: Harper and Brothers, 1880), online: Internet Medieval Sourcebook, Fordham University Center for Medieval Studies, <<http://www.fordham.edu/halsall/basis/einhard.html>> (last modified: 30 January 1999).

¹¹⁸ John A. Dickinson, "New France: Law, Courts and the Coutume de Paris, 1608-1760 (1996) 23 Man. L. J. 32 at 34, 38.

¹¹⁹ "The Laws of King Wihtræd, 690-725 A.D." in Oliver J. Thatcher, ed., *The Library of Original Sources* (Milwaukee: University Research Extension Co., 1901), Vol. IV: The Early Medieval World, online: Internet Medieval Sourcebook: Medieval Legal History, Fordham University Center for Medieval Studies, <<http://www.fordham.edu/halsall/source/560-975dooms.html>> (last modified: 29 June 1998).

¹²⁰ The text of the laws under that treaty can be found in F.L. Attenborough, *The Laws of the Earliest English Kings* (Cambridge: University Press, 1922) at 103-109.

¹²¹ *Blackstone's Commentaries*, *supra* note 5 at 54-56. Hale says of Edward the Confessor, "This King, to reduce the Kingdom as well under one Law, as it then was under one Monarchical Government, extracted out of all those Provincial Laws [i.e. Mercian, West Saxon and Dane], one Law to be observed through the whole Kingdom": Matthew Hale, *The History of the Common Law of England* (1713) (reprint Littleton, Colorado: Fred B. Rothman, 1987) at 56, online: McMaster University Archive for the History of Economic Thought

enacted, as by statute. That is, even as collections the rules remained folk-law, or customary law, in the sense that they were based on the convictions of the community, and the monarch “proclaimed” them as an official sign of the larger community’s approval. In a sense, these collections of general customs – as distinguished from purely local laws/customs – can be seen as early attempts at finding what later came to known as the “common law”, in that they were customs that were held to apply throughout the constituent parts of those kings’ realms.

The legal principle throughout recorded history has been that monarchs in the Anglo-Saxon/common-law system have not been able to alter old law or create new law without the consent of their subjects. Even Parliament did not venture to openly create new law until centuries after the common law emerged. Early statutes were merely declaratory of existing law. And medieval monarchs rarely omitted to claim that a decree had received advice and consent, so as to be consistent with the legal convictions of the community. Legal innovations were thus reconciled with the conservative principles of customary law. “[F]or legally speaking, there is only one law, the law which the community acknowledges by customs or express declaration, and which the monarch ordains.”¹²² It must be acknowledged, however, that on occasion the military or political power of the monarch or government ministers was such that opposition was silenced; and such silence was politically taken for consent. But silence in the face of acts that have had no legal foundation has never given them legal sanction.¹²³

Legal pluralism: one realm, three different legal systems

By the 11th century three provincial systems of laws were recognized in southern Britain under Edward the Confessor (reigned 1042-1066). The Mercian laws were observed in the midlands, by the descendants of the earlier Angle settlers, in those lands left to them after the later Danish invasions. West Saxon laws (after the Saxons)¹²⁴ prevailed in the south and west counties from Kent to Devonshire. And the *Dane-Lage*, or Danish laws, were held in the rest of the Midland counties and on the east coast.¹²⁵ Compare the geographic extent

<<http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/hale/common>> (last modified 9 January 1997).

¹²² Kern, *supra* note 12 at 73.

¹²³ See (e.g.) *Entick v. Carrington* (1765), 2 Wils. K.B. 275 at 292, 95 E.R. 807, in which the court ruled that failure to dispute search warrants, issued by Secretaries of State over a century, through the reigns of five successive monarchs, did not render them legal. The court reasoned that such acquiescence or failure to dispute could derive from other reasons than an acknowledgement of their legality.

¹²⁴ The Jutes were ethnically close to the Saxons, and they were generally under the West Saxon system, with local variations on particular legal matters. There were many Jute communities in Saxon territories.

¹²⁵ *Blackstone's Commentaries*, *supra* note 5, “Introduction” at 65; Hale, *supra* note 121 at 55-56; Hall (editor of *Glanvill*, *infra* note 137 at xi-xii); Maitland, *supra* note 94 at 3-4.

geographic extent of these separate systems of laws (figure 4) with the geographic distribution of ethnically distinct groups earlier waves of Anglo-Saxon migration from the continent (figure 5). There is a fairly close correspondence. The existence of only three overarching systems, where there had been innumerable self-governing communities centuries before, is evidence of a practical tendency of disparate customs in a single realm to merge in time. Yet the legal pluralism exhibited by the existence of three distinct legal systems is evidence of the constitutional principle that local law has an authority that is independent of the monarch. The rule is clear, therefore, that the monarch could give recognition to local custom, but had no authority to create or extinguish it.¹²⁶

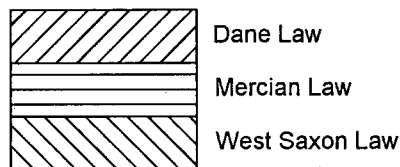
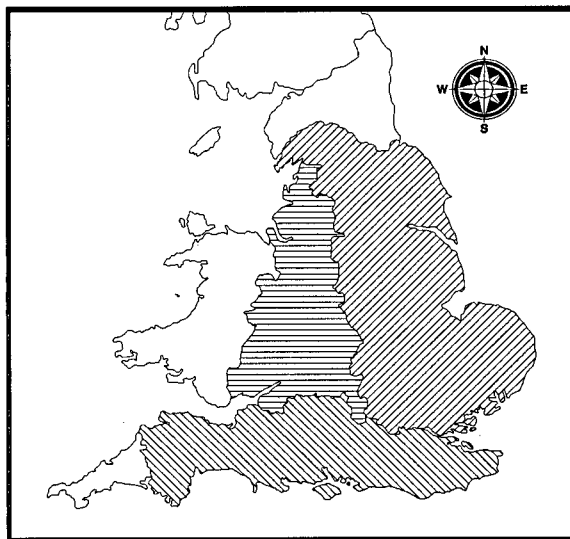


Figure 4 - Three provincial legal systems in the single realm of England in the 10th-12th centuries. Note the general correspondence of Mercian Law with the Anglian territory of the 9th century, Dane Law with Danish territory, and West Saxon Law with Saxon territory. Illustration by author, based on information by Matthew Hale, *supra* note 121 at 37.

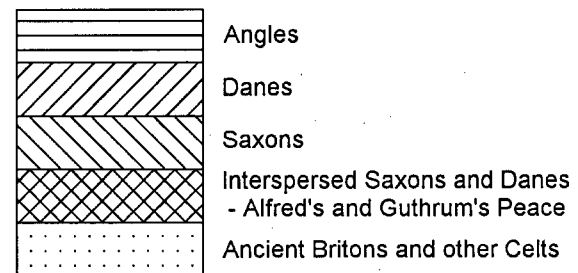
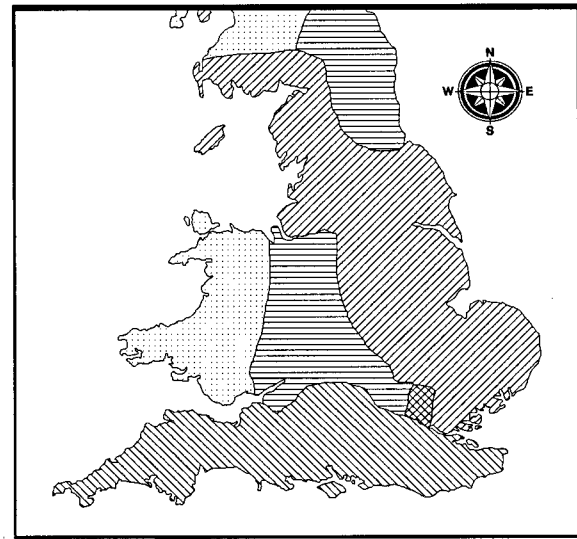


Figure 5 - Ethnic distribution in the late 9th century. Illustration by author, following William R. Shepherd, *Historical Atlas*, (New York: Barnes and Noble, 1929) at 60, online : Images of Medieval Art and Architecture homepage <<http://www1.pitt.edu/~medart/image/england/england2/mapsengl/msh9th.jpg>> (last modified: 13 January 1995).

¹²⁶ This common law constitutional principle continues to exist in modern times, though nowadays customary law can be extinguished by explicit statute.

Reconciliation was facilitated by the fact that, for the most part, the local populations were derived from culturally and ethnically related stock. In addition, they shared many aspects of their respective histories since arriving in Britain, and they had been subjected to largely similar political and religious influences. Furthermore, intermarriage and shared economic interests provided incentives for them to reconcile. Nevertheless, neighbouring communities remained distinct, and local populations conducted their relations according to their own views and traditions, enabling the maintenance of innumerable small differences that continued to have the force of law locally. But however small those differences, they nevertheless to have the force of law. Edward the Confessor's contribution was to extract overarching commonalities that prevailed throughout his realm. He recognized and promoted those legal commonalities as a means of unifying the administration of justice, in his capacity/role as font of justice. In like capacity, he maintained provincial and local custom in order to retain the support of his subjects. Blackstone suggests the promulgation of Edward's laws completed a project begun by his grandfather, King Edgar.¹²⁷ The fact that diversity was maintained, and even institutionalized, makes it clear that continuity of local law was a fundamental constitutional principle. The three provincial systems of laws continued in effect into the twelfth century – enduring the period of Norman rule. One may infer that the three systems were severely undermined by the anarchy that prevailed under King Stephen. That anarchy featured prominently in the emergence of the common law.

Why the sudden emergence of the common law in the 12th century?

Having established that there were reasons for separate local legal systems and reasons for reconciling those systems, the question remains why the common law did not arise as a formal legal concept until the reign of Henry II (reigned 1154-1189). Before that time local courts administered customary law that varied in many ways from county to county, and manor to manor. Why did the common-law develop so dramatically during his reign? Why not a century or two earlier, or later, if ever? The chief reasons lie in the political and social turmoil following the death of Henry's grandfather, Henry I, featuring the anarchy of a generation-long civil war. At the death of Henry I the time was not ripe, and conditions did not support its rapid development. By the end of his successor's anarchic reign, the emergence of the common law was inevitable, and dictated by the need to scrupulously apply the rule of law, in circumstances where it was difficult to prove the substance or procedure of the locally applicable law.

When Henry I died in 1135 he had no surviving male heir, but he had a daughter Matilda. She had a rival claimant in the person of her cousin, Stephen of Blois, son of Henry's sister. Both were grandchildren of William I. But Matilda was of the House of Normandy through her father the king because according to both Anglo-Saxon and Norman custom she

¹²⁷ *Blackstone's Commentaries*, *supra* note 5, "Introduction" at 54-56.

acquired the kinship of her father.¹²⁸ Matilda therefore had the royal kinship required in a candidate for the throne, but was a woman – anomalous in a ruler in Germanic cultures of the time. Stephen, on the other hand, was considered by many to be an ineligible candidate for the throne, his mother having married out of the House of Normandy into the House of Blois. The only other plausible candidate was Matilda's illegitimate half-brother Robert of Gloucester by their father Henry I. But although Robert was genetically descended from the deceased king, being a bastard he could never be king because in the king could be no imperfection.¹²⁹ Such kinship customs functioned for more than a millennium to maintain the distinctions between the clans and tribes, while joining them by way of intermarriage, exchange of access to land through dowry, uniting separate kin groups through the (presumably beloved) children of marriages. But disputes as to the precise application of those customs could also be a source of jealous rivalry when there was a monarchy at stake, as in 1135. The two cousins, Matilda and Stephen, thus contended for an office that could be occupied by only one.

Two decades of anarchy and destruction

Upon Henry's death in 1135, Stephen acted quickly. He was acclaimed king in London and seized the royal treasury while Matilda was still out of the realm. But his support in the rest of the country was far from unanimous. Henry had already gained the promise from many of his nobles that they would support his daughter Matilda after his death. Many of those nobles honoured their promise and fought for Matilda. Stephen's hold on his realm was precarious, at best, and the people suffered under him – both from his rule and from the war in opposition to it. Battles were fought, castles built, land taken and lost, and civil order destroyed. Reports from the period describe Stephen razing large parts of the countryside in 1139, presumably to deny the fruits of those lands to his rivals. The *Historia*

¹²⁸ This Anglo-Saxon custom is arguably the source of the rule that was imposed under the Indian Act on Indian women who married non-Indian partners. Such women and their children acquired the status/identity of their husbands. This rule functioned well for the Anglo-Saxons and Normans because it resonated with the rest of their world view and customary laws. But it was devastating for Indian peoples because for the most part it was repugnant to their ways of reckoning kinship and membership in their communities. The result in the Americas particularly was that individuals were isolated from their families, communities and institutions of support.

¹²⁹ By 1135 elements of Christian doctrine had crept into the law ways of many or most European/Germanic legal systems, bringing the requirement that a lawful marriage must be sanctified by the church. The rule functioned to limit the potential size of the extended family and thus to concentrate familial wealth by preventing dissipation. A special rule operated to render the child of a female monarch among those qualified to assume the throne, notwithstanding that the child was of the father's kindred. This is why, for instance, the throne of Great Britain descended to the House of Saxe-Coburg and Gotha (later renamed Windsor) through Edward VII, though his mother Queen Victoria was of the House of Hanover: Victoria married into the latter House, and Edward thus was legally of his father's kindred.

Novella paints Stephen as a spendthrift,¹³⁰ and indicts Roger, chancellor and Bishop of Salisbury under Stephen, for bribery.¹³¹ The *Gesta Stephani* describes “immense plunder, beyond computation”, the terrible burnings of villages and towns which reduced them to deserts, and the killing of great numbers of men, mostly blaming the other side.¹³² Armies lived off the resources of the lands they invaded, and mercenaries from the Continent often extracted plunder as part of their payment. The Anglo-Saxon Chronicle characterizes Stephen’s reign as “all dissention, and evil, and rapine”, and notes that by the end of the period, “well thou mightest go a whole day’s journey and never shouldest thou find a man sitting in a town, nor the land tilled. Then was corn dear, and flesh, and cheese, and butter; for none was there in the land.”¹³³ By all contemporary accounts there was widespread devastation and depopulation.

During the years of war, victory appeared to go back and forth between the two sides. At one point Matilda’s forces captured Stephen. Later, Stephen’s forces captured Matilda’s chief supporter, and the two contenders agreed to an exchange of prisoners. A consequence of alternating fortunes was that many people lost their land by favouring the wrong side, the land being granted to followers of the temporarily ascendant side. The result of the dispossessions was that many military figures were dispossessed, landless and disgruntled. Their personal distress, and their capacity for self-help by force of arms,

¹³⁰ William of Malmesbury (ca. 1090-1143), *Historia Novella : the contemporary history*, Edmund King, ed., K.R. Potter, trans., (New York : Clarendon Press, 1998) at 55ff. The *Historia Novella* clearly favoured Stephen in its recital of events. Nevertheless, it agrees substantially in matters of fact with the *Gesta Stephani*, *infra* note 132, which was written during the same period, but is partisan in the direction of Stephen’s rivals. Anglo-Saxon Chronicle, *supra* note 69 says Stephen squandered his treasure foolishly.

¹³¹ *Historia Novella*, *supra* note 130 at 57.

¹³² *Gesta Stephani*, K.R. Potter, ed., and trans., (Oxford: Clarendon Press, 1976) at 95.

¹³³ The Anglo-Saxon Chronicle, *supra* note 69 Part 7 says of the year 1137:

When the King Stephen came to England, he held his council at Oxford; where he seized the Bishop Roger of Sarum, and Alexander, Bishop of Lincoln, and the chancellor Roger, his nephew; and threw all into prison till they gave up their castles. When the traitors understood that he was a mild man, and soft, and good, and no justice executed, then did they all wonder. They had done him homage, and sworn oaths, but they no truth maintained. They were all forsworn, and forgetful of their troth; for every rich man built his castles, which they held against him: and they filled the land full of castles. They cruelly oppressed the wretched men of the land with castle-works; and when the castles were made, they filled them with devils and evil men. Then took they those whom they supposed to have any goods, both by night and by day, labouring men and women, and threw them into prison for their gold and silver, and inflicted on them unutterable tortures; for never were any martyrs so tortured as they were. ... This lasted the nineteen winters while Stephen was king; and it grew continually worse and worse. They constantly laid guilds on the towns, and called it "tenserie"; and when the wretched men had no more to give, then they plundered and burned all the towns; that well thou mightest go a whole day’s journey and never shouldest thou find a man sitting in a town, nor the land tilled. Then was corn dear, and flesh, and cheese, and butter; for none was there in the land.

constituted a political and social crisis that threatened to prolong the instability that prevailed in the kingdom. To address this instability, a compromise settlement was reached at Wallingford,¹³⁴ formalized in the Treaty of Winchester (1153), and ratified by Stephen's charter at Westminster. The agreement was that Stephen would retain the Crown until his death, upon which Matilda's son Henry would become king, as he would normally have done as Matilda's successor. And all persons who had been dispossessed of land during Stephen's reign by either side would be restored to them, and guaranteed to them by the king as font of justice. King Stephen would order the royal judges to ensure that wrongfully dispossessed persons could lawfully re-enter and take possession of the lands they had held as of right in 1135.¹³⁵ Castles built during the war would be destroyed. For the most part the agreement's provisions were honoured on either side. Stephen died the following year, in 1154. And into his role stepped 21 year old Henry II, who reigned until 1189.

What were the consequences of the war for the administration of justice? In the words of Maitland, "During the anarchy of Stephen's reign the civil, as contrasted with the ecclesiastical, organization of society had been well-nigh dissolved ..."¹³⁶ The judicial system, which had been previously largely independent in each shire, had fallen into disrepair, judgeships being bought and sold freely. The utter destruction of villages and towns meant that many of the seats of local government and courts simply no longer existed through much of the country. And even if courts had not been destroyed, many customary judges were no longer alive. And since local laws resided in the collective legal sentiment of the local community, the death of many local populations meant that local laws could in those localities could no longer be found by the old methods.

Henry II comes to the throne

Briefly stated, this was the state of affairs when Henry II took the throne. Much of the realm had been depopulated. The local justice systems were in many instances no longer in existence. Much of local custom had disappeared, and there was almost no realm-wide law, except for the meagre collections of some earlier monarchs. Powerful persons were eager to regain their lawful possessions. The monarch but did not have the authority to enact law to fill legal voids – he could "find" law, but not create it. He had not the power to

¹³⁴ After nearly two decades, neither side wished to continue the anarchy. The settlement at Wallingford was compelled in large part because both warring sides refused to battle at that time for their principals. Both sides agreed on the rule of law and the role of the monarch. Although they had disagreed on who was to be that monarch, they now wanted a resolution.

¹³⁵ More particularly, a writ of right was directed to the feudal lord of whom the wrongfully dispossessed person held his land, requiring the lord to do right in his court to the applicant: Maitland, *supra* note 94 at 111.

¹³⁶ Maitland, *supra* note 94 at 10.

impose his will on the realm as evidenced by the almost constant war and rebellion in one or another part of it throughout his life. And Parliament did not take upon itself the practice of enacting new law until centuries later. Yet Henry II was cast in the role of “font of justice”, with the expressed responsibility of remedying the wrongful taking of land from those who held it in the reign of his grandfather. Altogether, it was an unenviable position. It is my argument that the guarantee of returning lands to those who had been unlawfully dispossessed, in the troubled aftermath of the generation-long civil war, sparked the emergence of the common law as a remedial legal notion.¹³⁷

Drawing new order from anarchy and lost laws

In view of Henry’s obligation to ensure the return of lands to those who had been wrongfully dispossessed of them, the question arises: in which courts, and under which laws, would it be determined who had rightfully held the lands in 1135? Since the law of the time was passed down largely by oral tradition, the lack of local spokespersons produced a void with respect to evidence of the substance of the law. And where local populations could be found, those local populations would be in many cases comprised of recently arrived individuals, who could not possibly have knowledge of the ancient customs that were particular to the locality.

As a result of then-recent (and continuing) political and social events, Henry II began to promote centralized courts, as instituted by his grandfather, Henry I. As font of justice he appointed judges as required. It was the duty of those judges to deliver justice according to the law as they found it. In ordinary circumstances customary law might be expected to evolve very gradually in order to meet slowly changing requirements of a community. But the circumstances in the England of Henry II were very extraordinary. Never before had there been simultaneously a wholesale loss of customary law, and a royal promise to re-establish law and order in a context where neither the monarch nor the common council of the realm had any perceived authority to enact new law to replace that which was lost. In the extraordinary circumstances of Henry’s reign, the process of “finding” common customary law progressed at an extraordinary rate.

¹³⁷ Support for the argument can be found in Glanvill – the first treatise or textbook on the common law – written probably between 1187 and 1189, toward the end of the reign of Henry II, during whose reign the common law is believed to have emerged. Following a brief overview of law and governance, the first legal writ discussed was for the recovery of land wrongfully withheld from the lawful owner. The remainder of Book I concerns legal procedure for bringing the defendant into court if the dispute continues. Book II concerns itself with legal procedure at such trial, if necessary, and provides that the statement of claim must state that the land was held “as of fee” by the demandant’s ancestor in the time of Henry I or in the time of Henry II. There is no mention of the land having been held in the reign of Stephen. The inference is left that Stephen’s reign is rejected as a starting point for ancestral seisin. This is consistent with the terms of the Wallingford (1153) agreement, whereby all lands would revert to their owners as of the time of Henry I. See G.D.G. Hall ed., *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Oxford: Clarendon Press, 1993) [hereinafter *Glanvill*].

The process of "finding" the law through the efforts of the royal judges was by no means a novel process. Rather, it was the continuation and extension of a more-ancient judicial methodology that prevailed throughout Germanic Europe. Although the following passage is about medieval Germanic legal customs in general, it so closely describes the work of Henry's royal judges that its author might as well have been describing the judicial theory of the common-law itself.

When the case arises, for which no valid law can be adduced, then the lawful men or doomsmen will make new law in the belief that what they are making is good old law, not indeed expressly handed-down, but tacitly existent. They do not, therefore, create the law; they 'discover it.' Any particular judgment in court, which we regard as a particular inference from a general established legal rule, was to the medieval mind in no way distinguishable from the legislative activity of the community; in both cases a law hidden but already existing is discovered, not created.¹³⁸

The account of the role of judges in interpreting medieval customary law among the Germanic peoples describes equally well the role of modern day judges in construing statutes, or the common law, as applied to new or unforeseen circumstances.

If a law has become ambiguous or obscure, the doomsmen do not declare what ought to be established as law, but find in their wisdom or conscience what has always been right and consequently continues to be right. They may make a mistake, and actually declare a law that has never existed before. Indeed, they may even be aware that they have made an innovation. But they do not say so, and they cannot say so. They can no more say that they have created new law than a modern legislator can say that he has established a law out of self-seeking willfulness, class-spirit, or the like. For even if the Middle Ages actually made new law every day, medieval ideas forced them to assert that the reasonable, equitable law is also the old law. The 'first application of a law' is therefore never spoken of in those words in the Middle Ages. ... The typical expression for medieval legislative procedure is '*legem emendare*,' to free the law from its defects. Right and law are restored as they had been in the good old days of King Eric (in Sweden), of Edward the Confessor (in Anglo-Norman England), of Charles the Great [Charlemagne] (among the French and Germans), or of some mythical law-giver.¹³⁹

However numerous the small differences between communities, they were no impediment to the recognition of certain general commonalities. Where no local custom could be found on point, the close similarity between local *systems* of custom made it feasible as well as socially acceptable for Henry's royal judges to fill in the legal void by analogy from legal practices that in general were common to the rest of the realm. Such substitutions tended to resonate with local legal sentiment because they tended to bear at least a generic resemblance to the customs with which locals were familiar. In less than 36

¹³⁸ Kern, *supra* note 12 at 151.

¹³⁹ *Ibid.* at 165-66.

years – the adulthood of one man, Henry II – the effects of that practice began to be formalized in what came to be known as the common law. The accepted rule was, from the start, that local customary law would continue to be recognized and enforced, as it had been since “time immemorial”. Only where such could not be found or proven, might there be a need to presume the common law. Evidence of this general rule appears in *Glanvill*. The “Prologue” states that the monarch

does not scorn to be guided by the laws and customs of the realm which had their origin in reason and have long prevailed; and, what is more, he is even guided by those of his subjects who are most learned in the laws and customs of the realm.”¹⁴⁰

A half-century later Bracton was even more explicit, that where local law differs from the general law, local law prevails.¹⁴¹ Both Bracton and *Glanvill* are replete with examples of the common law being guided by custom, or deferring to local custom when the two were in conflict on matters of substance of the law,¹⁴² legal procedure,¹⁴³ lawful means of compelling a person to appear at court,¹⁴⁴ the royal prerogative¹⁴⁵ and penalties/fines/fees.¹⁴⁶

¹⁴⁰ *Glanvill*, *supra* note 137, “Prologue” at 2.

¹⁴¹ “... for law different from that outside sometimes prevails in cities by force of custom approved by those who use it, since such custom ought to be observed as law.” Bracton, *supra* note 12, v.2 at 27.

¹⁴² E.g. *Glanvill*, *supra* note 137 at 75, 77, 79, 84, 88 and Bracton, *supra* note 12, vol. 2 at 178, 217-8, 221, 222 (re inheritance); *Glanvill* at 84 and Bracton at vol. 2 at 255, 263 (re wardship); *Glanvill* at 57 (re purchasing freedom of person from villeinage); *Glanvill* at 86 and Bracton vol. 2 at 267, 268, 271, 272, 281 (re dowry); Bracton vol. 2 at 42 (re capture and ownership of wild beasts); Bracton vol. 2 at 43 (re ownership of bees); Bracton vol. 2 at 362, 380 (re apprehension of fugitives) *Glanvill* at 177 (re theft); Bracton vol. 2 at 60 (re duels). “[T]he general rule is that a woman never shares in an inheritance with a man, *unless there is a special rule in a particular city by ancient custom of that city* [emphasis added].” (*Glanvill* at 77).

¹⁴³ *Glanvill*, *supra* note 137 at 100-102:

It should, however, be known that, generally speaking, no court except that of the lord king has record; for in other courts if anyone says something which he later wishes to withdraw, he may deny against the whole court and swear or three-handed, or *with more or fewer according to the custom of different courts*, that he never said it. ... [But where a county court or other inferior court has record by virtue of special provisions] ... [a]nyone may allege in respect of the record of an inferior court that he said more than is contained in that record, and may prove this against the whole court by the oaths of two lawful men or more, *according to the custom of the court* [emphasis added].

See also *ibid.* at 14, 15, 24, 57, 100-101 and Bracton, *supra* note 12, vol. 2 at 381, 382, vol 3 at 295, 387-390, vol. 4 at 49-50, 54, 130, 284.

¹⁴⁴ *Glanvill*, *supra* note 137 at 63.

¹⁴⁵ The royal prerogative of wardship does not apply where there is burgage tenure – that is, a species of tenure governed by the legal customs of ancient cities: *ibid.* at 84.

¹⁴⁶ E.g. “[T]he general rule is that the amercement arising from any plea tried and determined in the county court is due to the sheriff. The amount of the amercement is not laid down by any general assize, but *depends on the custom of different counties, being more in one and less in another* [emphasis added].” (*Ibid.* at 113) See also *Ibid.* at 112. Where a tithing or other person or group is liable for a penalty for failure to produce a

Notably, the procedural rules imposed in the royal courts are constrained and guided in such a way as to conform to local and general custom when, for example, custom is offered as justification for excusing oneself from an appearance in those courts. The common law may therefore be seen not as a replacement for local customary law, but rather as a presumption of what those local customs must be, in default of proof to the contrary. In time it became redundant to prove that local custom was the same as the common law. Where local law was proven to exist there was no need to “find” a substitute, and no authority to extinguish local law in order to do so.

The common law as newly “found” tended to be acceptable for a number of reasons. First, the populations of neighbouring local communities had been derived from tribes which had in ancient times possessed similar (though not identical) systems of legal custom. The royal judges in their circuits (“eyres”) had ample opportunity to become familiar with customs in their regions because the boundaries of their circuits tended for the most part to correspond with the boundaries of the three provincial legal systems and with ethnic settlement patterns. Second, those communities had, by the time of Henry II, been subjected to centuries of common social, economic, and political pressures. Third, The common law provided the only practicable alternative to the anarchy of a legal void where local custom had been lost, and where the imposition of an arbitrary and newly conceived rule would have been unthinkable. A reasonable presumption of what the law almost certainly must be was therefore far preferable to no law at all. Fourth, the substance of most disputes in the early days of the emerging common law was the right to feudal tenure of land, which was of concern mainly to the military and ecclesiastical elite(s). After centuries of ‘holy war’ against the followers of Mohammed, the interests of those elites often converged. In addition, the composition of those elites often overlapped – many clerics also being important military figures.

Chapter summary

This chapter has offered an account of a generalized world view that underpinned Anglo-Saxon custom and law, and provided rules that both empowered and constrained tribal chiefs and monarchs under legal custom in 1st millennium continental Europe and in the British Isles. That world view also accommodated local customary law, and provided for its maintenance as culturally and politically distinct local communities gradually consolidated into an increasingly larger realm under progressively fewer monarchs. It generated the emergence of the common law as a response to the political and social turmoil that prevailed before and during the reign of King Henry II. If this account is valid, then we would expect to see the broad principles of that world view persist historically somewhat as the Anglo-Normans colonized the remainder of the Isles. That is, the monarch ought to

fugitive the amount is determined by local custom, as in Hereford: Bracton, *supra* note 12, vol. 2 at 350-351. See also *Glanvill*, *supra* note 137 at 112.

remain under the common law, and under local customary law so far as it was not inconsistent with royal sovereignty. And we would expect local legal custom to stand where contrary to the common law. Variations from that model on these points ought to be easy to detect. In the next chapter we will examine those hypotheses as the remaining part of the British Isles were brought under the Crown's protection.

Chapter 3 – Local legal custom and the colonization of the British Isles

In order to determine whether there was a constitutional relationship between local custom, the Crown and the common law in the period of overseas colonial expansion, it helps to know if there was a relationship before then. Colonization did not begin with post-Columbus oversea expansion, but was an ongoing process already underway since then-ancient times. The process of consolidating territories under progressively fewer leaders continued before, during and after William I. Anglo-Saxon/Norman constitutional norms governed the process of colonization/annexation. A constant feature of this process was the continuity of local law. Following his victory over Harold II at Hastings in A.D. 1066, William's first acts on the way from the battlefield to London included recognizing the ancient customs and privileges of towns such as Dover and Canterbury, and in doing so encouraged their acceptance of him as their king.¹⁴⁷ Such confirmation should not be considered as an act of special grace from William, but rather as his royal duty to acknowledge and protect pre-existing local rights. As we saw in chapter two, it had already been the regular practice for centuries, both in England and on the European continent, for rulers upon the accession to the throne, to confirm the laws and customs in their respective realms, according to their well-understood duty and role as monarchs to uphold them. The confirmation of custom was not seen as the promise of a new right. Rather, it was a renewed promise to perform an ancient and sacred duty. For William to refuse would have been unthinkable, and would have meant refusal on a nationwide scale to accept him as their king. William's fight was not with the English, but with Harold over who would be their rightful king. Both William and his son Henry I confirmed the laws of Edward the Confessor,¹⁴⁸ and the laws of William I included provisions for living under the three separate provincial legal systems as recognized by Edward the Confessor and Harold II, William's predecessor.¹⁴⁹

As the font of justice, a monarch assumes the same duties to subjects in new territories as to other subjects: that is, to reign in their benefit according to law.¹⁵⁰ Blackstone says that the royal dignity and prerogative exist in order to further those duties. Foremost among the duties of a king, says Blackstone, was to govern his people according

¹⁴⁷ Albert Kiralfy, "Custom in Mediaeval English Law" (1988) 9 *Journal of Legal History* 26 [hereinafter Kiralfy] at 31-32.

¹⁴⁸ Maitland, *supra* note 94 at 7-8; *Charter of Liberties* (1100), *supra* note 90, ss. 9, 13;

¹⁴⁹ A.J. Robertson, ed., and trans., *The Laws of the Kings of England from Edmund to Henry I* (Cambridge: University Press, 1925) at 254-255; Maitland, *supra* note 94 at 3; *Blackstone's Commentaries*, *supra* note 5, "Introduction" at 54-56; Hale, *supra* note 121 at 55-57.

¹⁵⁰ *Campbell v. Hall* (1774), Lofft 655, 1 Cowp. 204, 98 E.R. 848 (K.B.) [cited to Lofft] at 741: "conquered inhabitants once received into the conquerors [sic] protection become subjects; and are universally considered in that light, not as enemies or aliens."

to law,¹⁵¹ “it being a maxim in the law, that protection and subjection are reciprocal.”¹⁵² Therefore, extending the Crown’s protection is presumed as an incident of the assertion of sovereignty. As font of justice the monarch thus extends to new subjects in the acquired territories all the protections of applicable statute and common law that any other subject may claim, including the protections of local customary law where applicable.¹⁵³ In consequence, new subjects became entitled to rely on the new monarch to remedy breaches of unextinguished customary law. This was the legal world view of the Anglo-Saxons, their monarchs, and their Germanic cousins from Normandy, since they each arrived in England.¹⁵⁴ In later centuries the principle emerged that while the conqueror had/has the prerogative of imposing new laws on conquered peoples and territories, the legal presumption was/is that no such change occurred, unless explicitly made as an incident to the conquest. This prerogative expired with the death of the conqueror,¹⁵⁵ or by the monarch divesting herself of it, as by calling for a local legislative assembly,¹⁵⁶ and was therefore personal to the acquiring monarch, rather than a major prerogative of the monarchy itself.

As territories were added to the English (later British) possessions, their local laws and customs were retained, subject only to override by statute.¹⁵⁷ The Channel Islands, for

¹⁵¹ *Blackstone’s Commentaries*, *supra* note 5, book 1 at 212:

The principal duty of the king is to govern his people according to law. *Nec regibus infinita aut libera potestas*, [Neither free nor unlimited should be the power of kings] was the constitution of our ancestors on the continent. And this is not only consonant to the principles of nature, of liberty, of reason, and of society, but has always been esteemed an express part of the common law of England, even when prerogative was at its highest. ‘The king,’ saith Bracton, who wrote under Henry III., ‘ought not to be subject to man, but to God, and to the law; for the law maketh the king. Let the king therefore render to the law, what the law has invested in him with regard to others, dominion and power; for he is not truly king, where will and pleasure rules, and not the law.’

¹⁵² *Calvin’s Case* (1608), *supra* note 18 at 5a; *Blackstone’s Commentaries*, *supra* note 5, book 1 at 211.

¹⁵³ This presumption applies regardless of the means of acquisition, though the presumption may hypothetically be ousted by positive acts attending a conquest. See e.g. *Campbell v. Hall* (1774), *supra* note 150 at 741.

¹⁵⁴ The practice continued politically and in the law through the whole colonial period, though the overseas colonists often adopted the political (though non-legal) expedient of disregarding the legal rights of the indigenous peoples they encountered. But as constitutional case law has demonstrated, legal rights are not extinguished either through simple disregard or by forcibly preventing the rights holders from exercising them. And simple government policy or arbitrary use of force, even if practiced for a century or more, cannot turn an illegal act into a legal one. See e.g. *Entick v. Carrington* (1765), *supra* note 123.

¹⁵⁵ *Calvin’s Case* (1608), *supra* note 18 at 17b-18a; and *Campbell v. Hall* (1774), *supra* note 150 at 744 (citing *Calvin’s Case* (1608)).

¹⁵⁶ *Campbell v. Hall* (1774), *supra* note 150 at 746

¹⁵⁷ The power to override custom by means of statute was not recognized at the time of William I, but it was recognized centuries later as British constitutional practice evolved.

instance, were brought under English dependency by William I as part of his holdings in Normandy. Yet to this day they are not parts of the United Kingdom, though like the Isle of Man they are subject to its parliament.¹⁵⁸ Statutes of the English parliament do not normally affect them.¹⁵⁹ And appeals from their courts are not to the House of Lords but to the Queen in Council. The relation between them and England were a precedent and a template for the legal treatment of other territories acquired during the colonial expansion period, both in the British Isles and overseas.¹⁶⁰

The colonization and annexation of wales

The example of Wales amply illustrates three points. First, the assertion of sovereignty does not extinguish local legal custom or the rights that arise from it. Second, the introduction of the common law does not extinguish local legal custom or customary rights. This is not to say that extinguishment of local custom is impossible. Rather, extinguishment is only accomplished by clear statute. Third, statutes that infringe on customary law must be construed strictly, as must those statutes that infringe common law rights.¹⁶¹

Magna Carta guarantees that local customary law will continue

There were numerous occasions that English sovereignty was asserted over Wales, even before the emergence of the common law. Wales had been intermittently subject to one or more Anglo-Saxon monarchs since Egbert of Wessex (the first king of all the English) in 828. It is clear that by the time of King John (reigned 1199-1216), the English kings deemed Wales subject to them, though it was not a part of England itself.¹⁶² But subjection did not

¹⁵⁸ “[T]he United Kingdom’ means Great Britain and Northern Ireland, unless the context other wise requires, exclusive of the Channel Islands and the Isle of Man. ... ‘Great Britain’ means England and Scotland”: *Halsbury’s Laws of England*, vol. 8(2), 4th ed. reissue, *supra* note 95 at 11, para 3.

¹⁵⁹ That is, not unless specifically named in the statute, or the context of the statute requires.

¹⁶⁰ Maitland, *supra* note 94 at 337:

The interest of these small dependencies lies in this, that the relation between them and England formed a precedent for the treatment of the vaster dependencies which have gradually collected round the United Kingdom.

¹⁶¹ See discussion of the *Denbigh Custom* (1579) case below at 59, and of *Leicester v. Burgess* (1833), *supra* note 20 below at 130. See also *infra* note 327 and associated text.

¹⁶² As early as the year 828 King Egbert fought in North Wales and compelled the people there to “peaceful submission”. And in the time of King Alfred [reigned 871-899] North Wales was governed by Alfred’s viceroy. Yet English sovereignty over the Welsh did not prevent Wales being governed according to its own institutions. We know that in 1048 Edward the Confessor was lord over Wales, yet in 1049 Griffin was king

mean an extinguishment of local legal customs or institutions. Rather, the effect of subjection was to define the relative duties of fealty, or fidelity and service between lord and vassal, and to ascertain who was to be the guarantor of continuing legal customs, institutions and rights – that was, after all, the proper duty and role of a monarch. So long as there was no conflict with the lordship of English kings, it was Anglo-Saxon practice to leave in place the local customary laws of subject peoples. Indeed, it was not within the legal contemplation that they might change the law at all.¹⁶³ The *Magna Carta* explicitly recognized legal pluralism in the realm and the continuity of local law in Wales and elsewhere. It provided that legal disputes over “lands or liberties or other things” would be settled according to local law, “for holdings in England according to the law of England, for holdings in Wales according to the law of Wales, and for holdings in the March according to the law of the March [i.e. Mercian law].”¹⁶⁴ The guarantee extended even to that which was in the king’s possession or which had subsequently been granted away.¹⁶⁵

By specifically acknowledging the continued application of local legal custom, the *Magna Carta* clearly shows that the prior (and continued) occupation of both older and newer parts of England (and of territorial acquisitions) by people in distinctive organized societies had been reconciled with the sovereignty of the English Crown.¹⁶⁶ Variation in

of the Welsh. In 1094 there was a Welsh uprising, which was put down by English King William II in 1095. And in 1114 King Henry I put down another Welsh uprising. (Anglo-Saxon Chronicle, *supra* note 69).

¹⁶³ In some circumstances, however, local observances might be regarded not as law but as mere “lewd” practices. In such cases the local rule could be disregarded because the alleged custom would fail to meet one or more of the common law tests of certainty, reasonableness, immemorial origin or continuity..

¹⁶⁴ *Magna Carta* (1215) s. 56:

If we have disseised or kept out Welshmen from lands or liberties or other things without the legal judgment of their peers in England or in Wales, they shall be immediately restored to them; and if a dispute arises over this, then let it be decided in the March by the judgment of their peers -- for holdings in England according to the law of England, for holdings in Wales according to the law of Wales, and for holdings in the March according to the law of the March. Welshmen shall do the same to us and ours.

¹⁶⁵ *Ibid.* s. 57:

For all the things, however, which any Welshman was disseised of or kept out of without the lawful judgment of his peers by king Henry, our father, or king Richard, our brother, *which we have in our hand or which are held by others, to whom we are bound to warrant them*, we will have the usual period of respite of crusaders, excepting those things about which a plea was started or an inquest made by our command before we took the cross; when however we return, or if by any chance we do not set out on our pilgrimage, *we will at once do full justice to them in accordance with the laws of the Welsh and the foresaid regions.* [emphasis added]

¹⁶⁶ Note that such reconciliation was a foregone conclusion under the existing legal regime prevalent throughout Europe and in Britain, as an element of the Germanic world view. There was no need to create specific constitutional provisions in order to accomplish it. In Canada, however, it has been said that such reconciliation is accomplished by means of s.35(1) of the *Constitution Act, 1982*, *supra* note 59:

customary law from one shire to the next was a foregone conclusion. As font or reservoir of justice the monarch was supposedly the guarantor of all law – including local custom – and could be appealed to when local law was not administered locally. The very purpose of the barons' confrontation with King John was to force him to honour that obligation, to abide by ancient customary law, and to respect the barons' rights that arose under it. The *Magna Carta* was not new law or acts of King John's special grace, but rather an explicit and detailed acknowledgment of ancient and sacred duties of the monarch.

Customary law and the evolution of the mechanism of statutes

Although no alteration of true/good law was conceivable in medieval legal theory, as we saw in chapter 2, it was nevertheless recognized that unjust practices could arise and be enforced by arbitrary use of power. But when such practices were abolished, the abolition was expressed in terms of freeing the law from its defects. Even the common council of the realm could not in principle alter good law. But we also know that as societies evolve, so also do their legal views. By the 14th century English constitutional principles acknowledged at least the possibility of altering such unjust practices by statute. Parliament had by then gained the socially recognized authority to change law or add to it – “Parliament” including all of the following: the lords, the commons, the clergy and the monarch. As late as the seventeenth century English courts still declared that both the monarch and the houses of parliament were under the common law.¹⁶⁷ The old constraint against extinguishing law has

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. (Lamer C.J. in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 539, online: QL (SCJ) at para 36 [hereinafter *Van der Peet* (1996) cited to S.C.R.]; he reiterates the point at 543, 547, 551 and 554.)

It is here suggested that such prior existence needs no reconciliation with Crown sovereignty because the two are not incompatible. Rather, s.35(1) provides a legal grounding for those societies continuing to exist as distinct societies within the larger Canadian context, and for the continued exercise of practices that are necessary for their vitality in a modern context.

¹⁶⁷ E.g. Lord Coke in *Dr. Bonham's Case*, (1610), 8 Co. Rep 113b, 77 E.R. 646; and *City of London against Wood* (Hilary Term, 13 Will. 3), 12 Mod 669, 88 E.R. 1592 (K.B.) [hereinafter *London v. Wood* (1701)]. Although it is unfashionable to say so, the principle may still be seen in practice, as when a modern court reads a provision into a statute or reads a statute down in order to comply with the *Canadian Charter of Rights and Freedoms*, *supra* note 59. Section 24(1) states, for instance, “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” The rights and freedoms in the *Charter* are in many cases not defined by statute, but merely by reference to common law concepts such as “freedom of conscience and religion”, “peaceful assembly”, “principles of fundamental justice”, “unreasonable search or seizure”, “independent and impartial tribunal”, “cruel and unusual treatment”, “equal protection and equal benefit of the law”, and “the existence of any other rights or freedoms that exist in Canada”.

thus became relaxed over time, but has not been abandoned. Instead, the prohibition has been replaced by principles of constraint on extinguishment, with a presumption against extinguishment, and with a rule that extinguishment can be accomplished only by positive act using proper, prescribed means. A corollary is that statutes that infringe the common law or legal custom must be strictly construed. No casual extinguishment can occur, nor can extinguishment be lightly implied.

English kings asserted their sovereignty over the territory of Wales on many occasions by compelling subjection of the Welsh people to them, as we saw above. But subjection did not automatically entail taking their land, or extinguishing their laws and customs. Nor could such be accomplished by mere means of the royal prerogative. The land was not annexed to the Crown of England until 1284, by Edward I – the *Statutum Wallie* (*Statute of Wales*).¹⁶⁸ That enactment also provided for royal courts. It affirmed some Welsh laws and customs in particular¹⁶⁹ and others in general,¹⁷⁰ and abolished only a few.¹⁷¹ In addition, the statute provided that English law apply in respect of certain serious crimes: “larcenies, burnings, murders, manslaughterers, and manifest and notorious robberies”.¹⁷²

¹⁶⁸ *Statutum Wallie* (*Statute of Wales*) 12 Edward I (1284) [hereinafter *Statute of Wales* (1284)], in [and cited to] W.D. Evans, A. Hammond & T.C. Granger, eds., *A Collection of Statutes Connected with the General Administration of the Law*, 3d ed. (London: Thomas Blenkarn, 1836) vol. 4 [hereinafter *Collection*]. Some writers and judgments refer to this statute by an alternative name, *Statute of Rutland* (1284), e.g. Hale, *supra* note 121. And the judgment in *Process into Wales* (1670), Vaughan 395, 124 E.R. 1130 [cited to Vaughan] uses the terms interchangeably, for example at 399 and 414. There is some doubt whether this “statute” can be regarded as a statute of the English Parliament. As the court notes at 414-415,

for no such Parliament is found summoned, nor law made in it, nor is it likely that at that time a Parliament of England should be summoned there, for Rutland is doubtless in Wales, which had it been part of England then made, all laws made, or to be made in England, without naming Wales, had extended to it, which they did not before 27 H. 8.

The important point is not whether the “statute” was an act of Parliament, as distinct from an exercise of the conqueror’s prerogative. The important point is that it was both the presumption and the practice to leave the local custom laws intact generally, and to extinguish them only expressly, and in particular instances where necessary. “27 H. 8” refers to the statute *Laws in Wales* (1535), *infra* note 173.

¹⁶⁹ The *Statute of Wales* (1284), *supra* note 168 at 14 provided, “Whereas the custom is otherwise in Wales and in England concerning succession to an inheritance, inasmuch as the inheritance is partible among the heirs male, and from time whereof the memory of man is not to the contrary, hath been partible, our Lord the King will not have that custom abrogated ... with this exception, that bastards from henceforth shall not inherit.”

¹⁷⁰ *Ibid.*: “[C]oncerning things moveable as of contracts, debts, sureties, covenants, trespasses, chattels, and all other moveables of the same sort, they may use the Welsh law whereto they have been accustomed.”

¹⁷¹ *Ibid.*: “And if it happen that any inheritance should hereafter upon the failure of heir male descend unto females, the lawful heirs of their ancestor last seised thereof, we will of our special grace that the same women shall have their portions thereof to be assigned them in our court, although this be contrary to the custom of Wales before used.”

¹⁷² *Ibid.* at 15.

While providing some of the legal procedure to be used in royal courts in Wales, the statute also provided that much of the procedure be according to Welsh custom. It is clear that neither the assertion of sovereignty, the annexation of the territory, nor the introduction of an English court system in themselves could extinguish local legal custom in substance or procedure. And English monarchs were loathe to use even the conqueror's prerogative to extinguish local legal custom.

Early statutes respecting Welsh custom

The continued vitality of local custom in Wales is evident from the attention given to it in a pair of English statutes of 1535 and 1542.¹⁷³ The statutes were occasioned by Welsh political and military unrest. Henry VIII had accused a certain Welsh lord of conspiring with the king of Scotland to make himself ruler of Wales. The prefatory language of the 1535 statute referred to certain persons raising "great Discord, Variance, Debate, Division, Murmur and Sedition".¹⁷⁴ The statutes' underlying purpose was to settle the question of Wales' connection to England for all time. The strategy was to undercut Welsh resistance to English rule by introducing a justice administration system in which loyalists to the English cause occupied positions of power.¹⁷⁵ The statutes provided an English apparatus for the administration of justice in Wales, and a comprehensive code of regulations. The ostensible intent of the 1535 statute was "utterly to extirp all and singular the sinister Usages and Customs" that differed from those of England.¹⁷⁶ But its operative clauses failed to do this with respect to the substance of local custom. Those clauses began by ostensibly extinguishing Welsh custom, yet the *proviso* clauses were so all-encompassing that they protected most or all local customs. And in the three northern Welsh shires they were protected in their entirety from the application of the statute.¹⁷⁷ Many named lords and holders of specified offices elsewhere in Wales were exempted from any prejudice occasioned by its provisions for their lifetimes. The statute appears to be directed toward extinguishing specifically those laws and customs that distinguished *all* of the

¹⁷³ *Concerning the Laws to be used in Wales*, 27 H. 8 c. 26 [1535] [hereinafter *Laws in Wales* (1535)]. Section 1 acknowledged the legal continuity of "divers Rights, Usages, Laws and Customs [that were] far discrepant from the Laws and Customs of this Realm" of England, though the statute as a whole proceeded to assert the authority of Parliament to change them by statute. The second statute was *An Act for certain Ordinances in the King's Dominion and Principality of Wales*, 34 & 35 Henry VIII [1542] c. 26 [hereinafter *Ordinances in Wales* (1542)].

¹⁷⁴ *Laws in Wales* (1535), *supra* note 173, s. 1.

¹⁷⁵ The statute provided that all judicial proceedings be in English, and that all officers of the law must use the English language, on penalty of forfeiting their offices: *ibid.* s. 20.

¹⁷⁶ *Ibid.* s. 1.

¹⁷⁷ *Ibid.* s. 31.

specified area from England – in effect, the Welsh equivalent of English common law – but did not apply to purely local customs. For example, the statute specifically provided that land tenure in Wales conform to the laws of England, and not "after the Form of any Welsh Laws or Customs".¹⁷⁸ On the other hand, section 35 provided that land tenure which was governed by immemorial customs respecting "Issues and Heirs Males" should continue in effect as if the statute had never been made. And it provided for commissions to inquire into local legal customs in order that they might be retained and not extinguished. The commissioners were to inquire into "all and singular Laws, Usages and Customs" used in Wales for report to the king in council. All legal customs that the king in council should think "expedient, requisite and necessary" in any shire in Wales "... shall stand and be of full Strength, Virtue and Effect, and shall be for ever inviolably observed, had, used and executed ... as if this Act had never been had ne [sic] made."¹⁷⁹ Further, it gave the king discretionary power to suspend, repeal, revoke or abrogate any part or the whole of the Act for a limited period of three years after the dissolution of the then-present Parliament, such decisions being given the same authority as if made by Parliament.¹⁸⁰ In short, while the statute provided a mechanism by which local legal customs might be extinguished, it also provided for their retention. That is, it threatened to abolish all laws and customs in designated parts of Wales, yet it also made exception (or conditional exception) for all immemorial local customs. And it allowed the king in council to prevent the introduction of English law, implying a threat to withhold the benefit of English law where expedient.

The 1542 statute reiterated Henry's supposed authority to repeal, amend or add to Welsh law at his own discretion, such changes having the equivalent effect of statute.¹⁸¹ It also purported to extinguish a few local customs in particular.¹⁸² While the second statute is arguably even stronger than that of 1535, the constraints imposed on Henry's discretion were so powerful as to render the supposed discretion meaningless. The Act provided that nothing in the act should be "prejudicial nor hurtful to any person or persons, or bodies politic, for or concerning any lands, tenements, rents, services, bondmen, tolls or other hereditaments", but they should continue to enjoy them in full measure as before, as if the Act had never been made.¹⁸³ This *proviso* would have had the effect of nullifying any discretionary act of Henry that operated to a subject's detriment. The apparent conflict between the two provisions is moot, however, because the discretionary authority was never

¹⁷⁸ *Ibid.* s. 2.

¹⁷⁹ *Ibid.* s. 27.

¹⁸⁰ *Ibid.* s. 36.

¹⁸¹ *Ordinances in Wales* (1542), *supra* note 173, arts 119, 120.

¹⁸² E.g. Gavelkind: *ibid.* ss. 91, 128.

¹⁸³ *Ibid.* s. 126.

acted upon.¹⁸⁴ In fact, changes were made to Welsh law, but those changes were accomplished by means of statute, and not by executive fiat.¹⁸⁵

Despite the language in the statutes that threatened the extinguishment of local custom and customary rights, it appears that the underlying purpose was not to extinguish local customary law, but rather to induce political compliance by means of threats and promises.¹⁸⁶ That is, loyalists could expect to enjoy the benefits of both customary law and English law. And rebels feared they might enjoy neither.

Were local legal customs in Wales extinguished by the general statutes of Henry VIII?

Two questions arise from this pair of statutes. First, did they or did they not extinguish local legal custom in Wales where such local custom was contrary to the common law? Second, did they have the effect of conferring on the monarch the power to extinguish local legal custom or to change other law by executive act? The answer to both questions is a firm no. The first question – the extinguishment of local custom – came before a three-member panel of King's Bench in 1579. In the *Denbigh Custom* case¹⁸⁷ a custom was alleged that in the town of Denbigh, in Wales, a married woman might sell her land there, and such sale would bind her and her heirs as final, contrary to English common

¹⁸⁴ *Justice in Wales* (1607), *supra* note 23 at 49. See text accompanying note 191 below.

¹⁸⁵ Two statutes were enacted in the same session of Parliament pertaining to the administration of criminal justice in Wales: *For the Making of Justices of Peace within Chester and Wales, 1535* (England) 27 H. 8 c. 5 gave the Lord Chancellor authority to set up a court system, establish jails, establish a fine payment system and so on, in order to deal with murders, robberies, thefts, and breakings of the peace that had “remained unpunished” – clearly a statute for criminal law enforcement. In 1536 Henry VIII was delegated specific authority to “allot newly the Towns in the Shires and Marches of Wales” (28 H. 8 c.3) despite the *Laws in Wales*, but for three years only. The common law presumes that where statute was silent, Henry continued to be constrained by the *Laws in Wales*, and within the limits that the statute imposed. And therefore non-criminal legal customs would be otherwise unaffected, and there was only a three-year period in which they could have been extinguished by explicitly exercised executive discretion (*n.b.* not by royal prerogative). *The Bill for folding of Cloths in North Wales, 1539*, (England) 31 H. 8 c.3 was a consumer protection measure. 31 H. 8 c. 13, also in 1539 adjusted the justice administration system in Wales and redrew some local boundaries. And 35 H. 8 c. 11 (1543) provided for the raising of funds by taxation for the payment of wages of local governmental officials.

¹⁸⁶ One could argue that the 1535 and 1542 statutes for Wales did not in fact confirm the customary constraints on the monarchy, but rather marked the beginning of the road to absolutism. After all, section 36 of the 1535 Act purportedly gave to Henry the power to suspend, repeal, or abrogate the custom, or to revoke the introduced common law or statute. This is not a power that the monarch has customarily possessed as part of the royal prerogative. On the other hand, this power was an extraordinary one, of limited duration, and possessed by Henry VIII alone. Furthermore, he never acted on it, relying on statute only as we will see in discussion of the case of *Justice in Wales* (1607) below in text accompanying note 189.

¹⁸⁷ [no style of cause] (1579), 3 Dyer 363b, 73 ER 815 (K.B.) [hereinafter *Denbigh Custom* (1579)].

law. The issue before the court was whether this custom was abrogated by the 1535 statute. Two of the three judges ruled that the custom was not abrogated, because it was "reasonable and agreeable to some customs in England, for the assurance of purchasers; for the title of the act is, for laws and justice to be ministered in like form as in this realm". It is clear that the judges believed that the special place of local custom in England should also obtain in Wales, despite (or perhaps because of) the statutory introduction there of the common law. If local customs in England could prevail when contrary to the common law, then the same ought to apply in Wales. Note that the *Denbigh Custom* (1579) ruling did not say that the Welsh custom was good because it was agreeable to the common law; rather, it was not unlike some local exceptions to the common law in England. The distinction is important because otherwise the substance of local custom would have been assessed according to common law substance rather than according to common law procedure. Assessing custom by the substance of the common law begs the question of the custom's illegitimacy. The court reasoned that the administration of justice in Wales "in like form as in this realm" means that the royal courts must account for the fact that local custom must by definition vary from or contradict the common law; and that in such case the substance of the common law must defer to the substance of local legal custom. The common law is only a presumption as to the substance of local law. And that presumption is rebuttable by proof that local law is otherwise. The court ruled that local custom prevailed as a local exception to that part of the otherwise-applicable common law, but noted that it could be expressly extinguished, as had been done there with the custom of gavelkind.¹⁸⁸ The main effect of the 1535 and 1542 statutes was therefore to set general rules of procedure and administration, rather than to change or extinguish the substance of local customary law.

Did the putative discretionary authority to extinguish local custom by order in council survive in Henry's successors?

The second question – whether the monarch had a continuing, general discretionary power to abrogate local Welsh legal custom or add new laws – was answered in another three decades by the Court of King's Bench in 1607.¹⁸⁹ In that case King James I, well known for his pretensions of divinity and absolute regal power, relied on the 1542 statute, which provided: that the King's Most Royal Majesty shall and may at all times hereafter from time to time change, add, order, alter, [diminish], and reform all manner of things before rehearsed, as to his most excellent wisdom and discretion shall seem meet: and also to make laws and ordinances for the commonwealth and good quiet of the said dominion of Wales, and his subjects of the same, from time to time, at his Majesty's pleasure.¹⁹⁰

¹⁸⁸ Such common law requirements are essentially the same as in modern times. See the discussion of the modern doctrine below in chapter five.

¹⁸⁹ *Justice in Wales* (1607), *supra* note 23.

¹⁹⁰ *Ordinances in Wales*, 1542, *supra* note 173, ss. 119, 120.

James had argued that if Henry VIII had such purportedly unbridled power, then he too ought to possess it, and therefore be able to appoint justices in any manner he chose. A panel of his highest court ruled against him, however. It noted that the statute did not include the words "his successors," and therefore it should not be construed that the power was intended to be granted to Henry's successors. Given the political and social climate in Wales in Henry's time, the consequences of the uniting of Wales and England, and subjecting them to English laws, could not have been foreseen in 1535. Therefore it was thought reasonable, said the court, that King Henry VIII might alter them if and when necessary. But the court noted that Henry never acted on the power given to him by the statute.¹⁹¹ It observed that the effect of extending such powers into an indefinite future would be such that no one in Wales "could be certain of his life, land, goods, or liberty, or any thing which he hath," and that such uncertainty would leave the people of Wales in miserable subjugation. The court also noted that wisdom and discretion are not inheritable, which the makers of the statute well knew.¹⁹² The court held therefore that the power of altering laws was a mark of confidence in Henry himself, and that the power did not descend to his successors. It can be seen from this that the statutes of Henry VIII do not support the absolutist cause. Rather the opposite. The 1535 and 1542 statutes confirm that the monarch is under, not above, the law, and may not alter laws or customs except in Parliament.¹⁹³

Together, the *Denbigh Custom* (1579) case and the *Justice in Wales* (1607) case illustrate the principle that statutes in derogation of legal custom or the common law must be construed strictly.¹⁹⁴ A broad construction of the 1535 statute would have conformed with its stated intent to utterly extinguish all Welsh customs that differed from those of

¹⁹¹ *Justice in Wales* (1607), *supra* note 23 at 49.

¹⁹² Henry VIII had also been empowered by the *Lex Regia* 31 H.8 c.8, also called the *Statute of Proclamations* (1539), *supra* note 87. This enactment provided that a proclamation by the king in council, for the purpose of dealing with emergent situations of "great prejudice" to the realm, should temporarily have the same legal effect "as though made by act of parliament". But section 2 contained the *proviso* that such authorization did not extend to altering or suspending statutes in effect at the enactment of the statute, or to the statute itself, or to common law, "*nor yet any lawful or laudable customs of this realm or any of them, shall be infringed*.[emphasis added]". Even the *Lex Regia* did not extinguish the customary limitations on the royal prerogative with respect to changing statute, common law or customary law, except to the extent that it added the sanction of parliament to the enforcement of proclamations that the monarch might otherwise legally make. It is important to note that the *Statute of Proclamations* was repealed in the first year of the reign of Henry's successor by statute 1 Ed. 6 c.12, s.5, *supra* note 103.

¹⁹³ Even Henry was kept under the law by section 126 of 1542 statute, which limited his discretion to those acts by which no harm might come to a subject.

¹⁹⁴ See also the discussion in chapter 5, especially note 327 and associated text, and of *Leicester v. Burgess* (1833), *supra* note 20, below at 130.

England.¹⁹⁵ A broad construction would have extinguished all local customs that did not conform to English common law, as introduced in 1284¹⁹⁶ and affirmed in 1535. Yet as we have seen, contrary legal custom in Denbigh was held not to have been abrogated. Judicial affirmation of such local custom is consistent with a strict construction and inconsistent with a broad construction of the statutes. The 1535 and 1542 statutes, and cases in which they were judicially considered, are therefore evidence of the continuing practice and rule that local laws were presumed to continue, and of the continuing practice of extinguishing them only reluctantly, regardless of the wish to repress the local population politically or militarily.

We will see that the principle which presumed the continuity of local law in both England and in Wales has been generally applied across centuries of extension of the common law to the rest of the British Isles and to other lands. It was applied in the Isle of Man, the Irish plantations and Scotland. The same principle of continuity as applied in the British Isles was extended to the overseas colonies as a "maxim of constitutional law".¹⁹⁷

The union of Scotland and England

The relations between Scotland and England through the preceding centuries, and their eventual union into one country in 1707 is a shining example of the principle of the continuity of laws, customs and institutions. The Scottish example also helps one understand the constraints that local custom imposes on exercises of the royal prerogative.

As early as 924 Edward the Elder claimed Scotland and was acknowledged as lord by the Scottish king.¹⁹⁸ And Edward's son King Athelstan is said to have governed all the kings on the island of Britain.¹⁹⁹ The Anglo-Saxon Chronicle reports many instances of Scottish kings being subject to Anglo-Saxon/Anglo-Danish ones.²⁰⁰ About 1300 (i.e. 18 Ed. 1) Edward I arbitrated the succession of the Crown of Scotland in favour of Baliol, applying ancient Scottish practice, and receiving Baliol's homage. The important point here is that local institutions of governance were left essentially intact by the conquerors or overlords. And although kings might be subject to other kings, each was sovereign within his own

¹⁹⁵ *Laws in Wales* (1535), *supra* note 173, s.1.

¹⁹⁶ *Statute of Wales* (1284), *supra* note 168.

¹⁹⁷ Lord Mansfield used this term in *Campbell v. Hall* (1774), *supra* note 150 at 746.

¹⁹⁸ *Anglo-Saxon Chronicle* Part 2, *supra* note 69.

¹⁹⁹ *Ibid.* Part 3.

²⁰⁰ E.g. in 945, 1031, 1072, 1091. During this period there were many revolts by the Scottish, and on occasion Scottish kings made English kings subject to them.

realm. This situation continued until the 18th century. But a curious situation arose in 1603 that had/has important legal implications.

When one king gains a second kingdom by lawful succession, who is subject to whom?

In 1603 Elizabeth I of England died, and the rightful successor to the English throne James I was already the king of Scotland, James VI. What happened to the customary legal rights of the inhabitants of the two countries? Were the laws and customs of England dissolved when the Scottish king asserted sovereignty? Were those of Scotland dissolved? Were both sets of laws and customs dissolved? Neither? Were the citizens of each country, though bound by their respective customs to the same monarch, legally strangers to each other? What were the rights of the citizens of England in Scotland, and *vice versa*? Did the monarch gain powers over his subjects that kings of either country did not have before?

The question of allegiance was simplified by the fact that the feudal laws of allegiance in both countries were essentially the same. That is, there was/is a mutual bond between subject and monarch whereby subjects are bound to serve and obey the monarch and so long as (s)he stays within constitutional bounds,²⁰¹ and the monarch is bound to maintain and defend the subjects and their rights/interests.²⁰² This principle was held to apply to subjects of the monarch in whatever land or place they may be; the common law entitles them to claim the benefit of the local law of that place.²⁰³

Crown and country – difference?

The union of the English and Scottish Crowns in the single natural person of King James did not have the effect of erasing their respective identities as kingdoms/countries,

²⁰¹ These obligations are conditional upon the monarch's commands according with law/custom, and such commands must not be detrimental to the subject's legal rights or interests. When the monarch ceases to act according to his/her royal duties, (s)he jeopardizes the right to allegiance from the subjects. Charles I and his son James II were both deposed for violating this stipulation. The principle is as old as the right of resistance that characterized the relationship between monarch and subject among the medieval Germanic peoples generally. Recall the examples of kings John and Henry III, who expressly acknowledged that any breach of their kingly duties could be met with justified resistance by subjects until the monarch had mended his unkingly ways. See discussion of the right of resistance *supra* notes 10, 115 and accompanying text.

²⁰² *Calvin's Case* (1608), *supra* note 18.

²⁰³ Lord Coke made an exception in obiter to the hypothetical case of laws in a conquered country inhabited by "infidels", in which case local laws, he said, were abrogated by the mere fact of conquest. This exception, however, was specifically and unequivocally repudiated by Lord Mansfield for a unanimous Court of King's Bench in 1774, declaring that Lord Coke's "strange extrajudicial opinion ... will not make reason not to be reason, and law not to be law". Mansfield called the comment an "absurd exception", dismissing it as excessive. "[I]n all probability [it] arose from the mad enthusiasm of the Croisades [sic]." (*Campbell v. Hall* (1774), *supra* note 150 at 741.)

their legal systems or their institutions of governance. As the Lord Chancellor and twelve judges ruled in *Calvin's Case* (1608),

England and Scotland remain several [i.e. separate] and distinct kingdoms. They are governed by several judicial or municipal laws. They have several distinct and separate Parliaments.²⁰⁴

The judgment acknowledged that customary honours and titles were peculiar to the respective lands. That is, the holders of ancient office in one country were not entitled to assert their customary privileges in the other country.

Each kingdom hath several nobilities: for [although a man or his posterity may be] the heir of a nobleman of Scotland, and by his birth is legitimated in England, yet he is none of the peers or nobility of England.²⁰⁵

Continuity of local law is a maxim of constitutional law

The continuity principle should not be considered as merely an acknowledgement and accommodation of Scots laws, and institutions by the English, but rather as a mutual acknowledgement and accommodation. In *Campbell v. Hall* (1774) the Court of King's Bench considered the judgment in *Calvin's Case* (1608) as an instance of an ancient legal principle. Lord Mansfield C.J. traced the consistent observance of the continuity of laws and legal custom from the sixth century – centuries before there was an England. The judgment in *Campbell v. Hall* (1774) reaffirmed the doctrine of continuity by saying that in all acquired lands, whether by cession or by conquest, the "law and legislation of every dominion" is equally applicable to everyone there. And the pre-existing local law

is the true rule for the decision of all questions which arise there: whoever purchases, sues or lives there, puts himself under the laws of the place, and in the situation of its inhabitants. ... [L]aws of a conquered country continue until they are altered by the conqueror. The justice and antiquity of this maxim is uncontrovertible ...²⁰⁶

In the judgment Lord Mansfield characterized the continuity principle as a "maxim of constitutional law," citing a unanimous court in *Calvin's Case* (1608), and saying of the maxim,

no book, no saying of a Judge, no not even an opinion of any counsel public or private, has been cited; no instance is to be found in any period of our history where it was ever questioned.²⁰⁷

²⁰⁴ *Calvin's Case* (1608), *supra* note 18 at 15a.

²⁰⁵ *Ibid.* The distinction between the customs of each country extends also to the royal prerogative. Those royal prerogatives of the minor sort – as distinguished from those that go to essential functions of government or to the very sovereignty of the Crown – are peculiar to each country.

²⁰⁶ *Campbell v. Hall*, *supra* note 150 at 741.

²⁰⁷ *Ibid.* at 746.

“Minor” royal prerogatives are subject to local customary law

Although James tried to assert an unprecedented absolute supremacy over law and Parliament in England, the powers he alleged were not such as he possessed even in Scotland. In Scotland, as in England, the prerogative powers of the monarch were (and are) constrained to a similar extent by local legal customary law. In order to understand this point it is necessary to take a closer look at the legal concept of royal prerogative. In chapter two we saw that the Crown has a special pre-eminence or sovereignty before all others, in order to govern according to law, in the subjects' interests. This pre-eminence is expressed in the form of royal prerogatives. But all royal prerogatives are not the same. In more modern times it is common to classify them as either “major” or “minor” prerogatives. And it is the latter classification that will be used here. Chitty explains the distinction thus:

[T]he various prerogatives and rights of the sovereign which are merely local to England, and do fundamentally sustain the existence of the Crown, or form the pillars on which it is supported, are not it seems *prima facie* extensible to the colonies or other British dominions which possess a local jurisprudence, distinct from that prevalent and peculiar to England. To illustrate this distinction the attributes of the King, sovereignty, perfection and perpetuity, which are inherent in and constitute his Majesty's political capacity, prevail in every part of the territories subject to the English Crown, by whatever peculiar or internal laws they may be governed. ... [B]ut in countries which, though dependent on the British Crown, have different and local laws for their internal governance, as for instance the plantations or colonies, the minor prerogatives and interests of the Crown must be regulated and governed by the peculiar and established law of the place. Though if such law be silent on the subject it would appear that the prerogative as established by the English law prevails in every respect: subject perhaps to exceptions which the difference between the constitution of this country and that of the dependent dominion may necessarily create. By this principle many difficulties which frequently arise as to the King's foreign prerogative may be readily solved.²⁰⁸

Major prerogatives are therefore those upon which the essential functions of government rest, the administration of justice, or the sovereignty of the Crown itself. They must necessarily run in all parts of Britain, and in all other places where the Crown's sovereignty runs, regardless of local customs or other laws. Major, or “greater rights and prerogatives” of the Crown are determined by the “law of the empire”, which is the common law.²⁰⁹ Since minor prerogatives are not necessary to sustain the sovereignty of the Crown, they are not introduced with the assertion of sovereignty. If it can be shown that local customary law ousts the presumption of a particular royal prerogative in Britain, then the prerogative in question must therefore be one of the “minor” sort. A brief look at customary law in relation

²⁰⁸ Chitty (1820), *supra* note 103 at 25-26.

²⁰⁹ *Ibid.*

to land tenure in Scotland, and the feudal notion of the monarch's prerogative of holding the radical (or underlying) title to all land, will illustrate the distinction, and some of the constraints that customary law can place on royal prerogatives.

Possession of underlying title to land is a minor royal prerogative only

By the common law, the title to the foreshore of ocean waters (i.e. the land that is between the high- and the low water marks) is presumed to vest in the Crown. And title in beach front property extends by the common law to the line of the high tide only. But in *Smith v. Trustees of Port of Lerwick* (1903)²¹⁰ the proprietor of land adjacent to the beach in the Scottish town of Lerwick, Shetland brought an application to have it declared that his property extended to the lowest low-water mark. He could not trace his title to any Crown writ. His application was based on possession from time immemorial in him and his predecessors in title, and by the customary laws of *udal* tenure. He was opposed by persons who claimed the property by right of a disposition from the crown dated July 1, 1878, which on its face purported to convey "All and whole the right, title, and interest of Her Majesty in, to, and over ... [the piece of foreshore in dispute] being part of the foreshore and bed of the sea below high-water mark" to the local government. The document of the alleged grant was lodged in the General Register of Sasines, where records were kept of the sale and purchase of heritable (landed) property in all of Scotland.²¹¹

Following the purported Crown grant, the local government constructed a street along the beach, between the applicant's house and the water, and a public walkway below the street and extending beyond the low-water mark, such that there was in effect no foreshore at that place. The applicant brought his action in respect of the land between the street and the former low water mark. He argued by the doctrine of custom that the Crown could not convey any right of property to the defendants because the prerogative right of the Crown to the foreshore depended on feudal principles of law, which were inapplicable to lands held under *udal* tenure. And since the lands had not been converted into feudal holdings, the Crown could not grant a valid title to them. In addition, he claimed that immemorial possession in him and his predecessors gave him common law title.

Interestingly, the applicant's common law argument failed, while his customary law argument succeeded. His common law, immemorial possession argument failed because he had not exercised any *exclusive* right of occupation in the property below the street: any occupation he had made of a lesser sort was such as could have been exercised by any

²¹⁰ *Smith v. Trustees of Port of Lerwick* (1903), 5 Sess. Cas. (5th) 680, 40 Scottish Law Reporter 502 (Scot. C.S.) [hereinafter *Lerwick* (1903)]. For discussion of *udal* tenure, and its application to the facts of the *Lerwick* (1903) case see W.P. Drever, "Udal Law and the Foreshore" (1904) 16 Jur. R. 189.

²¹¹ A second disposition to similar effect was dated February 12, 1879 and registered in the same office.

member of the public. On the other hand, the court found that customary *udal* law did indeed apply, and consequently the alleged royal grant was not valid because it depended on (inapplicable) feudal law.²¹² Since *udal* law applied, attention to that law was required to determine the appropriate remedy. *Udal* law recognized that private property rights are subject to public rights incident to an open seashore. But since the building of the esplanade effectively erased the seashore in that place and thereby rendered such rights inapplicable, the applicant was found to have good title to the property disburdened of any public rights incident to an open seashore. The court held that the Crown's right in the foreshore of Shetland was one of sovereignty, not of property. An alleged royal grant is therefore insufficient in itself to convey valid title if the Crown itself possesses no right which it can alienate.²¹³ And the public interest in having access to the foreshore cannot establish such a right or extinguish the force of local legal custom. It can only be done by clear statute. *Udal* customary law therefore continues to ground an alternative system of land tenure in parts of Scotland,²¹⁴ under which system the Crown is denied underlying or radical title to land within its sovereignty. The *Lerwick* case demonstrates that the presumed royal title to land is based on a minor royal prerogative, and is subject to local law.²¹⁵ The distinction between major and minor prerogatives has also been applied in the Crown's overseas dominions, including Canada.²¹⁶

²¹² The notion of feudal law cannot be applied in a generic sense without references to the particular feudal law of the particular place. In an appeal from the Island of Jersey, the Judicial Committee of the Privy Council held, "The existence of the [feudal] custom in another country [as in England] affords no legal inference, that it therefore exists in the country in which the claim is set up [i.e. Jersey]." *A.G. v. Symonds* (1830), 1 Knapp 390, 12 E.R. 368 (P.C. Jersey) [hereinafter *Symonds* (1830) cited to Knapp] at 397-98

²¹³ There are numerous cases in which royal grants were held to be invalid, on the basis that the Crown purported to grant that which it did not possess. E.g. *Lord Berkley's Case* (1561), 1 Plow. 223, 75 ER 339 (K.B.); *Alton Woods* (1600), *supra* note 101; *Case of the Master and Fellows of Magdalen College in Cambridge* (1615), 11 Co. Rep. 66b, 77 ER 1235 (K.B.) [hereinafter *Magdalen College* (1615) cited to Co. Rep.]; *R. v. Bishop of Rochester and Sir Francis Clark* (1675), 2 Mod. 1, 86 E.R. 906 (K.B.) [hereinafter *Rochester* (1675) cited to Mod.] "The king's grant passes only what he may lawfully convey": *Alton Woods* (1600) at 40b. Where there is a false recital in a royal grant, "the King shall not be concluded to shew, or say the truth, but the law shall adjudge him rather to be deceived": *ibid.* at 43a. "[W]hen the King is deceived, or mistaketh the law, the grant is void": *ibid.* at 43b. "In all cases where the King's grant is void because of a mistake in his title, it is to be intended the King would not make the grant, unless the title were so as it is recited": *Rochester* (1675) at 4.

²¹⁴ *Kaur v Singh*, [1998] Scot. J. No. 170 (Scot. C.S. Inner House), *aff'g* *Kaur v Singh*, [1997] Scot. J. No. 287 (Scot. C.S. Outer House), online: QL (SCOT).

²¹⁵ H. V. Evatt, *The Royal Prerogative* (Sydney, Australia: Law Book Company, 1987) at 626 notes that even if feudal law were to be introduced as part of the common law, it is (as with the rest of the common law) such introduction is qualified by local circumstances.

²¹⁶ In *A.G. v. Black* (1828), Stuart K.B. 324 (on appeal from Quebec) at 324 Reid C.J. stated for the court, "We take the principle to be, that in all cases where the greater rights and prerogatives of the Crown come in question recourse must be had to the public law of the Empire, as that alone by which such rights and

Union of Scotland and England by statute

Soon after the Crowns of England and Scotland were united in James I an English statute²¹⁷ authorized commissioners to treat with those from Scotland regarding a union of the two kingdoms. That is, the union of the Crowns did not automatically entail the union of the countries. Just over a century later the efforts of those commissioners led to a pair of statutes – Scottish and English – which accomplished the union effective May 1, 1707.²¹⁸ But even the union of the two kingdoms into one did not generally extinguish the laws of either. If such extinguishment were automatic, the question would undoubtedly have arisen: would the laws of Scotland extinguish those of England? *Vice versa*?

In fact, the statutes did provide for the harmonization of certain and particular laws respecting primarily respecting trade and commerce, import duties and such like. The Scottish judicial system of courts and judges was retained essentially intact, separate and distinct in form, structure and jurisdiction from that of England, as before.²¹⁹ For greater clarity the statutes provided that all other laws in Scotland should remain in full force, “except such as are contrary to, or inconsistent with the terms” terms of the treaty upon which the respective Acts of Union were based.²²⁰ Although the uniting of the Scottish and English Crowns in 1603 did not automatically make the peers of one country the peers of

prerogatives can be determined..” And he noted at 326 (citing Chitty (1820), *supra* note 103), ““where peculiar laws and process exist, as in Guernsey and Jersey, the king himself in seeking to recover his own debts therein, must resort to such laws for redress’ – which alludes not merely to the form of process to be used, but also to the extent of recovery to be had.”

The case of *Lyons (Mayor of) v. East India Company* (1836), 1 Moore Ind. App. 175, 18 E.R. 66 (P.C. Bengal) considered whether the Crown was entitled to the estate of deceased aliens in the east Indian British colonies by escheat (an incident of feudal tenure) according to royal prerogative, or alternatively whether aliens could devise real estate by will. In England at the time, such devise was legally impossible. The court found that the English law on which the prerogative rested had not been introduced into the east Indies, and therefore the land did not escheat to the Crown. The royal prerogative of escheat must therefore have been ranked among the minor royal prerogatives.

²¹⁷ *An Act authorizing Certain Commissioners of England to treat with Commissioners of Scotland, for the Weal of both Kingdoms, 1604* (England), 2 James 1 c.2.

²¹⁸ *An Act for the Union of the two Kingdoms of England and Scotland, 1706*, (England) 5 Anne c.8. [hereinafter *Act of Union, 1706* (England)]. The English statute had its parallel in an Act of the Scottish Parliament January 16, 5 Anne.

²¹⁹ *Ibid.* s.19.

²²⁰ *Ibid.* s.18. Section 19 stated the same provisions with respect to the terms of the Act itself. Note that here is an example of treaties made between two constituent groups of subjects under the same monarch. See *Calvin's Case* (1608), *supra* note 18 for authority that both English and Scottish were subjects of the same monarch, and therefore could not be “alien” to each other.

the other²²¹, the *Act of Union* (1706) provided that the Peers of Scotland were granted the same customary honours and dignities as those in England, though only sixteen Scottish Peers would sit in the House of Lords, and forty-five Scottish representatives would sit in the House of Commons.²²² The following year a small change was made to the Scottish judicial system in that the English system of justices of the peace was superimposed on the Scottish system, additional persons being appointed, with additional powers as in England before the Union.²²³ The change was constrained by the *proviso*, however, that the Scottish proceedings should be “according to the Laws and Customs of Scotland.”²²⁴

Ireland – local custom is not extinguished merely by either the fiction or the fact of conquest

The example of Ireland demonstrates again that neither conquest nor the introduction of the common law nor the forbidding of English persons in Ireland to use Brehon customary law were sufficient to extinguish local custom. In addition, it shows that even in places that are not considered part of England or of Great Britain, the rules in the common law doctrine of custom should be applied to determine the validity of alleged custom.

The Anglo-Saxon Chronicle reports Irish visitors to the court of King Alfred the Great (reigned 871-899). But scant mention is made in the record of political connections. However Maitland says that in 1169 a number of English or Norman barons landed in Ireland and began to take part in the quarrels of Irish leaders. In response, Henry II went there himself in order to prevent the establishment of an independent Norman state and received the homage of the barons and the Irish chiefs. An Irish settlement was established in the eastern part of the island and divided into counties, the king granting charters to its boroughs. Maitland says the common law was regarded as binding in the English settlements, but not elsewhere.²²⁵ It is clear that Brehon law continued to be applied beyond the English counties for centuries, until Ireland was fully conquered.²²⁶

²²¹ *Calvin's Case* (1608), *supra* note 18.

²²² *Act of Union, 1706* (England), *supra* note 218, ss. 22, 23.

²²³ *An Act for rendering the Union of the two Kingdoms more intire and compleat, 1707* (U.K.), 6 Anne c. 7.

²²⁴ *Ibid.* s.2.

²²⁵ Maitland, *supra* note 94 at 333.

²²⁶ See also *Case of Tanistry* (1608), *infra* note 227 and *Moore v. Goan* (1933), [1934] I.R. 44 (Ireland S.C.), online: Brehon Law Project <http://ua_tuathal.tripod.com/moore.html> (date accessed: 14 October 2001) for judicial findings that the common law did not run in the rest of Ireland.

The history and application of English common law in Ireland were considered in 1608 by the Irish Court of King's Bench in the *Case of Tanistry*.²²⁷ Ireland was not made subject to the Crown of England all at one time, but rather piecemeal. Some parts of Ireland had to wait four centuries to be made subject. For similar reasons, the common law was not introduced there all at once either.

But as to the introduction of the common law of England into this Kingdom of Ireland, it is to be observed that as this island was not fully conquered and reduced to subjection of the crown of England, all at one time, but by parcels, and in several ages; so the common law of England was not communicated to all the inhabitants, [all at once], but from time to time, and to special persons and families of the Irishry, to whom the King was pleased to grant the benefit and

²²⁷ *Case of Tanistry* (1608), Davis 28, 80 E.R. 516 [both are in Norman French], *A Report of Cases and Matters in Law, Resolved and Adjudged in the King's Courts in Ireland. Collected and Digested by Sir John Davies, Knight* (Dublin: Printed for Sarah Cotter, 1762) [hereinafter Davies Reports (Dublin edition)] 78 [cited to Dublin edition]. This case should be read cautiously and critically. The report of the judgment accurately sets out the common law tests for the existence of a valid local legal custom, but the report is of those tests being applied in an erratic fashion. The reported account of the trial and judgment was written by Sir John Davis (a.k.a. Davies), who was counsel for one of the parties in the dispute. He had argued that the local custom of land tenure had been extinguished. And his task as Attorney-General of Ireland at the time was to actively promote the establishment of the Irish "plantation" in the face of any local law that might undermine it, and to contrive a land tenure system to replace existing Irish law. He was therefore not impartial to the outcome of the trial. The arguments he wrote into his report were internally inconsistent, and contrary to established common law principles in particulars. The report exemplifies good law badly applied. It should be noted that despite Davis' client winning the case (according to Davis' report) the dispute was settled out of court by his client giving up part of the lands which Davis claims to have won for him. Davis' account of the custom of tanistry can therefore be taken as support for the doctrine of custom where it is an admission against his client's interest, but as mere self-serving statements where they detract from the doctrine. For background on the Tanistry case see "The Case of Tanistry" (November, 1950) 9-1 Northern Ireland Legal Quarterly 215. Others of Davis' reported judgments respecting local legal custom have also been dismissed as bad law. *Royal Fishery of the Banne* (1610), Davis 54, 80 E.R. 540 (in Norman French), Davies Reports (Dublin edition) 149 was cited as an "erroneous statement of the common law" by the majority of the Supreme Court in *Moore v. Goan* (1933), *supra* note 226. The Davis Reports are therefore of dubious authority respecting the extinguishment of legal custom.

Davis is better known as a poet, politician and royal flatterer than a legal luminary. His rationale for his role as Attorney-General for Ireland in expelling the Irish "natives" from their lands and possessions is as fatuous and ill-grounded in law or fact as King James' own account of the powers and role of the monarchy. Davis wrote,

[S]o as His Majesty doth in this imitate the skilful husbandman, who doth remove his fruit trees, not with a purpose to extirpate and destroy them, but that they may bring better and sweeter fruit after the transplantation. Those and other arguments were used by the attorney [i.e. Davis himself] to prove that His Majesty might justly dispose of those lands both in law, in conscience, and in honour; wherewith the natives seemed not unsatisfied in reason, though they remained in their passions discontented, being much grieved to leave their possessions to strangers, which they had so long after their manner enjoyed. (Taken from a letter from Sir John Davis to Robert, Earl of Salisbury, concerning the state of Ireland in 1610, online: Andrew J. Morris Genealogical Resources Homepage <<http://www.genealogy.org/~ajmorris/ireland/hulst.htm>> date accessed: 18 October 2001).

The fact that such absolutist views of the monarchy were repudiated as law by the royal courts and by Parliament did not prevent royal appointees from holding or promoting them.

protection of his laws.²²⁸

English common law was implicitly applicable among the subjects of the English king as early as the time of Henry II. It was formally introduced to Ireland by the Statute of Kilkenny, 40 Ed. 3 (1367). That statute declared Brehon law, described as the common law of Ireland in the *Case of Tanistry* (1608) to be not law. It prohibited the use of Brehon law among those who were "of the English race," but not otherwise among the Irish.²²⁹ Further, the common law could only run in those parts of Ireland in English hands.²³⁰

Despite some parts of Ireland not having been conquered, the statute 33 Hen. 8 declared that Irish persons in all parts of the island "were from thenceforth accepted and reputed subjects and liege-men to the kings and queens of England, and had the benefit and protection of the law of England, when they would use or demand it."²³¹ The inference is clear that Irish who did not use or demand English law were not generally bound by it. It was the opinion of a unanimous court in *Moore v. Goan* (1933) that as a matter of historical fact, large parts of Ireland did not then adopt the use of English law.²³² In his third year James I proclaimed English common law in effect in all of Ireland, on the basis of conquest.²³³ Despite that proclamation, courts in Ireland and England continued to apply local customs that met the tests of the common law. Lord Coke observed that "they [in Ireland] retaineth unto this day divers of their ancient customs",²³⁴ contrary to the common law. The Irish Parliament did not consider the mere introduction of the English common law as having extinguished local legal custom because it found it necessary to enact a statute in 1612 repealing a number of Irish customs.²³⁵ In the *Case of Tanistry* the same common law

²²⁸ *Case of Tanistry* (1608), *supra* note 227 at 101. This passage was cited with approval by both the majority and the minority of the court in *Moore v. Goan* (1933), *supra* note 226.

²²⁹ *Case of Tanistry* (1608), *supra* note 227 at 106.

²³⁰ *Ibid.* at 102. The rationale was that the common law cannot be put into execution where the king's writ does not run; and this is not possible except where there are ministers of the law to serve and return the king's writs.

²³¹ *Ibid.* at 106.

²³² *Supra* note 226 at 63-64.

²³³ Referenced in *Case of Tanistry* (1608), *supra* note 227 at 108.

²³⁴ Lord Coke in *Calvin's Case* (1608), *supra* note 18 at 32a.

²³⁵ *An Act of Repeale of diverse Statutes concerning the Natives of this Kingdom of Ireland, 1612*, (Ireland) 11, 12 & 13 James I, c. 5.

tests were applied that have continue to this day.²³⁶ And 20th century rights that are based on custom have been found to continue in Ireland, to the exclusion of common law on the narrow point.²³⁷

Vested rights survive the extinguishment of legal custom

Rights that arose under legal custom can persist even though the custom that generated the rights may have been extinguished. In *Moore v. Goan* (1933)²³⁸ the plaintiff claimed the exclusive right to a fishery in tidal waters on the ground of a prescriptive right, arguing a presumed royal grant dating from before such was prohibited by the *Magna Carta*, or on the alternative ground that such exclusive right had been appropriated under ancient Brehon customary law. If that part of Ireland (i.e. Tirconnail) had been subject to an English monarch since before the *Magna Carta*, then the common law would have supported a claim based on the English doctrine of prescription.²³⁹ But the court having found that English common law did not run in the locality in question until nearly four centuries after the *Magna Carta*, a royal grant was therefore impossible. And the basis in prescription for the claim was consequently disallowed. The court then turned to Brehon law to determine whether an exclusive right to fish in tidal waters could have been legal under Irish custom.²⁴⁰ However, since the court found that Brehon law would not have allowed such private appropriation, the claim on the basis of local legal custom was disallowed. It is important to note that the substance of the Brehon law was not dismissed

²³⁶ *Case of Tanistry* (1608), *supra* note 227 at 87-92. Davis was only partly correct with respect to local customs and royal prerogatives, in that he failed to distinguish between major and minor prerogatives. For the major/minor distinction see above at 65. For a discussion of the criteria that an alleged custom must meet in modern courts see below in chapter 5.

²³⁷ In *Abercromby v. Town Commissioners of Fermoy*, [1900] 1 I.R. 302 [hereinafter *Abercromby*] the Irish Court of Appeal upheld a custom for the inhabitants of Fermoy to use a strip of land along the river for their daily recreation. Holmes L.J. noted at 314 that popular amusement took many shapes, and legal principle does not require that customary rights of this nature should be limited to certain ancient pastimes.' *Abercromby* and the observation by Holmes L.J. were cited with approval by Lord Hoffmann in *Sunningwell Parish Council v. Oxfordshire County Council*, [1999] H.L.J. No. 26 (H.L.), online: QL (HLJ) [hereinafter *Sunningwell* (1999)] in which a unanimous five-member court of the House of Lords ordered that a 10-acre parcel of land attached to a church be retained as a village green for recreation by the villagers of Sunningwell, on the strength of local customary law, despite the Board of Finance for the diocese having received approval from the Oxford County Council to develop the land for housing.

²³⁸ *Moore v. Goan* (1933), *supra* note 226.

²³⁹ In order to establish a right by prescription it is necessary that the alleged right could have been lawful at the time it began: *Gateward's Case* (1607), 6 Co. Rep. 59b, 77 E.R. 344 (Common Pleas). If a lawful beginning is possible, then such is presumed: *Cocksedge v. Fanshaw* (1779), 1 Dougl. 119 at 132, 99 E.R. 80 (K.B.) [cited to Dougl.].

²⁴⁰ *Moore v. Goan* (1933), *supra* note 226 at 66.

out of hand. Rather, the rights that were alleged to have vested under Brehon law were not presumed to have been extinguished when the Brehon law itself was extinguished, subject to examining what the Brehon law itself had been. In effect, the spirit of Brehon customary law informed the application of the common law long after the body of the Brehon law ceased to function in its own right.

The curious notion of the divine right of kings

The colonization/consolidation of the British Isles was just being completed as the overseas colonial enterprise was beginning in earnest. It was during that period – the 17th century – that the existing constitutional limits on the Crown's authority to extinguish legal customs, or to modify or create law, were sorely and repeatedly tested. The union of the English and the Scottish crowns in King James (1603-1625) brought a novel and alien political theory of the monarchy that had no foundation in Anglo-Saxon custom or in Scots law. James and his court advocated a brand of royal absolutism that was virtually unknown before except by the name "tyranny", which in common law doctrine can never give rise to valid law. The kings of the Stuart dynasty, their business cronies and their flatterers vigorously promoted the view that monarchs were above the law and beyond Parliament's control. In 1609 James I had this to say about the monarchy:

Kings are justly called gods, for that they exercise a manner or resemblance of divine power upon earth: for if you will consider the attributes to God, you shall see how they agree in the person of a king. God hath power to create or destroy, make or unmake at his pleasure, to give life or send death, to judge all and to be judged nor accountable to none; to raise low things and to make high things low at his pleasure, and to God are both soul and body due. And the like power have kings: they make and unmake their subjects, they have power of raising and casting down, of life and of death, judges over all their subjects and in all causes and yet accountable to none but God only. They have power to exalt low things and abase high things, and make of their subjects like men at the chess, a pawn to take a bishop or a knight, and to cry up or down any of their subjects, as they do their money. And to the king is due both the affection of the soul and the service of the body of his subjects....²⁴¹

James wanted so badly to be godlike, but fell so short. His views had only a superficial resemblance to monarchical theory in Anglo-Saxon custom and the common law. He considered that since the choice of who was to become king was at least partly due

²⁴¹ "James I on Monarchy" in N. Sheffe and W.E. Fisher, eds., *A Sourcebook for Modern History* (New York: McGraw-Hill, 1964) at 10. Reprinted there from *The Works of the Most High and Mightie Prince, James, King of Great Britaine*, (London: 1616).

to a divine choice,²⁴² the powers of the person holding the office must therefore be divine also, and being divine they must also be unlimited. Kings must therefore be above the law – laws existing by the king's will. His absolutist views have also been called the “divine right of kings” theory. The opinion was widely accepted at the time, however, that the method of choosing the holder of an office does not determine the powers that the office holder wields.²⁴³ Still, James was eager to test the limits of what custom and the law would allow, and did so repeatedly. But his courts of law consistently rejected his absolutist pretensions.

King James was no more above the law than any British monarch before him, or since

On numerous occasions James argued that he was above custom and law.²⁴⁴ His conception of the monarch as font of justice was that “font” in that context, meant source of justice, rather than its repository. And as the source of justice, his will and his word ought to be law.²⁴⁵ He went so far as to argue before Lord Coke that it was treason to assert that the king should be under the law.²⁴⁶ James argued that as font of justice he might remove

²⁴² That is, upon his royal birth, James' person bore the imprint of the hand of God.

²⁴³ Grotius makes a convincing argument against the claims of the absolutist monarchs that royal succession, as an act of God, confers a distinct character to the monarchy. Succession, says Grotius, is not a title of power, nor does it give that power a distinctive character. Rather, succession is merely a continuation of power already in existence. The conferral by succession of the legal right to govern is a conferral only of so much power as was granted by the first act of choice. (Grotius, *supra* note 62, book 1, chapter 3 at 113).

²⁴⁴ It is important to note that the absolutist powers that James I alleged had no basis either in English nor in Scottish legal theory. In fact, feudal law, upon which much of the common law is based, has in some ways had even less impact on the common-law in Scotland than it had in England. For instance see *Lerwick* (1903) case, *supra* note 210, and its discussion above at 66, in which the feudal law of tenure was found not to have displaced the more ancient customary law known as udal law. In some respects, therefore, Scottish kings had less power than their English counterparts. And English kings definitely did not have the absolute powers for which James I contended.

²⁴⁵ This view has never had the general sanction of the courts, though some writers and judges have asserted that at some mythical time in the past this was the case. Writers such as Thomas Hobbes, Jeremy Bentham, and John Austin posited such a fanciful situation as fact. Marceau J. in *Operation Dismantle v. Canada* (1983), 3 D.L.R. (4th) 193 at 222, 49 N.R. 363, [1983] F.C.J. No. 1095 online: QL (FCJH) [cited to D.L.R.] (F.C.A.) mistakenly characterized the royal prerogative as “... what has been left to the King from the wide discretionary powers he enjoyed at the time he governed as an absolute monarch.” Sadly, this definition has also crept into works such as the *Dictionary of Canadian Law* (2d ed.) (Scarborough, Ontario: Carswell, 1995), s.v. “royal prerogative”. Hall J.A. wrongly suggested in *Provincial Court Judges' Assn. of British Columbia v. British Columbia* (1998), 160 D.L.R. (4th) 477 at 489, 108 B.C.A.C. 177, 51 B.C.L.R. (3d) 139, 12 Admin. L.R. (3d) 161, [1998] B.C.J. No. 1230 Vancouver Registry No. CA022301 (BC CA), online: QL (BCJR) [cited to D.L.R.] (B.C.C.A.) that an absolute monarchy existed in Britain until the end of the seventeenth century, despite the volumes of case law from before, during and after that period that it did not. See discussion of “font of justice” in chapter 2 at 33.

²⁴⁶ *Prohibitions del Roy* (1607), *supra* note 24 at 65.

criminal or civil causes on his own volition from the scrutiny of judges and render judgment on them himself.²⁴⁷ This view was actively promoted by Richard Bancroft, Archbishop of Canterbury. But his rationale was religious, rather than legal in nature: “such authority belongs to the King by the word of God in the Scripture.”²⁴⁸ In James’ view, judges were merely delegates of the monarch. Lord Coke unequivocally rejected the argument with the unanimous concurrence of “all the Judges of England, and Barons of the Exchequer”. They held that the monarch could not rule personally in any criminal or civil case, though he could enter a stay in his own causes. The monarch might sit in certain courts, but judgments were always rendered by the court, as had been the practice ever since William I.²⁴⁹ The court found it preposterous that religious doctrine might define the legal powers of the monarchy.

James’ royal courts affirm that the Crown has no prerogative to make, break, alter or extinguish any law.

James persisted in trying to boldly extend the royal prerogative where no monarch had legally gone before. In the *Case of Proclamations* (1610)²⁵⁰ he attempted a novel though circular argument. Three years earlier he had issued proclamations that prohibited the construction of new buildings in and about London, and forbade the processing of wheat into starch. Complaints were raised in Parliament that the proclamations were contrary to law. James submitted the matter to his judges in a constitutional reference. James’s argument was that since every precedent must have a commencement, it was therefore within the power of the king to make an order on any new matter of law, according to his wisdom, for the good of his subjects. In effect he wanted to arrogate to himself – that is, to the executive branch of government – the legislative powers that were vested in Parliament. An unanimous judicial panel rejected the argument unequivocally. The ruling is important both for its reaffirmation of the role of custom in law, and for its affirmation of the constraints that the common law places on exercises of the royal prerogative.

Several principles emerge from the judgment. The court explicitly confirmed the continuing role of custom, as distinguished from the common-law: “the law of England is divided into three parts, common-law, statute law, and custom; but the King’s proclamation

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.* at 64.

²⁵⁰ *Case of Proclamations* (1610), *supra* note 12.

is none of them.”²⁵¹ It also rejected the commencement-of-precedent argument: “the King by his proclamation cannot create any offence which was not an offence before.”²⁵² The court also reaffirmed the source of the royal prerogative in custom, and the constraints that custom imposes: “the King hath no prerogative, but that which the law of the land allows him.”²⁵³ It also dealt with permissible uses of royal proclamations: “But the King for prevention of offenses may by proclamation admonish his subjects that they keep the laws, and do not offend them; upon punishment to be inflicted by the law.”²⁵⁴ These general principles have been judicially reaffirmed through the centuries. They have important consequences for administrative law. They are also crucial in determining the legal impact of royal proclamations on Aboriginal legal customs and institutions.

King James and his Stuart successors never quite grasped the principle that they, their royal predecessors and their successors did not have their royal powers because they were kings. Instead, the powers existed in order for the king to serve the law and his subjects. Where the king or his agent acted contrary to law, such act had no legal effect because the law is not what the king does, but what he ought to have done. James professed legal sophistication but possessed only pseudo-legal sophistry. He and the other Stuart kings who followed considered themselves above the law and above the interests of the realm and the state. Their despotic and self-serving behaviour resulted in nearly a century of alternating armed truce and open warfare between forces of the absolutist Stuart monarchists on the one hand, and Parliament on the other. The absolutists found no support in the law.

Chapter summary

As we have seen, the normal practice among the Germanic peoples of continental Europe and the British Isles was that when the political “we” encountered, subjugated or annexed a political “others” the existing laws and political institutions of the “others” was allowed to continue in place, provided the sovereignty of the “we” remained unimpaired. This pattern, similar to that observed in the early and late Roman Empires, was observed among the early Germanic tribes of the European continent, recognized by treaty between

²⁵¹ *Ibid.* at 76. The word “custom” should be taken to refer to local legal customs as distinct from realm-wide custom, which is the common law.

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

the Anglo-Saxons and Danes, and affirmed by medieval monarchs.²⁵⁵ The continuity of local laws was a feature of the Norman regime in Britain, just as it had been for centuries before William I -- both in Britain and on the Continent. Although it was inconceivable in William's time that the king or the council of the realm could create new law simply by willing it into existence and proclaiming it, the principle gradually developed over succeeding centuries that customary laws could be changed by explicit statute. And new laws could be imposed by later conquerors or the recipients of ceded territory, though within limits.²⁵⁶ presuming always that no change occurred unless expressly made. This was the constitutional situation with respect to the laws of the British and the laws of the peoples they encountered in the colonial enterprise -- both in the British Isles, and later overseas. According to this view, the assertion of sovereignty over a territory carries with it the legal presumption that local legal custom will be protected by the monarch as font of justice, in full measure, in similar fashion as in the mother country. The assertion of sovereignty only extinguishes those local legal customs or other laws that are repugnant to British sovereignty itself, but no others.

In the 17th century the Stuart kings challenged the constitutionalists and lost. Although their absolutist pretensions were thoroughly discredited in courts of law, and militarily quashed by the forces of Parliament in removing two Stuart kings from office, the effect of their political theory on the overseas colonial enterprise was immense. According to the absolutists, no customary law can exist in the colonies except by the will of an absolute and irresistible sovereign. Under this theory it would follow that any place without a king or queen must necessarily be a legal desert; new laws could be established by the will of the British monarch; and pre-existing laws or legal customs could continue only if the monarch deigned to recognize and affirm them. Lack of such recognition must effectively extinguish any customary law that might have existed previously. Advocates of the absolutist theory would constrain the monarch only to the effect that the common law rights of British settlers must be respected as their "birthright". But the effect of this selective assertion of subjects' rights on a racially discriminatory basis was to protect the settlers' own narrow interests while sacrificing the customary rights of the indigenous peoples into whose midst they had come. The tension between constitutionalist legal continuity and absolutist legal creationism²⁵⁷ appears in the tension between officially recognizing legal rights in principle, and subverting them somewhat effectively in practice, as we will see in the next chapter.²⁵⁸

²⁵⁵ Even when Danish King Canute conquered virtually all of Anglo-Saxon Britain, provincial systems of customary law remained. See figure 4. See also Seebohm, *supra* note 67 at 498.

²⁵⁶ *Infra* note 269; Chitty (1820), *supra* note 103 at 29.

²⁵⁷ The absolutist theory holds that the binding power of laws is *created* by the Crown's assent to new law, or by its consent to old law: unless and until the Crown agrees, no law has binding power.

²⁵⁸ This has been a nearly constant feature of colonialism. It is expressed nowadays in the tension between the so-called recognition doctrine and the claims of immemorial or inherent rights.

Chapter 4 – Local customary law in the overseas colonial experience

Besides if we admit a Right in the Indians to give their Lands to whom they please, what becomes of the Right of the Crown or its Representatives to dispense the Crown Bounty? (Goldsbrow Banyar to Sir William Johnson, 1761)

Chapter overview – Why didn't the doctrine of legal custom enter colonial law – or did it? A myth finds favour overseas

Two contending theories of constitutional law found expression in the jurisprudence and political practice in the British overseas colonies. Under absolute monarchist theory, such legal practices as existed before the Crown asserted sovereignty can continue afterward only at the pleasure of the Crown. Under common law constitutional monarchism on the other hand, customary law is presumed to continue in legal effect as of right, subject only to positive acts of extinguishment by a constitutionally competent authority.

The colonial historical record reveals both the official acknowledgement of the continued validity of customary laws and institutions, and extra-legal infringement of them, contrary to common law and enacted law. But despite infringements in practice, the record supports judicial recognition of Aboriginal legal custom, where proven, under either theory. This chapter will examine the divergence of colonial perceptions of common law and legal custom on the one hand, from the doctrine as applied in Britain on the other, in light of colonial evidence that customary laws and institutions continue. Continued validity was acknowledged explicitly and implicitly in both prerogative acts such as proclamations and treaties, and in enactments by legislatures. Those acts recognized customary laws of governance, group membership and kinship, land tenure and dispute resolution. They also asserted the duty of officers of the Crown to acquaint themselves with local legal custom. Common law jurisprudence and the rule of law favour the constitutionalist position..

Although there has never been a legal basis for absolute monarchism in the Westminster system of governance and law, the myth took root in the overseas colonies in the 17th century. It continues to have staunch advocates into the 21st century. The pretense found special favour in the colonies among recipients of royal “grants”, and among colonial government officials, those being mainly royal cousins, business cronies and other prominent absolutists who owed their privileged colonial positions to the largesse of the royal court.²⁵⁹ Whether small or conspicuously lavish, as in the Hudson's Bay Company

²⁵⁹ The second charter of the Virginia Company in 1609 listed eight earls and dozens of other lesser lords, officers and gentlemen numbered among its members: The Second Charter of Virginia, (May 23, 1609) in Francis Newton Thorpe, ed., *The Federal and State Constitutions Colonial Charters, and Other Organic*

Charter (1670), colonial grants were interpreted by the grantees most broadly in order to maximize their own interests and minimize competing ones. And where a grant was at best questionable, it was in the interest of the colonists to vehemently support it because the alternative was to deny the legal basis of their own claims. The effect of the absolutist variety of legal positivism was to foster the notion that no rights vest in Aboriginal people(s) until and unless specifically recognized by the Crown, and that such act of recognition is a mere act of grace.²⁶⁰

As a government official, one's view of the monarchy can have serious implications in interpreting one's own authority. It is trite to say that officials in government derive their authority either from statute or from common law discretionary powers and privileges of the Crown, otherwise known as royal prerogatives. It is easy to see that if one relies on having authority that devolves from an all powerful monarch, then the official can have greater authority. On the other hand, if one holds only a delegated part of a limited authority, one's own power must also be diminished. The deeper water in the well, the more that can be drawn from it. Colonial officials were known to trumpet their own authority by aggrandizing the authority of the Crown to delegate it. An example appears in the assertion of Provincial secretary Goldsbrow Banyar to Sir William Johnson that no one had a right to acquire lands from the Indians without prior licence from the government. Banyar's position was not motivated by the rightness or wrongness of the Indians' cause, but rather by the threat to his own authority and privileged position in the colonial bureaucracy:

Besides if we admit a Right in the Indians to give their Lands to whom they please, what becomes of the Right of the Crown or its Representatives to dispense the Crown Bounty?²⁶¹

Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America (Washington, DC : Government Printing Office, 1909), online: The Avalon Project at the Yale Law School Homepage <<http://www.yale.edu/lawweb/avalon/states/va02.htm>> (date accessed: 12 October 2000). Colonial interests and those of the royal court often overlapped. During the civil war, staunch royalist Henry Bishop fled England and found refuge in Virginia. After the Restoration, he returned to England and was made Postmaster General under Charles II. Prince Rupert of "Rupert's Land" fame was granted the HBC Charter by his cousin, King Charles II.

²⁶⁰ This approach has found expression in judgments such as *St. Catherine's Milling and Lumber v. R.* (1888), 14 App. Cas. 46 (P.C. Canada) [hereinafter *St. Catherine's* (1888)] at 54, in which the words "for the present" were expanded to mean the right of Aboriginal peoples to their lands depended on the goodwill of the monarch. For many years this application to Aboriginal title found favour. But it was rejected in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193, (1997) 66 B.C.L.R. (3d) 285, [1998] 1 C.N.L.R. 14, online: QL (SCJ), [hereinafter *Delgamuukw* (1997) cited to S.C.R.], indicating the somewhat more robust nature of Aboriginal rights.

²⁶¹ Letter from Goldsbrow Banyar to Sir William Johnson, June 24, 1761 in James Sullivan, ed., *The Papers of Sir William Johnson* (Albany: University of the State of New York, 1921) [hereinafter *Johnson Papers*] vol. 3 at 425.

Treaty making and legal custom – common law fundamentals

From a very early period treaties with Indian peoples were used to foster good relations, cultivate alliances and promote trade. The treaties often contained explicit or implicit acknowledgment of indigenous customary rights. And such acknowledgment supports the continuity of local legal custom under both the constitutionalist and the absolutist theories. An absolutist would argue that local custom continues only by virtue of the monarch's consent to the treaty, while a constitutionalist would counter that the treaty is merely evidence of rights that would continue even if the treaty were not made. Both theories support the continuance of Aboriginal custom as law. A brief review of the history and law of treaty making will indicate that the constitutionalist position is the stronger.

Treaty making has been an instrument of government policy and of reconciliation among parties since ancient times. It has been used as a device to reconcile competing interests in a formal way where law *per se* has proved inadequate or inappropriate. Recall the 9th century treaty between Alfred and Guthrum (English and Danish Kings respectively in Britain) to jointly certify the continuance of local customary laws within Danish and English communities in Britain.²⁶² We saw in Chapter 2 how a treaty was used to end the civil war between rival claimants to the English throne and settled the succession of the Crown in Henry II – the Treaty of Winchester, 1153. The classic treaty paradigm is an agreement between States, where the sovereign of each (i.e. the head of state) has no legally binding power over the other or others. A more general statement is that treaties are made where the legal power of the parties to impose their will on the other does not exist, is in dispute, or it is politically inexpedient to do so, or the use of force has unacceptable consequences. The terms of the treaty serve not only to encapsulate and memorialize the substance of the political agreement, but can also instruct the servants of the Crown in implementing it.

Anglo-Saxon custom has conferred the prerogative of making treaties on the monarch, as representative of subjects. The rationale is that the confidentiality and dispatch required to execute public measures makes it impractical for the entire populace to negotiate.²⁶³ The Crown is nevertheless bound by other constitutional limitations. Custom and the common law constrain the prerogative of treaty making because the monarch, as font of justice, is always under the law. The Crown may not by its prerogative extinguish, alter, create or enlarge any law or custom, though it may and ought to acknowledge such as already exist.²⁶⁴ Treaties that purport to modify statute or common law are not effective

²⁶² *Supra* note 120. And see figure 5.

²⁶³ *Blackstone's Commentaries*, *supra* note 5, book 1 at 224; Chitty (1820), *supra* note 103 at 39.

²⁶⁴ *Case of Proclamations* (1610), *supra* note 12 at 76.

unless confirmed by parliament,²⁶⁵ though treaties that do not modify the law need no such confirmation. They nevertheless bind the Crown by its own will – and the Crown’s ministers and servants – as long as the treaty lasts. This means that government officials must act in accordance with treaties except where such would violate an established law. Treaties should therefore be interpreted according to the will and intent of the parties.²⁶⁶ That said, the law presumes that the Crown intends always to conform with the law, and never to subvert it. Since treaties must be interpreted only in accordance with existing law, legal customs are therefore presumed to continue unless proven to be extinguished by some other lawful means. Onus of proving that legal custom has been extinguished is therefore on the one who alleges its extinction. Such proof must be clear and compelling.

The common law provides that only a clear statute can extinguish a legal custom, except in the case of conquest or cession, where the acquiring monarch²⁶⁷ may expressly alter the law of the country unless and until that prerogative is forsaken by act of the Crown itself, as by calling for a local governmental assembly.²⁶⁸ And alterations of the local law must comport with the fundamental principles of the common law and not otherwise.²⁶⁹ But

²⁶⁵ It is well-established in the common law that the making of a treaty is an executive act, while the performance of a treaty’s obligations requires legislative action if those obligations entail alteration of domestic law. Unlike some other countries the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive – the government of the day – decides to incur the obligations of a treaty which involve alteration of law, then it must run the risk of obtaining the assent of Parliament to the necessary statute or statutes. (per Lord Atkin in *Canada (A.G.) v. Ontario (A.G.), Reference re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act, and Limitations of Hours of Work Act*, [1937] A.C. 326 at 347-48, [1937] 1 D.L.R. 673, [1937] 1 W.W.R. 299 (P.C. Canada), aff’d [1936] S.C.R. 461, [1936] 3 D.L.R. 673 [hereinafter *Labour Conventions Case* (1937) cited to A.C.].

²⁶⁶ In this context the will of the sovereign is germane. But note that the monarch’s “will” does not create new law, though it may create royal obligations and impose duties/constraints for servants acting on the Crown’s behalf: *Campbell v. Hall* (1774), *supra* note 150 at 741; *Chitty* (1820), *supra* note 103 at 29.

²⁶⁷ This prerogative does not extend to that monarch’s successors: *Calvin’s Case* (1608), *supra* note 18; *Process into Wales* (1670), *Supra* note 168 at 403; *Campbell v. Hall* (1774), *supra* note 150 at 744-45, citing *Calvin’s Case* on point with approval.

²⁶⁸ *Campbell v. Hall* (1774) (K.B.) at 741.

²⁶⁹ Lord Mansfield LCJ. in *Campbell v. Hall* (1774) *supra* note 150 at 741-42 was clear on this point: [[I]f the King has power (and when I say the King, I mean in this case to be understood “without the concurrence of Parliament”) to make new laws for a conquered country, this being a power subordinate to his own authority, as a part of the supreme Legislature in Parliament, he can make none which are contrary to fundamental principles; none excepting from the laws of trade or the authority of Parliament, or privileges exclusive of his other subjects.

This limiting principle was affirmed recently in *Bancoult v. Secretary of State for the Foreign and Commonwealth Office*, [2000] E.W.J. No. 5772 (England and Wales High Ct. of Justice, Q.B. Div.), online: QL (EWJ) [hereinafter *Bancoult* (2000)] at para 37. The court held that a fundamental or constitutional right can only be abrogated by the executive where such has been specifically authorised by Act of Parliament –

constitutional common law provides that the monarch cannot vary from any articles of capitulation or treaties of cession entered into on the conquest of a country.²⁷⁰ The honour of the Crown can thus be bound by prerogative acts such as treaties, that protect or acknowledge existing rights.

Before the erection of colonial governments the Crown's treaty-making prerogative was virtually unfettered by laws in the colonies except insofar as common law (in the case of the Crown) and local customary law (in the case of Aboriginal parties) constrained the authority of the respective signatories to agree to them. Modern treaties, on the other hand, may intersect with the myriad laws that have since been enacted, though a mere treaty is still insufficient to extinguish legal custom. Nevertheless, the rights which local custom gives can be surrendered voluntarily though the custom remains.²⁷¹ But where no domestic laws are modified by modern treaties, or new laws created, or legal rights infringed, then modern treaties do not legally require ratification. Servants of the Crown are nevertheless bound by them. Modern political practice and expectations dictate, however, that statutory ratification is often politically expedient. A statute can also have the advantage of clarifying legal rights and obligations where they might otherwise be unclear. In addition, treaties are not generally considered as binding beyond the parties to the treaty itself. A statute can bind third parties, whereas a treaty does not bind them *ex proprio vigore*.

Early treaties and relations with indigenous colonial peoples

In the early days of the colonial enterprise the neighbouring Indians were eagerly courted by colonists as economic partners and military allies. Their aid to the first colonists was crucial to their very survival in what was, to the newcomers, often a hostile land. And recognition of the Indians' independence and their rights was necessary in order not to alienate them. That recognition was sometimes formalized in treaties. The earliest of them maintained the distinction between "we" and "they", but acknowledged each others' independence and friendship. The treaty between the Plymouth colonists and Wampanoag chief Massasoit in 1621 characterized Wampanoag and English King James as equals, friends and allies. It pledged collective responsibility of each group for any theft of each other's belongings. Each side would support the other in times of war. In times of peace neither side was to approach the other armed. And Massasoit would use his influence to bring "his neighbour confederates" into the peace. A contemporary account of the treaty concludes, "Lastly, that doing thus, King James would esteem of him as his friend and

general words will not suffice. The judgment cited passages to similar effect in *R. v. Lord Chancellor ex parte Witham*, [1998] Q.B. 575 (U.K.); and *Ex parte Simms*, [1999] 3 W.L.R. 328.

²⁷⁰ Chitty (1820), *supra* note 103 at 29-30.

²⁷¹ To illustrate the distinction by analogy to the common law: one can agree to sell something without extinguishing the common law principle that (s)he cannot be compelled to sell it. And one can grant a right of possession by rent or lease without extinguishing title to the property.

ally.”²⁷² Otherwise there was no reference to changing the local legal and political status quo. In short, the treaty presumed and required mutual support, non-interference and respect.

Another treaty of the same period, between the Dutch and the Mohawks of the Five Nations Confederacy in 1613²⁷³ expressed similar principles in the form of a metaphor. Under the Two-Row Wampum Treaty, or Guswenta,²⁷⁴ the Mohawk and the Dutch peoples would be as two vessels travelling the same river, each according to its own set of rules, never interfering with the course of the other. In the European ship are the laws, institutions and forms of government of the colonists. In the Mohawk canoe are those of the Mohawk. The Mohawk commemorated the solemn the agreement in the form of a beaded belt, which served as a ceremonial record of the treaty’s terms, obligations and expectations. Two rows of purple beads, representing the Mohawk and the Dutch, are separated by three rows of white, symbolizing peace, friendship and respect. The separation by the white rows symbolized that the two vessels would remain distinct, each one being autonomous within its own sphere. For the Mohawks, this demonstrated their immemorial right to an independent existence, and an intention to maintain it, though sharing the river. And the Dutch found it eminently reasonable because it resonated with their own norms, laws and customs that required them to respect the ways of the people into whose midst they had come. The Europeans thus gained by the grace of their neighbours and by treaty what they could not claim by right of law or grant of their own sovereign.

The metaphor expressed in the treaty would have been equally meaningful to the Dutch and the Mohawk, even given the differences between their respective world views in other matters. For the Dutch, it was an analog of European norms that governed relations and contact between peoples of different customs within empires, kingdoms, counties, shires and parishes. The Europeans would have expected the same reciprocal respect of local customary law in neighbouring communities anywhere in Europe. Some sources place the date of the treaty in 1640,²⁷⁵ between the Dutch and the Iroquois Confederacy, of which the Mohawk Nation was and is a member. In 1664 the English entered into a treaty under

²⁷² A contemporary account of the treaty is recorded in D.B. Heath, *A journal of the Pilgrims at Plymouth; Mourt's relation, a relation or journal of the English plantation settled at Plymouth in New England, by certain English adventurers both merchants and others* (New York: Corinth Books, 1963), online: Mayflower Web Page Book Research Project Homepage <<http://members.aol.com/calebj/mourt1.html>> (last modified: 30 April 1997).

²⁷³ *Re Stacey and Montour and the Queen*, [1982] 3 C.N.L.R. 158 at 161, 63 C.C.C. (2d) 61 [cited to C.N.L.R.] (Que. C.A.) refers to another "Two Row Wampum" treaty, entered into in 1664 at Fort Albany, now in the State of New York, between the English Colonel Cartwright and the Indians of New York.

²⁷⁴ Also “Kaswentha” and various other transliterations,

²⁷⁵ Cited in *Lac La Ronge Indian Band v. Canada*, [1999] S.J. No. 773, 188 Sask. R. 1, [2000] 1 C.N.L.R. 245 at 250, online: QL (SJRE) [cited to C.N.L.R.].

the same terms, at Albany, after the Dutch ceded their New Amsterdam interests. Whether 1640 and 1664 saw new agreements, or renewals and accessions to the 1613 agreement, may be mere semantics because it was the practice of the Indian participants that treaties required continual renewal in order to maintain their binding effectiveness. The terms of the Two Row Wampum Treaty(ies) were nothing new to the Europeans. Just as Danish and English tribesmen (once peace had been established) agreed to live in nearby communities in Britain under their own respective laws in the 9th century under English King Alfred the Great of Wessex and Danish King Guthrum,²⁷⁶ so too did the Dutch and the English agree with the Mohawk. The closeness of fit between the metaphor and Anglo-Saxon constitutional law suggests strongly that the Europeans subscribed to the same metaphor. An early Anglo-Saxon analog might have been neighbouring tribes of armed immigrant Danish and Saxon farmer-mercenaries on opposite banks of the Thames River, agreeing similarly to each row their own longboat and not interfere with the ways of the other. The Two Row Wampum was thus another restatement of a thousand years of Anglo-Saxon common custom in relations with "other" peoples in a colonial context. By the treaty the Crown, on behalf of all of its subjects, symbolically took collective responsibility for violations by any of its subjects in the same way that the patriarch of an Anglo-Saxon tribe of farmers/mercenaries would guarantee the good behaviour of his kinsmen/platoon. In actual fact, there were violations of the treaty. But since the monarch is deemed to have acted only on the advice and consent of subjects, the common law attributes those violations to "evil Counsellors" and "wicked advisors" rather than to the sovereign. And therefore the violations, even if by government agents, cannot have changed any laws or extinguished any rights.²⁷⁷

Some modern commentators, even those sympathetic to Aboriginal rights in a broad sense, dismiss the Two Row Wampum metaphor as unworkable in modern times. Alan Cairns, for instance, characterizes the metaphor as a "vision of separate societies on separate paths heading to separate destinations, which casts a blind eye on our interconnectedness".²⁷⁸ With respect, I submit the Two Row Wampum Treaty did not represent a complete disregard by the treaty parties for the wishes, goals or well-being of each other. Rather, it symbolized the establishment of a relationship between the two groups, and a desire to make the relationship endure. It definitely did not symbolized a wish

²⁷⁶ *Supra* note 120.

²⁷⁷ *Blackstone's Commentaries*, *supra* note 5, book 1 at 220.

²⁷⁸ Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 9.

to remain “separate ... separate ... separate.” Elsewhere Cairns characterized the agreements as indicating a “shared indifference” to each other.²⁷⁹ But by suggesting that the Two Row Wampum is based on shared indifference, he does a disservice to that agreement and to the parties who entered into it. If there was truly a “shared indifference”, then there would have been no need for concluding a solemn agreement and holding it to be a treaty. That treaty was not an agreement to have nothing to do with each other. Rather, it was intended to establish and guide relations between the communities on an ongoing basis. The metaphor of the Two Row Wampum is not unlike that revealed on many European coats of arms and

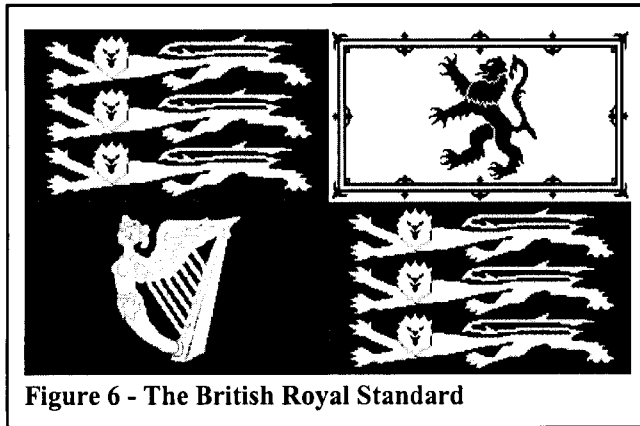


Figure 6 - The British Royal Standard

standards. On the Royal Standard of the British Crown, for instance, there are four quarterings – two for England (three lions passant), one for Scotland (a lion rampant) and one for Ireland (a harp). See figure 6. The quarterings symbolize that England, Scotland and Ireland each remain separate and distinct entities within the larger political unit. Who could seriously argue that the Royal Standard symbolizes nothing more than a “shared indifference” between the constituent parts of the United Kingdom?

The Two-Row Wampum is important not only for its depiction of the Mohawk understanding of their agreement with the Europeans, but because it also reflects European notions of constitutional law as well, at the time it was made. The Two Row Wampum treaties are evidence not only of the narrow terms of those agreements, but also that many European colonists of the period continued generally to acknowledge their own constitutional principles that governed relations between peoples of different cultures living in close contact. The treaties did not establish those constitutional principles, but signalled their continued application.

It makes no difference which language was spoken by the European parties to the treaty. It matters not whether the European party to the treaty was Dutch or English because the principles symbolized by it are at the core of the legal systems of Germanic peoples in general, including both those nations. And since it accorded with the fundamental principles of both their legal systems, both English and Dutch were bound to abide by it. The terms of the treaty were not arbitrary in content. Rather, they were a restatement of rules that were common to virtually all of Europe. In acknowledging the freedom of the other party to travel the river of destiny in its own canoe, the Dutch reaffirmed a long-established tradition of European law in general, not to mention an ancient and fundamental constitutional principle

²⁷⁹ *Ibid.* at 211.

of the Anglo-Saxons. That is, the customs, laws and institutions of an encountered people are presumed to continue; and due respect to them ought to be rendered in dealings with the indigenous people whether as a group or as individuals.

The words and sentiments contained in the Two Row Wampum treaty formed the *nominal* model of relations between Europeans and the indigenous peoples for the next centuries. While it was the model in theory, there were serious variations from it in practice. Still, aside from treaty obligations, the prevailing European law and the common law continued to presume the continuity of established local laws, customs and institutions wherever the European laws were carried.

Relations deteriorate

Despite the noble sentiment of tolerance in the treaties, the practice on the colonial ground by settlers was generally one of disrespect of customary legal rights. The settlers' main economic activity in the English colonies was farming. It placed the settlers in direct competition with the Indians for the latter's land. This led to armed conflict and, usually, devastation of the neighbouring peoples. But even when peace treaties were imposed on the survivors, those treaties often recognized the continuity of local customs.²⁸⁰ In the few decades following the founding of the colony of Virginia in 1606, disease, deceit and war had reduced the surrounding Indian peoples to a fraction of their former populations. The 1677 treaty that was forced upon the Aboriginal survivors stated that they had become subject to the English King. Nevertheless, their customary right to govern themselves through their own institutions, and to maintain their established social and political relationships, were explicitly confirmed. Article 12 of the treaty provided that "each Indian King, and Queen have equall power to govern their owne people and none to have greater power then other, except the Queen of Pomunky to whom severall scattered Indians doe now againe owne their antient Subjection."²⁸¹ It is untenable that James I had extinguished customary laws and institutions in Virginia and vicinity in 1606, and then constituted Indian "Kings" and "Queens" within a fixed hierarchy of relative feudal relationships. And it is just plain silly to think his grandson Charles II did it in 1677. It is certain that colonial officials

²⁸⁰ The justice of the Indians' cause was often lost on the colonists. The rights and interests of Indians within colonial boundaries tended to be disregarded in practice, while those beyond the frontier were noticed, at least in official policy and in treaties. After all, it was not in the colonists' interests to foment resistance among the peoples on their borders. And those neighbouring peoples could still be valuable sources of furs and hides – both as harvesters, and as intermediaries/traders with more-distant peoples. It served the colonists' interests, therefore, to respect the rights and law-ways of Indians beyond the frontier for a longer time, at least until the economic and military situations favoured a change. Adherence to constitutional principles was often driven more by practical considerations than because it was the right thing to do.

²⁸¹ *Treaty Between Virginia And The Indians*, 1677, online: Amonsoquath Tribe of Cherokee <<http://www.amonsoquath.org/treaty-of-1677.html>> (last modified: 10 September 2001).

did not have that power. It can only be concluded that the treaty refers to pre-existing systems of governance according to the Natives' own customary law-ways. Note that the treaty describes governance and leadership among the Indian peoples by analogy to a wrongly-posed European model of supposedly irresistible kings and queens. In fact, Pomunky was not a kingdom or an empire. It was merely the largest group in what was known to the Whites as the Powhatan Confederacy. But the fact that the nature of their governance and institutions was misunderstood by the Europeans does not diminish the promise not to interfere with them.

The recurring promises to respect customary governance is consistent with the common law requirement that the monarch and the common law courts are obliged to uphold legal custom and customary rights. And that thread runs through the history of the overseas colonial period. But that thread shared the colonial tapestry with the theory of absolute monarchism. Since the principal grantees were associates of the absolutist royal cause, elements of their theory of law were disproportionately represented in colonial law and jurisprudence. The March 1, 1669 constitution of the North Carolina plantation is a case in point. The form of government in the colony was chosen for the express purposes of being agreeable to "the monarchy under which we live" and to "avoid erecting a numerous democracy". The same section refers to the province as having been granted as a "county palatinate", "with all the royalties, Proprieties, Jurisdictions, and privileges of a County Palatine, as large and ample as the County Palatine of Durham."²⁸² A county palatinate in England was a part of the realm with the government being led by a person or body having virtually all of the customary rights, privileges and prerogatives of a full monarch, though being part of England, and the lords being subject to the English Crown. The leader of the colony was to be called a Palatine. In design and effect, the governors of the colony recreated, as closely as possible, a pocket-monarchy on the eastern seacoast of North America, but one such as never existed in England except in absolutist fancy. Even the lord of a county palatine in England was subject to the local customary laws, in the same way as those customs may have constrained the monarch, and did constrain servants or agents of the Crown.²⁸³

²⁸² *The Fundamental Constitutions of Carolina*, March 1, 1669 in Francis Newton Thorpe, ed., *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* (Washington, D.C.: Government Printing Office, 1909) [hereinafter *Carolina Constitution, March 1, 1669*] s. 1, online: The Avalon Project at the Yale Law School Homepage <<http://www.yale.edu/lawweb/avalon/states/nc05.htm>> (date accessed 15 October 2001).

²⁸³ Since the monarch is sovereign and supreme in dignity, the common law does not permit local custom to bind his or her person or goods, the person of the monarch being considered sacred and inviolable. But those customs bind the Crown's servants where they are not inconsistent with the monarch's sovereignty. This said, customs that govern land (as distinct from the monarch's goods/chattels), or its uses or possession, continue to prevail despite the Crown's possession of it. "No custom shall bind the King for his person or goods ... it is otherwise of customs which go with the land, for these bind the King, as gavelkind, borough English, etc": *Anon.* (1547) Jenk.83, 145 E.R. 159. That is, although no one might lay hands on the monarch, neither the Crown nor its servants can violate local custom by mere royal prerogative, without a statute to that effect. And

Religious tolerance and legal incapacity

After setting out the governance of the colony along feudal lines, the constitution included words of constraint with respect to the Native inhabitants:

But since the Natives of that place, who will be concerned in our Plantations, are utterly Strangers to Christianity, [their] Idolatry, Ignorance, or mistake gives us no right to expel or use them ill.²⁸⁴

This language, including the words of constraint, was consistent with feudal principles of law. Under feudal principles a tract of land might vest in someone by royal grant,²⁸⁵ but the grant was subject to the customary legal rights of the locals. It was unlawful for the proprietor, even by feudal principles, to infringe those customary rights. It is no surprise therefore to see the constraints reflected in the constitution, even if considered by the absolutists as merely a righteous turn of phrase. But it was not in their interests to give real effect to their high language. And so in a flourish of Christian piety, undoubtedly motivated by a sense of religious tolerance among the colonist cogs of the colonial engine, the Indians were stripped of access to courts of law. In practical effect their legal rights were negated for want of access to a judicial forum. That is, no legal claim could be brought in North Carolina by or on behalf of an Aboriginal inhabitant unless he were a member of a Christian church:

No person above seventeen years of age shall have any benefit or protection of the law, or be capable of any place of profit or honor, who is not a member of some church or profession, having his name recorded in some one, and but one religious record at once.²⁸⁶

The fact that more than one church would be tolerated in the colony is significant. Any seven persons might form a church, provided the terms for admittance and communion were written in a book, that the religious record of each church were kept in a public record, and that each church observed Communion according to the rules in the colony's constitution.²⁸⁷ But it is equally significant for their Aboriginal neighbours that such tolerance ended at the cultural divide. Of course it would have been impractical for

neither could a palatine legally do so.

²⁸⁴ *Carolina Constitution, March 1, 1669, supra* note 282, s. 97.

²⁸⁵ But note that feudalism does not require an absolute monarch. The common law requires that the validity of a royal grant depends on the corpus of the grant being the Crown's to give. The Crown was judged incapable of granting away land in *Lerwick* (1903), *supra* note 210 because it had never been infeudated – that is, attached to the Scottish Crown, either by escheat, forfeit as for treason or high crimes, or by statute as for Wales. In the case of the overseas colonies, however, many improper Crown grants have subsequently been perfected by statute.

²⁸⁶ *Carolina Constitution, March 1, 1669, supra* note 282, s. 101.

²⁸⁷ *Ibid.* ss. 95-100

Aboriginals to comply with those rules, assuming they had any desire to do so. Nevertheless, the failure to be duly recorded as a member of a constitutionally recognized church meant the denial of benefit or protection of the law. It is ironic that the mixed blessing of limited religious tolerance was also a curse that blinded colonial courts to the existence of inconvenient indigenous legal custom.

It can be seen that even if Natives had considered asserting a legal right before a 17th century North Carolina court, they were prohibited from being heard there by the constitution of the colony. The effect of this exclusion was to deny them the opportunity to argue or advance proofs of their legal customs. And in default of such proof, the legal presumption remained that the common law prevailed in full measure. Since there was no practical mechanism available for Natives to assert local legal custom in colonial courts, it came to be accepted in the colonial popular wisdom that no local legal custom remained – or at least, not such as could apply where non-Aboriginal interests were concerned. Consequently, arguments based on legal custom did not enter the legal lexicon of the colonies. But although overlooked for the most part, the doctrine continued in latent form, subject to assertion as a principle of common law where applicable.²⁸⁸ Failure to argue a common law doctrine is not proof of its non-existence, or evidence of its extinguishment.

Systemic discrimination hides legal doctrine, but does not extinguish it

How can we explain the fact that the doctrine of custom retained its vitality in the courts of the home country, yet failed to appear in the colonial jurisprudence? Part of the explanation comes from the common law doctrine of custom itself, and part comes from the intercultural and subcultural dynamics of colonial and frontier society. Since the common law requires that a legal custom must have an immemorial origin in the place where it applies, no European could assert any right by legal custom in the colonies except those customs that ran with the land when the colonists arrived, because their arrival in the colonies is within legal memory.²⁸⁹ The common law also requires that the locality of a local

²⁸⁸ The Judicial Committee of the Privy Council observed in 1889 that the conditions in a colony may change, in which case more of the common law may find ear: “[A]s the population, wealth, and commerce of the Colony increase, many rules and principles of English law, which were unsuitable to its infancy, will gradually be attracted to it”: *Cooper v. Stuart* (1889), *supra* note 5.

²⁸⁹ The common law places the cut-off date for legal custom at the end of Henry II’s reign in 1189 A.D., or the time when English law and the sovereignty of the Crown began to run in the place, whichever came later. The Isle of Man, for instance did not come under the English Crown until the reign of Edward IV (1461-83). In the case of *Mylchreest* (1879), *supra* note 19 at 304 the court ruled that it was sufficient for the validity of a local custom in the Isle of Man that it arose at a time when the people of that place were still free to give their consent. *Mylchreest* is discussed below at 112 ff. And in *Moore v. Goan* (1933), *supra* note 226 local custom was accepted in principle as a ground for allowing private fisheries to survive the assertion of sovereignty in Ireland, even though such would have been contrary to *Magna Carta* and the common law. See discussion of *Moore v. Goan* above at 72.

custom must be identifiable with legal certainty. Consequently, whereas a local custom might be in legal force in a shire or parish in England, it could not be asserted in the foreign places in which the colonists found themselves. A third requirement is that the persons to whom the local custom applies must be identified with legal certainty. In most cases Europeans would not fall within the category of such persons.²⁹⁰

But if European colonists could not raise arguments of legal custom, then who else? We have already seen that Indians, not being Christians, were prevented in many cases from asserting their rights in colonial courts. This general strategy was followed repeatedly, in many places, into the 20th century. Amendments to Canada's Indian Act in 1927²⁹¹ made it illegal to raise funds to pursue land claims in Canada; but as we have seen from recent Canadian judgments, such enactments did not extinguish the right to compensation once it again became legal for courts to entertain complaints. Not only was the legal forum denied, but political representation also. Indians in British Columbia were nominally entitled to vote when that province entered Confederation. But they were stripped of the right a few months later by provincial statute in 1872.²⁹² Much of the explanation for the failure of the doctrine to be asserted in the colonies is that Aboriginal advocates were denied a judicial or political forum in which to advance their cause. Whereas assertions of rights under local legal custom were entertained and maintained as an unremarkable matter of course in Britain, analogous colonial assertions were denied a judicial hearing.

Another reason arguably contributed in large part to the silence of Indians' voices in introduced colonial institutions. Certain subcultures of European society, and certain political tenets, were disproportionately represented in colonial society and colonial courts. Adherents to the "absolute monarchy" cause were favoured because their opponents would simply not have been among those receiving the early grants. Not only were grantees inclined to support the validity of the royal grants – and consequently to deny the validity of contrary customary rights – they were by implication pre-selected on the basis of prior political beliefs. Admittedly, this coincidence of factors was less significant in later colonists from Britain and elsewhere. But by the time of overseas colonial expansion, royal absolutism had already overshadowed constitutionalism in many European countries, with the vigorous support of the Roman Catholic Church. In time, of course, royal absolutism fell

²⁹⁰ Exceptions can easily be contemplated. Adoption of European persons, in infancy or otherwise, into families or clans might bring individuals within the category of persons to whom the custom applies. If the acquired status carries/carried attendant customary rights, such as membership in a group or access to resources, then such individuals might claim the benefit of local legal custom in the colonies. Such status by adoption was expressly recognized in a statute of the Province of Canada, *supra* note 2. Alternatively, non-Aboriginal persons might be brought within a custom by marriage.

²⁹¹ *An Act to amend the Indian Act*, R.S.C. 1927, c. 32, s. 6. The prohibition was lifted in 1951: *The Indian Act*, R.S.C. 1951, c. 29, s. 123.

²⁹² *Qualification and Registration of Voters Amendment Act*, R.S.B.C. 1872, s. 13.

into disfavour as a tenable political theory. But by the 18th century, the 17th century pretense had been transformed into a myth that it had once existed. And by then there was a landed colonial gentry to attest to its former existence, despite its patent falsity.

Despite the temptation on the part of many colonialists to deny customary rights or institutions of Native peoples, references found their way into many colonial documents, such as treaties and royal instructions to colonial authorities. Not all reference were direct or explicit. References can be found in what the documents said, and also in what they failed to say. It was common in the early treaties, for instance, to provide a dispute resolution mechanism for incidents between Indians and Europeans in specific terms. For example, a 1693 treaty provided,

If any controversie or difference at any time hereafter happen to arise between any of the English and Indians, for any real or supposed wrong or injury done on one side or the other, no private revenge shall be taken by the Indians for the same, but proper application be made to their Majesties' government upon the place, for remedy thereof, in a due course of justice ...²⁹³

But there was no reference to disputes between Indians, or to extinguishment of the customary mechanisms by which they might be resolved.

Customary dispute resolution mechanisms

It is common in many indigenous social control systems for the victim or the victim's kin to decide whether to overlook an alleged wrong or to respond. Various systems provided that retribution could be visited on the perpetrator, the perpetrator's kin, or anyone from the perpetrator's community. Where a major offence had been committed, it was legitimate under the customs of some eastern Nations for the victim's kin to defer lawful punishment, and impose it even years later – or not – as their prerogative. Though the practices functioned well in their close cultural context, they certainly conflicted with British notions of assault, for instance, as a breach of the king's peace, and the attendant role of courts and legal certainty/finality of punishment and judgment. The provision in the 1693 treaty was no doubt for the purpose of preventing private wrongs from escalating into major inter-community disputes, given that European and Indian communities of people were strangers to each other's notions of law, and would be interacting over generations. Note, however, that there was no mention of situations in which the disputants were both European, or both Indian. Those situations were beyond the purview of the treaty, and were

²⁹³ From Treaty of 1693 with Tribes of Massachusetts Bay and Rivers Area, signed 11 August 1693 at Fort William Henry. The treaty was reaffirmed in 1713 and 1714. Identical terms were contained in the December 15, 1725 treaty with tribes of Nova Scotia and some New England areas and in 1749 (reaffirmed in 1786). The 1752 treaty with the Micmac included the same provision for English/Indian disputes, but added that Indians could appear in English courts. All these treaties online: Canada's Schoolnet "First Peoples on Schoolnet" Homepage <<http://www.schoolnet.ca/aboriginal/treaties/1763-e.html>> (last modified: 9 September 1998).

by implication left to the legal regimes of the disputants' respective communities.

A few of the treaties with eastern tribes provided that where English were to encroach on Indian lands without authorization from the governor, they did so at their own peril:

If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands westward or south-ward of the said boundary which are hereby allotted to the Indians for their hunting grounds, or having already settled and will not remove from the same within six months after the ratification of this treaty, such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please.²⁹⁴

English disputants in Indian territory in those circumstances would presumably not have recourse to English or colonial courts. Rather, they would have to settle the matter between themselves. Alternatively, if they had integrated with or been adopted into the host Native people of the place, they might be subject to pressures of mediation. As adoptive members of Indian families and/or clans they might well be subject to customary law. For the most part, however, the obvious inference is that it was intended that disputes between English and English would be dealt with according to English law or that of the colony. There was only rare mention of disputes between Aboriginal parties. The understanding of the parties to such treaties at the time could only have been that such disputes were not matters for English or colonial courts, and consequently must be left for customary measures. Recall that in some colonies only a member of an established Christian church could claim the benefit or protection of the colony's law. Since the vast majority of Indians in those places in the 17th century were disentitled from appearing in colonial courts, it must be concluded that the drafters contemplated they would continue to rely on such customary laws and legal fora as they might possess.

²⁹⁴ Treaty with the Cherokee, November 28, 1785 art 5, in Indian Affairs: Laws and Treaties. Vol. II (Treaties). Compiled and edited by Charles J. Kappler. Washington : Government Printing Office, 1904), online: Oklahoma State University Library Kappler Project Homepage <<http://digital.library.okstate.edu/kappler/Vol2/treaties/che0008.htm>> (last modified: 30 May 2001). Similar provisions were included in the following treaties:

January 21, 1785 treaty with the Wyandot; January 3, 1786 with the Choctaw; January 10, 1786 treaty with the Chickasaw; January 31, 1786 with the Shawnee; January 9, 1789 with the Wyandot, Delaware, Ottawa, Chippewa, Pattawatima and Sac Nations; August 7, 1790 with the Creeks; July 2, 1791 with the Cherokee; August 3, 1795 with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Weeas, Kickapoos, Piankashaws, and Kaskaskias. They are in the same hardcopy volume, and all online through the same homepage at <<http://digital.library.okstate.edu/kappler/Vol2/treaties/wya0006.htm>>, <<http://digital.library.okstate.edu/kappler/Vol2/treaties/cho0011.htm>>, <<http://digital.library.okstate.edu/kappler/Vol2/treaties/chi0014.htm>>, <<http://digital.library.okstate.edu/kappler/Vol2/treaties/sha0016.htm>>, <<http://digital.library.okstate.edu/kappler/Vol2/treaties/sha0016.htm>>, <<http://digital.library.okstate.edu/kappler/Vol2/treaties/cre0025.htm>>, <<http://digital.library.okstate.edu/kappler/Vol2/treaties/che0029.htm>> and <<http://digital.library.okstate.edu/kappler/Vol2/treaties/wya0039.htm>> respectively, and all last modified: 30 May 2001.

Treaties not only recognized local customary law in general terms, they sometimes referred to specific customs or to customary institutions for (e.g.) dispute resolution. This practice was not limited to the English, but was also engaged in by the French. A March 7, 1742 French document shows a grant of lands to Huron Indians at Lorette in Quebec by the Company of Jesus (Jesuits) (at the purported request of those Indians) from land which had presumably been granted to them (Jesuits) by the French Crown. The grant bears a reversionary interest in the Reverend Fathers, and a *proviso* that the Indians may not alienate the land to others. An interesting dispute resolution provision appears:

And that if hereafter any difficulty should arise that could not be foreseen the same shall be investigated by the old men and the chiefs in the presence of and with the approval of the Missionary who shall decide the whole matter.²⁹⁵

While the dispute resolution provision arguably is a diminution of the customary Huron mechanism, the reference to elders and community leaders clearly acknowledged the role of the Huron elders in dispute resolution in an adjudicative model. Where the British asserted sovereignty following the Seven Years War, they honoured the relations that the French had established with the Aboriginal peoples in the region. In fact, on February 2, 1794 the British confirmed the 1742 grant, along with additional holdings. The 1794 document omitted the provision for oversight by a missionary, leaving the whole mechanism and process clearly in the hands of the Huron themselves:

And that if in the course of time any difficulties should arise in respect to the said grant, the same shall be as heretofore inquired into and settled by the Chiefs in council with the old men of the said village.²⁹⁶

Dispute resolution was a matter to include in treaties until at least a century later. Numbered treaties Two through Eight each contain essentially the same provision that the signatories should obey and abide by the law, and maintain peace among themselves and with other bands, and assist Her Majesty's officers in apprehending offenders against the law or against the respective treaties. The intent behind the provision to obey and abide by the law should be obvious: to ensure the maintenance of law and order. The reference to the Indian signatories maintaining order among themselves is arguably a reference to customary mechanisms of dispute resolution. Some of the prairie peoples, were notable for their ancient "soldier" or "police" societies, by which order was kept at annual gatherings and in their large, communal hunts. Reasonable non-Aboriginal negotiators would not have contemplated extinguishing customary social control mechanisms that served to maintain order. It is certain that the Aboriginal signatories did not. Both parties had an interest in keeping the peace. The Aboriginal signatories to Treaty 7 anticipated that the role of the North-west Mounted police would be to protect their peoples from former enemies among

²⁹⁵ Canada, *Indian Treaties and Surrenders From 1689 to 1890 – in Two Volumes* (Ottawa: Brown Chamberlin, Printer to the Queen's Most Excellent Majesty, 1891) and Canada, *Indian Treaties and Surrenders From No. 281 to 483* (Ottawa: C.H. Parmelee, Printer to the King's Most Excellent Majesty, 1912) [hereinafter collectively *IT&S*, and designated volumes 1-3], vol. 3 at 256-58.

²⁹⁶ *IT&S*, *supra* note 295, vol. 3 at 262

other First Nations and from unscrupulous Whites.²⁹⁷ They did not contemplate a dismantling of their societies. The rule from Canadian case law is that treaties with Indians should be interpreted in light of the interpretation that the Indian signatories would have given them. And the common law rule is that infringements against customary legal rights, whether by surrender (treaty) or by statute (extinguishment), must be strictly construed because custom cannot be extinguished by light implication if avoidable. The conclusion must be, therefore, that social control mechanisms based on customary law were intended to continue in legal effect.

Alternatively, one could argue that the provision was merely *pro forma*, and was thus included in treaty without real attention to its substance or the obligation to honour the treaty's spirit. But it matters not whether the drafters of the treaty were consciously aware of the legal import of the provision. If they were aware, then the continuity argument is made. If they were not aware, then the requisite clear intent to extinguish was necessarily absent. In order for the treaty to have avoided the continuation of customary institutions, there would have had to be an intention to extinguish that right. In legal effect, even the vague words of the provision can have had no other effect than to affirm the status quo. The reference to Indians keeping the peace among themselves is therefore evidence that local legal customs and institutions of social control had not been extinguished.

Local custom and land tenure

In addition to reference to customary institutions for maintaining social order, there are also references to specific rules, such as for indigenous modes of land tenure. Land tenure in the Iroquois Confederacy, or Haudenosaunee, was governed by principles which were very unlike those in the common law system of England. Yet those Aboriginal principles found expression in treaties drafted largely by English legalists. In England land had been held for centuries almost exclusively by men, in a patrilineal society as a matter of social and legal policy, and as a social and legal presumption. This mode of tenure was part of a self-reinforcing complex of inter-related values and norms that supported a particularly Anglo-Saxon world view. And it was expressed and reinforced in innumerable small ways in legal language. But in many peoples around the world, land is held according to other schemes (only by women, for instance) in the context of particular cultural matrices of observances and practices.

In 1783 the British were defeated by the American revolutionaries. Many so-called *United Empire Loyalists* moved north to the remaining British colonies. Among them were much of the Haudenosaunee (Iroquois Confederacy), who moved as a coherent political and

²⁹⁷ Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Dorothy First Rider, and Sarah Carter, *The True Spirit and Intent of Treaty 7* (Montreal & Kingston: McGill-Queens University Press, 1996) [hereinafter *True Spirit*].

social unit. In order to accommodate them, the British made arrangements with the Mississauga people the following year for a parcel of land for the Confederacy to occupy. The 1784 document that commemorated this “surrender” of land to the Crown was signed by the “Sachems, war chiefs, and *principal women* of the Messissagues Indian Nation [emphasis added].”²⁹⁸ It was not common in that period to refer to women in legal documents unless the context specifically required it. Not only did Haldimand refer to women, but to ‘principal women’. Since women were not generally recognized in European society of the period as having a valid role in political or legal matters at the time, it is noteworthy that they were mentioned explicitly at all, and doubly noteworthy that they were acknowledged in their culturally appropriate socio-legal capacity. In the circumstances, the words were a clear recognition of the prominent role that women played in Mississauga government. Reference to them supports the assertion that their participation in the arrangement was recognized by Haldimand as legally required under local customary law.²⁹⁹ If Haldimand had merely indulged their participation as a political expediency, then there would have been no reason to mention them in his legal document. And even if he did indeed view it as a mere indulgence, then it is still evidence that the Mississauga considered it as legally required according to their own laws. Reference to “sachems” and to “war chiefs” is reference to functionaries within the local traditional/customary government constitutional structure.

Later the same year Governor Haldimand transferred the land to the Six Nations in the form of a grant.³⁰⁰ When the Six Nations relocated north to the newly acquired land they did so as an intact legal, social and political entity rather than as individuals. They intended to re-establish their society in the new place. This intent naturally included the exercise of their ancient laws, relationships and institutions. Interestingly, the 1784 Haldimand grant referred to the Six Nations as His Majesty’s faithful allies, rather than subjects. If the grant had referred to them as subjects, then there would be support for the argument that the people of the Six Nations could carry with them no other laws than the common law. But as

²⁹⁸ The signatories are referred to in a 7 December 1792 adjustment to the 1784 surrender in *IT&S*, *supra* note 295, vol 1 at 5.

²⁹⁹ There is precedent for this position in English case law. In *Combes’ Case* (1613), 9 Co. Rep. 75a, 77 E.R. 843 [cited to Co. Rep.] it was held that although the holder of land by customary tenure might surrender it personally in open court by the common law, where it was surrendered by attorney, the attorney must follow the requirements of customary law.

But it was resolved that the attorney ought to pursue the matter and form of the surrender in all points according to the custom, as the copyholder himself ought to have done; as if the surrender by the custom ought to be by the rod, or by any other thing, or in any other manner, the attorney ought to pursue it.

The fact that the British officials were undoubtedly unfamiliar with indigenous customary laws in the colonies does not detract from their evident efforts to observe the formalities of them, as required by English rules of legal procedure.

³⁰⁰ *IT&S*, *supra* note 295, vol. 1 at 251.

allies, their relationship with other British subjects would be analogous to that between the various ethnically and politically distinct groups under the peace of English King Alfred and Danish King Guthrum, living adjacent to each other, each according to its own internal laws and customs,³⁰¹ or Saxons and Jutes relocating as villages en masse, the adult men adding their fighting strength to that of their host when needed, and having land to farm when not.

By 1793 the Six Nations were becoming anxious that the informal nature of the 1784 Haldimand document might be seen as a mere licence to occupy the land, and not a true title to it. To satisfy those misgivings Governor Simcoe clarified and made more explicit the 1784 grant in Letters Patent January 14 and April 1, 1793. The grant confirmed ... to the said Chiefs, Warriors, Women and People of the said Six Nations, and their Heirs, the full and entire possession, Use benefit and advantage of the said District or Territory of Land to be held and enjoyed by them in the most free and ample manner and *according to the several Customs and usages* by them the said Chiefs, Warriors, *Women* and People of the said Six Nations [emphasis added].³⁰²

The grant went on to provide that no subsequent conveyance or alienation of the land would be valid except “among themselves the said Chiefs, Warriors, Women and People of the said Six Nations”, and that any surrender of the land could only be to the Crown.³⁰³ This accorded with long-established British law and policy in the Americas since the early 17th century. It is important to note the general reference to Six Nations customary law in the words “customs and usages” as recognition by the British of the continuity of customary law in principle. Even more significant is the reference to women as recipients of the grant. According to the Six Nations constitution, *Gayanashagowa*, women in the Six Nations are the owners of all the land and the soil.³⁰⁴ Since women were not generally considered in

³⁰¹ Saxon King Alfred the Great and Danish King Guthrum concluded a treaty in about 886, under which Saxon and Danish victims of murder, in a border region between the two kings’ respective dominions, were held “equally dear”, though their respective communities would continue to live under their own legal customs. The text of some laws under that treaty can be found in Attenborough, *supra* note 120. The area of Alfred’s and Guthrum’s Peace is seen in figure 5.

³⁰² *IT&S*, *supra* note 295, vol. 1 at 7. See also 14 January 1793 grant, *ibid.* at 9.

³⁰³ *Ibid.* at 8: “Provided always, that if at any time the said Chiefs, warriors, women and people of the said Six Nations should be inclined to dispose of and surrender their use and interest in the said district or territory or any part thereof, the same shall be purchased for us, our heirs and successors, at some public meeting or assembly of the Chiefs, warriors and people of the said Six Nations, to be holden or that purpose by the Governor, Lieutenant Governor, or person administering our Government in our Province of Upper Canada.” The restriction also appears in the same wording in the Simcoe Grant of 14 January 1793, *ibid.* at 10.

³⁰⁴ “The Constitution Of The Iroquois Nations: The Great Binding Law, *Gayanashagowa*” in A. C. Parker, *The Constitution of the Five Nations or The Iroquois Book of the Great Law* New York State Museum Bulletin No. 184. (Albany, New York: University of the State of New York, 1916) [hereinafter *Gayanashagowa*], online: University of Oklahoma College of Law Homepage <<http://www.law.ou.edu/hist/iroquois.html>> (last modified: 30 August 2000), provides as follows.

42. Among the Five Nations and their posterity there shall be the following original clans: [14 clans

English society as legitimate holders of land except in special circumstances, and since women in general were considered as not worthy of mention except where the law particularly concerned them, there can be no other explanation than that the reference to them in this grant was an explicit acknowledgement of Six Nations customary law.

The Six Nations adherence to their customary requirement for the participation of women in land dealings can be seen in subsequent documents around alienation of parts of the same parcel of land. On May 20, 1796, "the Sachems, War Chiefs and *Principal Women* of the Mohawk, Oghquaga, Seneka, and Cayuga Nations, residing at the Grand River, in the Province of Upper Canada [emphasis added]" purported to grant 2,000 acres of land through a formal sale, for the token consideration of one pound, to Nancy and Mary Margaret Kerr:

KNOW ALL MEN BY THESE PRESENTS that we, the Sachems, War Chiefs and Principal Women of the Mohawk, Oghquaga, Onandaga, Seneka and Cayuga Nations, residing at the Grand River, in the Province of Upper Canada, for and in consideration of the Goodwill, Friendship, and affection which we have for Nancy Kerr, and Margaret Kerr, *in whose veins flows our blood*, they being children of Robert Kerr and Elizabeth Kerr (daughter of Mary Brant *our sister*) and also in and for the further consideration of the sum of one Pound lawful money of the said Province ... do give, grant, enfeoff, alienate and confirm unto the said Nancy Kerr and Mary Margaret Kerr (as tenants in common) a certain Tract of Land [situated within the Haldimand (1784)/Simcoe (1793 grant)].³⁰⁵

Two points of interest arise from this document. One is that not only were women of the Six Nations mentioned generally in the document of transfer, but also that almost a third of the Six Nations signatories were women. This is evidence that the men of the Six Nations considered their presence as quite legitimate, and even requisite. The second point is the example of customary law being used to assert kinship by descent through the female line, rather than through the male line as with the Anglo-Saxons. Membership in a clan or Nation of the Six Nations Confederacy was determined by one's mother. This means that Mary Brant's children and her daughter's children were also members, as reflected in the phrase, "in whose veins flows our blood." The land transfer was therefore not directly to Europeans, which had been contrary to colonial law and policy for more than two centuries and

are named]. These clans distributed through their respective Nations, shall be the sole owners and holders of the soil of the country and in them is it vested as a birthright.

44. The lineal descent of the people of the Five Nations shall run in the female line. Women shall be considered the progenitors of the Nation. They shall own the land and the soil. Men and women shall follow the status of the mother.

³⁰⁵ *IT&S*, *supra* note 295, vol. 1 at 10.

reiterated in the *Royal Proclamation of October 7, 1763*.³⁰⁶ Instead, it was to Aboriginal women who were entitled to hold land by the customary law of their own people. Six Nations women continued to be featured in documents surrendering land to the Crown, and in Crown grants, well into the 19th century.³⁰⁷

From the beginning of colonization, customary laws of self-governance of indigenous peoples in the Americas were not only acknowledged, but the attention of colonial officials was especially directed toward discovering the substance of those customs. Following the issue of the *Royal Proclamation of October 7, 1763* Governor Murray was instructed in the following terms:

And you are to inform yourself with the greatest Exactness of the Number, Nature and Disposition of the several Bodies or Tribes of Indians, of the manner of their lives, and the Rules and Constitutions, by which they are governed or regulated. And you are ... to use the best means you can for ... uniting them to Our Government.³⁰⁸

Murray would not have considered these instructions novel or peculiar. In fact, it had already been Murray's established practice for several years to acknowledge Aboriginal customary law and to instruct his subordinates to give it due respect,³⁰⁹ according to the

³⁰⁶ Support for this assertion can be found in (e.g.) Brian Slattery, *The Land Rights of Indigenous Peoples, as Affected by the Crown's Acquisition of Their Territories* (PhD. Thesis, University of Oxford 1979) (Saskatoon: University of Saskatchewan Native Law Centre, 1979) at 112 ff. He notes that as early as 1634 the Massachusetts court had "ordered that 'no Person whatsoever shall buy Land of any Indian without License first hand and obtained of the General Court.' Any land purchased in contravention of this rule was to be forfeited to the colony." These provisions were repeated in a 1694 enactment. In 1701 it was enacted that purchases in violation of those provisions for the previous 65 years were null and void. The colony of Plymouth had similar legislation since 1643, and Connecticut in 1663 and 1687. Similar laws prevailed in New Haven (1639), New Hampshire (1641, 1686 and 1718), Rhode Island (1651 and 1658). Slattery also refers to a 1675 legal opinion by a number of leading English counsel in response to a question "whether a grant from the Indians was sufficient to furnish title to a settler without grant from the King or his assigns." The opinion was decidedly against such title

³⁰⁷ Cession by "the Chiefs, Warriors, Women and People of the Six Nations Indians" of 20 February 1845, in *IT&S*, *supra* note 295, vol. 1 at 132; cession of 12 January 1847, *ibid.* at 143; grant of 8 November 1850, *ibid.* at 170.

³⁰⁸ Cited in J. Leslie & R. Maguire, *The Historical Development of the Indian Act*, 2d ed., (Ottawa: Indian and Northern Affairs Canada, 1978) at 5. Note that at the time, the imperial officials did not believe that the customary systems of governance of the Indian peoples in the *Proclamation* lands were within the ambit of "Our Government".

³⁰⁹ THESE are to certify that the CHIEF of the HURON Tribe of Indians, having come to me in the name of His Nation, to submit to His BRITANNICK MAJESTY, and make Peace, has been received under my Protection, with his whole Tribe; and henceforth no English Officer or party is to molest, or interrupt them in returning to their Settlement at LORETTE; and they are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English: -- recommending it to the Officers commanding the Posts, to treat them kindly.

centuries-old Anglo-Saxon and Norman rule. Murray's instructions are reminiscent of instructions for stewards holding manorial courts in the time of William I, requiring them to acquaint themselves with the customs of the manor.³¹⁰

The Royal Proclamation of October 7, 1763 and legal continuity

Failure of British officials in the colonies to abide by the doctrine of continuity could be cause for disruption, as in the case of Quebec following the French cession in 1763. That instrument established governments in four newly acquired colonies for the administration of the affairs of the colonists and the making of laws. English officials in Quebec, however, interpreted the proclamation as disregarding the prior laws and customs, causing great concern for the French inhabitants. The Imperial Committee of Council for Plantation Affairs referred the matter to the Attorney and Solicitor General for a report. Although their report specifically addresses the concerns and rights of the French colonists, their observations on the continuity of laws applies also to the customary laws and institutions of the Aboriginal peoples – both within the territory known as Quebec, and elsewhere.

The report identifies two main sources for civil discontent in Quebec. The first is the administration of justice in the territory with little participation by the French in Quebec, by persons who did not speak the language and who conducted proceedings in a language not understood by Quebec parties, and the introduction of strange procedural forms. "This must cause the Real Mischiefs of Ignorance, oppression and Corruption, or else what is almost equal in Government to the mischiefs themselves, the suspicion and Imputation of them." The second major complaint was the construction of the *Royal Proclamation of October 7, 1763* put on it by some British judges and officers. They acted as if it were the intent of the *Proclamation* to at a single stroke "... abolish all the usages and Customs of Canada, with the rough hand of a Conqueror rather than with the true Spirit of a Lawful Sovereign". Protection and benefit of English laws had not been extended to the new French subjects, noted the report. Instead, unnecessary and arbitrary new rules had been introduced, tending to "confound and subvert rights, instead of supporting them."

In the Report the Attorney- and Solicitor-General endorsed a prior recommendation of the Lords of Trade that in all cases where property rights and claims are based on pre-conquest (i.e. by the British in Canada) events, French "usages and customs" should

Given under my hand at Longueuil, this 5th day of September, 1760.

JA. MURRAY

By the Genl's Command,

JOHN COSNAN, Adjut. Genl.

[This text taken from *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1031, 70 D.L.R. (4th) 427, [1990] 3 C.N.L.R. 127 [cited to S.C.R.], online: QL (SCJ).]

³¹⁰ Kiralfy, *supra* note 147 at 30.

prevail in courts. The Report went on to justify its recommendation through recourse to British law:

There is not a Maxim of the Common Law more certain than that a Conquered people retain their antient Customs till the Conqueror shall declare New Laws. To change at once the Laws and manners of a settled Country must be attended with hardship and Violence; and therefore wise Conquerors having provided for the security of their Dominion, proceed gently and indulge their Conquered subjects in all local Customs which are in their own nature indifferent, and which have been received as rules of property or have obtained the force of Laws. ... We are humbly of opinion, that it would be oppressive to disturb without much and wise deliberation and the Aid of Laws hereafter to be enacted in the province the local Customs and Usages now prevailing there. ... British Subjects who purchase Lands there, may and ought to conform to the fixed local Rules of Property in Canada, as they do in particular parts of the Realm, or in the other Dominions of the Crown. The English Judges sent from hence may soon instruct themselves by the assistance of Canadian Lawyers and intelligent Persons in such Rules, and may Judge by the Customs of Canada, as your Lordships do in Causes from Jersey by the Custom of Normandy.³¹¹

The analogy of Channel Islands law is just as valid today as it was in 1766.³¹² The report makes it clear that it was not uncommon in conquered territories for local laws or customs to govern such matters as the purchase of lands. Reference to the British Isles jurisprudence makes it unavoidable that the terms “usages and customs” were intended in their proper doctrinal context.

The continued application of the local laws of Quebec had come into question because The French Crown ceded its interests there following a British defeat there over French forces. This is not to say that Quebec laws had been extinguished – but some British persons in the Americas were notorious for interpreting the “conquest” in that light. The

³¹¹ U.K., *Report of Attorney and Solicitor General Regarding the Civil Government of Quebec to the Right Honourable the Lords of the Committee of Council for Plantation Affairs*, (14 April 1766), online: Solon Law Archive Homepage <http://www.solon.org/Constitutions/Canada/English/PreConfederation/report_1766.html> (last modified: 27 February 1988).

³¹² In 2001 a case went to the Judicial Committee of the Privy Council on appeal from the Island of Jersey, a British possession in the channel between England and France since 1066. At issue was a legal custom that was alleged to apply to a transfer of land. Having found that the custom had been duly proven, the majority held that the legal custom should be applied despite its incompatibility with the common law:

English law is of no assistance on this matter. It has been held that it is not legitimate to import the principles of English law into Jersey law relating to property rights, even if in any case this could be done [citation omitted]. It is important therefore, when one is applying the rule to the facts, to confine one's attention strictly to the limits and characteristics of the remedy for deception *d'outré moitié* that are to be found in the customary law of Jersey: *Snell v. Beadle*, [2001] J.C.J. No. 5 at para 23, [2001] U.K.P.C. [5] (P.C. Jersey), online: Q.L. (JCJ). The minority shared this view, but differed on the scope of the custom and the application of its characteristics.

report of the Solicitor- and Attorney-General correctly stated the law on point, but the question of legislation by the conqueror's prerogative came before the imperial courts again in 1774. In *Campbell v. Hall* (1774)³¹³ the Court of King's Bench was called upon to rule on whether the laws that prevailed in the colony of Grenada continued to have force in the face of prerogative legislation issued by the British king a few months after the October 7, 1763 *Royal Proclamation*. There the Court of King's Bench held that the pre-existing local laws continued to have legal force. Had it not been for the *Royal Proclamation*, George III would have had authority to impose new law by the conqueror's prerogative – though only in the conquered places. But such power to legislate terminated in each conquered colony as soon as it was granted its own legislature. Lord Chief Justice Mansfield ruled for a unanimous court that there is a presumption in favour of the continuation of the pre-existing law. He said the pre-existing law applies equally to everyone there – both inhabitants and new arrivals. The court ruled that the established local law is

the true rule for the decision of all questions which arise there: whoever purchases, sues or lives there, puts himself under the laws of the place, and in the situation of its inhabitants. An Englishman in Minorca or the Isle of Man, or the plantations, has no distinct right from the natives while he continues there. [The] laws of a conquered country continue until they are altered by the conqueror.³¹⁴

Lord Mansfield, through the cases he cited in support of the ruling, traced English law and practice back as far as the sixth century. He characterized the doctrine of continuity as a "maxim of constitutional law", and said of it:

no book, no saying of a Judge, no not even an opinion of any counsel public or private, has been cited; no instance is to be found in any period of our history where [the maxim] was ever questioned.³¹⁵

The principle is important because it applies not only to the situation and laws in Grenada and other "Proclamation lands", but as a general common law principle it applies also to other situations and local laws not covered by the Royal Proclamation. I refer specifically to the laws of Aboriginal peoples – not just to the peoples in the Ohio valley, but to peoples beyond the immediate purview of the *Proclamation* – whether in North America, Australia, Africa, India or elsewhere. Their laws are presumed to continue as a matter of constitutional common law, subject to clear alteration by competent authority. The position is untenable that George III and his cabinet could have been ignorant of the existence and implications of the continuity doctrine because the same Lord Mansfield who sat in judgment in *Campbell v. Hall* (1774) served, while Lord Chief Justice, in the cabinet upon whose advice the

³¹³ *Campbell v. Hall* (1774), *supra* note 150.

³¹⁴ *Ibid.* at 741.

³¹⁵ *Ibid.* at 746.

Proclamation was issued in 1763.³¹⁶ The *Proclamation* did, however, provide for the apprehension of some offenders in the proclamation lands. But those provisions applied only to offences committed within the colonies proper. Offenders were to be captured and sent under guard to the colony where the crime had been committed. There was no word in the *Proclamation* of establishing laws, or law enforcement mechanisms, for the proclamation lands.

Self-definition of membership recognized in legislation – band membership

Pre-Confederation colonial statutes sometimes made reference to Indian customs in a direct or indirect way. An 1850 statute of the Province of Canada referred to rights and privileges in Indians that did not vest in “persons of European descent”.³¹⁷ The statute provided that members of a band included persons “reputed to belong to the particular Body or Tribe of such Indians”, and all persons “adopted in infancy by any such Indians”.³¹⁸ Given the small non-Aboriginal population in the territory, and that membership of bands would therefore be known only to the bands themselves, the reference to “repute” can only mean the opinion within the Aboriginal communities themselves. The legislation acknowledges, therefore, the right and custom of bands to define their own membership.³¹⁹ Similar legislation was enacted the same day for Upper Canada.³²⁰ These provisions remained with minor changes until 1869, when the infamous “marrying out” provisions first appeared, by which upon marriage an Indian woman and the children of the marriage were deemed to

³¹⁶ The legal doctrine in *Campbell v. Hall* (1774) was not known only to legal professionals, but was widely accepted and understood. Note the similarity in language between that of Lord Mansfield and that of the 1766 report of the Attorney and Solicitor General, quoted above at 100. If such respect is lawfully due a conquered people and their legal systems by British law, then it can be no less due to the Indian peoples who were Britain’s allies, of whom no question of conquest can be entertained. At least some of those peoples continued to be referred to as allies, rather than as subjects, in official documents long after the *Royal Proclamation of October 7, 1763*. In the Haldimand grant of 1784 to the Six Nations, for instance, those people were referred to as “His Majesty’s faithful allies” and not as subjects: *supra* note 300.

³¹⁷ *Indian Lands Protection Act, 1850* (Lower Canada), *supra* note 2, preamble.

³¹⁸ *Ibid.* s.5.

³¹⁹ All four subsections of the definition of “Indian” recognized and accommodated the principle of kinship, as the basis for membership. Membership could on the basis of “Indian blood”, marriage with an Indian, or descent from a single parent “on either side” who was an Indian. Note also the reference to adoption. Since the notion of adoption was unknown to the common law, and was not the subject of general statute for non-Indians in Canada until 1873 in New Brunswick, the inescapable inference is that the legality of adoption by customary law was recognized by the 1850 statute.

³²⁰ *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, S. Prov. Canada 1850, c.74 [hereinafter *Indian Lands Protection Act, 1850* (Upper Canada)].

have acquired the status of her husband – Indian or non-Indian, or members of other bands, as the case may be.³²¹ The purpose of the marrying out clause was to restrict access by the woman's white husband to Indian lands, and not to extinguish the right of bands to determine their membership by their own customs for other purposes. Self-determination of band membership was bolstered in the 1876 consolidation of Indian legislation. Indians who statutorily lost band membership after being five years out of the country without leave of the Superintendent-General could not regain band membership without permission from the band. And while enfranchisement had been available to Indians since 1869, the 1876 Act required the consent of the band before one of their men could avail himself of it.³²²

Self-definition of membership by band custom was also recognized by treaty commissioners. In 1873 Lieutenant-Governor Morris reported that the Chippewa participants in the North-West Angle treaty included husbands of Indian women, who lived with the bands as members of the Aboriginal communities. In response to a plea by a Chippewa chief to consider their mixed-blood kin as band members the Lieutenant-Governor instructed the "Half-breed" members of the band to define themselves as Indians or as whites for the purpose of the treaty:

Chief: I should not feel happy if I was not to [take meals] with some of my children that are around me -- those children that we call Half-breed -- those that have been born of our women of Indian blood. We wish that they should be counted with us, and have their share of what you have promised. We wish you to accept our demands. It is the Half-breeds that are actually living amongst us -- those that are married to our women.

Governor -- I am sent here to treat with the Indians. In Red River, where I come from, and where there is a great body of Half-breeds, they must be either white or Indian. If Indians, they get treaty money; if the Half-breeds call themselves white, they get land. All I can do is refer the matter to the government at Ottawa, and to recommend that you [sic] wish be granted.³²³

Lieutenant-Governor Morris' instructions to the mixed-blood persons to choose their own status is clearly consistent with the view that the right of bands to define their own membership had not been extinguished. Those instructions must be seen as affirmation and

³²¹ *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c.6, s. 6* [hereinafter *Gradual Enfranchisement Act, 1869*].

³²² *Indian Act, S.C. 1876 c. 18* [hereinafter *Indian Act, 1876*], s. 86. The voluntary enfranchisement provisions specifically referred to men, and not to women. Interestingly, few took the step of enfranchisement. The Indians did not see the same advantage in the provision that had been envisioned by the legislators.

³²³ Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including The Negotiations on which they were based* (Toronto: Belfords, Clark & Co., 1880) (reprint Saskatoon: Fifth House, 1991) at 69.

recognition of the right. The consistent pleas of the bands that the "Half-breeds" in their midst be included in the treaties, are evidence that the usual membership principle was to include kin, according to band custom. Further, the repeated practice by the treaty Commissioners in recognizing and acceding to band requests to include married-out women and their families is evidence that the government in fact recognized bands' right to define themselves, despite the government's attempts to regulate them from access to Indian land. The British Columbia Court of Appeal has recognized that proof of an Aboriginal right may be shown by recognition through legislative or administrative action.³²⁴

Respect for band custom in the process of land surrender was also mandated by statute. From the 1860s a clause began to appear in Canadian treaties that in principle acknowledged the continuity of indigenous rules of governance. The clause was a declaration that the meeting at which a surrender of land was approved had been called according to the rules of the surrendering band.³²⁵ The clause appeared in surrender documents from coast to coast into the 20th century.³²⁶ One might argue that the attention "to their rules" was mere lip service to customary law. That argument is possibly correct. Nevertheless the legalists in the dominant society considered such legal form to be essential to the validity of the land transfers. That argument is also correct. And the failure of the government negotiators to seriously consider customary law cannot be entertained in legal argument on behalf of the Crown because the Crown is required by the common law, as font of justice, to uphold and abide by all law. The express statutory requirement that local rules of governance be observed is therefore an explicit recognition that certain aspects of customary government continued to apply. Neither governmental officials nor courts of law are entitled to disregard that recognition, or the constraints that it placed on both the tribal and the federal negotiators/signatories.

³²⁴ *Sparrow v. R.* (1986), 36 D.L.R. (4th) 246, [1987] 2 W.W.R. 577 at 597, 9 B.C.L.R. (2d) 300, [1987] 1 C.N.L.R. 145 (B.C.C.A.) [cited to W.W.R.].

³²⁵ *An Act respecting the Management of the Indian Lands and Property*, S. Prov. C. 1860, c.151, s. 4(1) [hereinafter *Indian Lands Management (1860) Act*] provided that no surrender of reserved land would be valid or binding unless certain conditions were met, including

Such release or surrender shall be assented to by the Chief, or if more than one Chief, by a majority of the Chiefs of the tribe or band of Indians, assembled at a meeting or Council of the tribe or band summoned for that purpose *according to their rules* and entitled under this Act to vote thereat, and held in the presence of an Officer duly authorized to attend such Council by the Commissioner of Crown lands ... [emphasis added].

³²⁶ *IT&S*, *supra* note 295 provides a number of examples, including surrenders by the Colpoy's Bay Band (Province of Canada) 17 August 1861: *AT&S* vol. 1 at 233; Sumas Lake Band (British Columbia) 21 January 1891: *IT&S* vol. 3 at 18; River Desert Band (Quebec) 27 January 1891: *IT&S* vol. 3 at 22; Ermine Skin's Band (District of Alberta North West Territories) 18 April 1891: *IT&S* vol 3 at 28; Nipisiquit Band (New Brunswick) 21 April 1896: *IT&S* vol. 3 at 184; Chacastapasin's Band (Saskatchewan) 23 June 1897: *IT&S* vol. 3 at 200; Alnwick Band (Ontario) 13 May 1899 *IT&S* vol 3 at 263; and Crane River Band (Manitoba) 24 October 1903: *IT&S* vol 3 at 395.

Chapter summary

The myth of absolute royal power has been exposed as having no basis. And since the monarch is always under the law, any pretended exercise of authority beyond what the law allows can have no legal consequences. There has never been a royal power in Canada to extinguish customary laws by royal prerogative or by discretionary act. In the alternative: even if there were a prerogative power to do so, it has not been exercised to that effect. In fact, the opposite is true: legal customs of Aboriginal peoples have been affirmed in royal proclamations, treaties, instructions to colonial officials and royal grants and more. Moreover, the continuity has been recognized in colonial and dominion statutes. It follows that local customs continue in legal effect. This assertion naturally gives rise to important questions. How can legal customs be recognized? How are they proven? What are the standards of proof and where lies the onus of it? And how are judges to deal with customary law if it is alleged before them? We will turn to these questions in the next chapter.

Chapter 5 – The Modern Common Law Doctrine of local legal custom

Chapter overview

The common law doctrine of custom has a clearly defined body of principles to guide courts of law in assessing alleged custom's validity, and in applying it. When a custom is alleged as law, courts must assess it. The common law provides for onus of proof, standards of proof, and legal presumptions at various stages in proving its legal existence. A valid custom must have four essential attributes: certainty, legal reasonableness, immemorial origin and continuity. The terms have been defined in some precision by consistent and ample jurisprudence from the medieval period through to the present day.

Legal custom can be extinguished in only three ways. It can be extinguished by a clear statute or second, by incompatibility with the Crown's sovereignty itself. Finally, there is the conqueror's prerogative of giving or abolishing laws, but the law presumes against the latter, and any change in law must be expressly made. Extinguishment should not be lightly implied, and can only be accomplished by clear statute or unavoidable construction. The law is not only what the monarch or a transient majority in a legislature finds it expedient for the moment to recognize. No extinguishment can occur merely by lack of a positive act of confirmation.

The common law flowed as a legal presumption into acquired territories, in full measure, and in all places and matters, in default of other law. That is, the common law is presumed to speak, except if custom has already provided a rule to govern the point in question. As an exception to the common law, local legal custom must be proven, whereupon the rule of law requires that it be judicially considered, within its narrow terms. Both the common law and local custom constrain statute to a strict construction when infringed by it.³²⁷ Where local custom is silent, the common law speaks. And legal custom can speak where both the common law and statute are silent or ambiguous, as in the division of family

³²⁷ E.A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 211 expresses the principle as a presumption "that the Legislature does not intend to make any substantial alteration of the law beyond what it explicitly declares, either in express terms or by clear implication. The principle may alternatively be expressed as a presumption against an intention by Parliament to interfere with vested rights. It is supported by the following passage from *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629 at 638, [1933] 4 D.L.R. 545 [hereinafter *Spooner Oils* (1933) cited to S.C.R.]:

A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" [citation omitted], unless the language in which it is expressed requires such a construction. The rule is described by Coke as a 'law of Parliament' (2 Inst. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference. (per Duff C.J.).

Halsbury's Laws of England, vol. 12(1), 4th ed. reissue (London: Butterworths, 1998) at 198-99, para 646 "Abolition by Statute" notes, "[I]f there is any uncertainty as to whether a general statutory provision is inconsistent with a custom, the custom will be taken to survive."

property on Indian reserves upon the breakup of marriage partners.³²⁸ In some cases courts can give remedy for breach of customary law by individuals or for unconstitutional governmental action. In addition this chapter discusses some challenges common law courts must address in applying the criteria and giving remedy, if and when available.

What is “custom” in the common law

A leading case on the relationship of customary law to the common law, and on the requirements of proving customary law, is *Hammerton v. Honey* (1876).³²⁹ There the court said that custom takes the place locally of the common law. It is not statute law, but it is local law because it is the law of the particular place as distinguished from the general common law. Local legal custom is the law of the place as it existed before the time of legal memory – or the time of which the common law can take notice. In England, that is generally taken to mean the time of Richard I, whose reign began in 1189.³³⁰ As local law, custom takes the place that would ordinarily be occupied by the general common law.³³¹ *Halsbury's* says custom and the common law are of “co-ordinate” or equal authority, and are as equally binding.³³² All local customs wherever they may operate are subject to judicial review in accordance with the principles of common law which govern the validity of customs.³³³ It is well established that courts must consider legal custom³³⁴ where proven.

³²⁸ Chapter six below discusses some ways in which customary law can have modern application to family law in Aboriginal contexts. But a brief foretaste of that discussion is appropriate here. Provincial laws are not effective in binding Indians *qua* Indians, or their lands. This means that provincial statutes relating to division of property upon the divorce of marriage partners do not apply to lands on reserves: *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, (1986) 26 D.L.R. (4th) 175, [1986] 3 W.W.R. 193, [1986] 2 C.N.L.R. 45, online: QL (SCJ) [hereinafter *Derrickson*]. And there is no federal statute on point.

³²⁹ *Hammerton v. Honey* (1876), *supra* note 55. This case was cited with approval by the Court of Appeal Chancery Division in *Mercer v. Denne* (1905), *supra* note 55 in respect of its recitation of the law of custom, and by English courts into the 1990s. For example, *R. v Suffolk County Council ex parte Steed*, [1996] NLOR No 3668 (U.K., C.A.), online: QL (NLOR) [hereinafter *Steed* (1996)]; *Sunningwell* (1999), *supra* note 237; *Perry v. Norfolk County Council*, [1996] E.W.J. No. 1896 (H.C., QB Div), online: QL (EWJ.) [hereinafter *Perry* (1996)].

³³⁰ *Hammerton v. Honey* (1876), *supra* note 55 at 603.

³³¹ *Ibid.*; *Falmouth (Lord) v. George* (1828), 5 Bing 286 at 293, 130 E.R. 1071 [hereinafter *Falmouth* (1828)] (per Best C.J.); *Lockwood v. Wood* (1844), [1843-60] All E.R. 415 at 418 (Ex. Ch. on appeal) (per Tindal C.J.).

³³² *Halsbury's Laws of England*, vol 12(1) 4th ed. reissue *supra* note 327 at 155, para 601; *Smart* (1881), *supra* note 20 at 170.

³³³ *Halsbury's Laws of England*, vol 12(1) 4th ed. reissue *supra* note 327 at 155, para 601.

³³⁴ *Anonymous – Case 104* (1706), 11 Mod Rep. 68, 88 E.R. 892.

And where customs have already been affirmed, judicial precedent is admissible to prove or disprove customs as alleged.³³⁵ Customs may give rise to enforceable rights (as in the land of another),³³⁶ impose burdens on one class of persons for the benefit of others,³³⁷ impose legal duties,³³⁸ or absolve persons of duties otherwise imposed by the common law.³³⁹ Despite custom occupying the place of the general common law within a particular locality, custom must yield to clear statute. Only Parliament can extinguish a legal custom.³⁴⁰ General words, however, are not sufficient to extinguish a custom.³⁴¹

Proving custom – onus

Since the common law is presumed to apply everywhere, and since judges in the common law system are presumed to know it, common law of course need not be proven. Customary law, on the other hand, is offered to displace the presumptions of the common law, and therefore it must be proven where it is alleged. It is not surprising that the onus of such proof is on the party alleging it. Rebuttal is accomplished through attacking any of the four required elements of immemorial origin, continuity, certainty or reasonableness.

³³⁵ *Falmouth* (1828), *supra* note 331; *Hammerton v. Honey* (1876), *supra* note 55.

³³⁶ *Tyson v. Smith* (1838), [1835-42] All E.R. 94; *Lockwood v. Wood* (1844), *supra* note 331 at 418; *Hall v. Nottingham* (1875) 1 Ex. D. 1; 45 L.J.Q. 50; 33 L.T. 697; 24 W.R. 58 (C.A.); *Mercer v. Denne* (1905), *supra* note 55.

³³⁷ See *Halsbury's Laws of England*, vol. 12, 4th ed., *supra* note 53 at 12, para 417.

³³⁸ *Egerton v. Harding*, [1974] 3 All E.R. 689 (C.A.).

³³⁹ *Parochial Church Council of Aston Cantlow and Wilmcote with Billesley, Warwickshire v. Wallbank*, [2000] T.N.L.R. No. 176, *The Times*, March 30, 2000 (Ch. Div.), online: QL (TLR) [hereinafter *Wallbank* (2000)] *per* Ferris J:

"At common law the repair of an ancient parish church was the obligation of the rector of the parish, whether spiritual or lay, *in the absence of a custom to the contrary*, and a lay impropiator in receipt of the rents and profits of the rectory was liable for repair even where at the time he purchased the land forming part of the rectory he had no notice of the liability...[emphasis added]"

The judgment was reversed in *Wallbank v. Aston Cantlow Parish*, [2001] E.W.J. No. 2236 U.K. C.A.), online: QL (EWJ.) on the ground that on the facts of the case, the common law liability was unenforceable because it was contrary to the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and the *Human Rights Act 1988* (U.K.), without disturbing the observation about local customary law.

³⁴⁰ *Infra* note 413 and accompanying text.

³⁴¹ *Infra* note 413 and accompanying text; also the discussion of the *Denbigh Custom* (1579) case *supra* note 187 at 59, and *Leicester v. Burgess* (1833), *supra* note 20, below at 130.

Courts need not judicially consider custom unless it is pleaded.³⁴² In some respects customary law is treated the same way as foreign law, and in other ways customary law is dealt with more leniently. With foreign law, common law courts are not entitled to take judicial notice of it. Foreign law must be proven by expert witnesses.³⁴³ In the absence of such expert testimony, Canadian courts will act as if the foreign law is the same as the *lex fori*, the law of the particular forum.³⁴⁴ Unlike foreign law, customary law can be treated in part as an ordinary fact, not strictly requiring in principle the testimony of specially qualified experts to prove local custom. Customs which have been proven in previous cases, moreover, may be noticed without proof. Nevertheless, practical considerations may dictate the assistance of experts in order to avoid injustice. In England local customs usually derive from variations on the common cultural theme with which judges have a reasonable familiarity. Local Aboriginal customs, on the other hand, arise from cultural practices that are embedded in a matrix of mutually reinforcing ceremonies, symbols, rights and obligations, shaped by the culture's world view. Judges are unlikely to be unfamiliar with such things. This means that persons with special knowledge will sometimes be necessary to assist courts in assessing the cultural significance of the practices that are alleged to have legal significance. The proof of customary law, is in large measure a question of fact, and must come from the Aboriginal societies themselves. But the "reasonableness" of those practices, in the context of the particular people who the customary law is said to affect, is a question of law. Mainstream judges are unlikely to have the training and understanding necessary to allow them always to conceptually stand outside their own cultural background, and assess such "legal reasonableness" cross-culturally. Such legal reasonableness requires an understanding of the legal and social context in which the alleged custom functions. Judges may on occasion require, therefore, the assistance of experts in legal anthropology.

³⁴² *Hunt v. Hargill* (1719), Fortes. Rep. 347, 92 ER 884, (sub nom. *Hargill v. Hunt*) 11 Mod. Rep. 304 [cited to Fortes.]

³⁴³ *Amosin v. The Mercury Bell*, [1986] 3 F.C. 454, 27 D.L.R. (4th) 641 at 644-45, 66 N.R. 361 [cited to D.L.R.].

³⁴⁴ In some circumstances courts in Canada are permitted to notice foreign law without proof. For the purpose of an application under Part 3 of the *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 54 provides'

For the purpose of an application under this Part, a court may take notice, without requiring formal proof, of the law of a jurisdiction outside British Columbia and of a decision of an extraprovincial tribunal.

If a court can take notice, without proof, of foreign law, then why not (with proof) of local custom, where the common law mandates it? See discussion of family law in modern application in chapter 6 below.

The common law requires that legal custom must have four essential attributes: immemorial existence, reasonableness, certainty, and continuity.

a) Immemorial existence

The first essential element is that the custom must actually or presumptively have existed from time immemorial, or “time out of mind”. Evidence that the practice has existed as of right as long as human memory will raise a presumption in law of its longevity. In order for the practice to exist as a right it must have had a beginning that was not contrary to law at that time. It is not necessary to prove a legal beginning, however, because the legal rule is that “wherever there is an immemorial usage, the court must presume every thing possible, which could give it a legal origin.”³⁴⁵ The mere possibility of a non-lawful beginning is not sufficient to defeat the presumption. In *Brocklebank v. Thompson* (1901) the owner of an estate in Cumberland, England sued in trespass against an inhabitant of the parish for using a footpath on private land. The path ran past the front of the mansion-house, to and from the nearby eighth-century church. The defendant alleged that it had been the custom from time immemorial that inhabitants of the parish had the right to use the footpath for going to and from the church, despite the path not being public. Joyce J. held,

I find as a fact, that the disputed way has been used as of right for as long back as living memory extends ... Rights, or alleged rights, which have been long enjoyed are deemed to have a legal origin, if such be possible, which, in the absence of proof that it is modern, is deemed to have commenced beyond legal memory.³⁴⁶

He upheld the custom and found that any person who was within the custom could bring an action for obstruction “irrespective of special or particular damage sustained by him individually. On that basis he ruled, “[I]f the defendant presses for it, I think he is entitled to a mandatory injunction”.³⁴⁷

Once the practice that supports a custom is proven to have existed since beyond living memory, the presumption is raised that it has existed since beyond legal memory. This is rebuttable by proof that it is not possible for the custom to have existed for the requisite time. This can be done by various means, such as showing that it was extinguished by a known statute, even if that statute has since been repealed. Alternatively, one could prove the impossibility of an alleged custom’s existence by demonstrating that an incompatible valid custom has existed within legal memory, because customs cannot be set

³⁴⁵ *Cocksedge v. Fanshaw* (1779), *supra* note 239 at 132.

³⁴⁶ *Brocklebank v. Thompson* (1901), *supra* note 55 at 350.

³⁴⁷ *Ibid.* at 355

up in opposition to each other.³⁴⁸ Another means is to show that the alleged custom arose at some more recent time as, for instance, a response to an identifiable event, a statute, or regulations.³⁴⁹ The onus of rebuttal of custom in any respect lies on the party seeking to rebut it.

The terms “time immemorial” and “time out of mind” arguably lack precision in colloquial use. In order to provide a more certain meaning to those terms, the English courts took as their guide provisions of early statutes restricting the periods within which actions for the recovery of land had to be brought. In 1275 a statute of Edward I³⁵⁰ set the cut-off date as 1189 – the last year of the reign of Henry II. The statute provided that no action under a writ of right could be brought for any claim based on alleged possession of land before that king’s reign.³⁵¹ Any allegation of possession before that time were facts which courts could no longer consider: they were beyond legal memory. By analogy, English courts extended the notion of “beyond legal memory” to all matters of prescription and legal custom. Hale notes³⁵² that any statutes that were made before 1189 are no longer pleadable

³⁴⁸ *William Alfred’s Case* (1610), 9 Co Rep 57b, 77 E.R. 816 [hereinafter *William Alfred* (1610) cited to Co. Rep.]. Where two immemorial customs are alleged that are absolutely incompatible with each other, they cannot both be accepted. It is clear that such laws cannot co-exist in the same place and time. But where one is merely a qualification of the other they are not inconsistent. See also *Blackstone’s Commentaries*, *supra* note 5, “Introduction” at 67-68.

³⁴⁹ It is known that some practices that originally were imposed on bands and Indian bands and Nations were subsequently internalized by the respective peoples, and then held out by them as “traditional” practices. Many of the traditionally matrilineal and/or matriarchal Aboriginal societies have since adopted the patrilineal and patriarchal model imposed by Canada’s Indian Act and regulations, and have internalized that model to the extent that many of their members believe it to be an Aboriginal right of immemorial origin. Others have taken organizational models imposed on their communities by missionary societies, and in modern times described them as pre-contact models in similar detail as if reading from the letters in which the missionaries first proposed them. On the other hand one should be careful of discounting allegations of custom merely because the practices take the form of imposed or recently introduced models. To do so would ignore that such models could be embraced or resisted according to their similarity with ancient rights and practices. The mere fact that an elder uses a European term to describe an important community official in her youth is no guarantee that such official did not perform customary duties. And the closer the fit between the introduced model and truly indigenous community structure and organization, the more likely the model would be accepted.

³⁵⁰ *Supra* note 19.

³⁵¹ Note that the writ of right was the favoured legal device for giving effect to the promised restoration of lands, provided for in the Treaty of Winchester, 1153, discussed above at 45. In that Treaty, King Stephen and (his successor) Henry II promised that those who had been dispossessed of their lands in the lengthy and devastating civil war (1135-53) would be restored. Henry died in 1189, and his son, Richard I took the throne. By providing that no subsequent legal action could be commenced in respect of possession of land before the end of Henry’s reign, the 1275 statute, *supra* note 19, in effect settled that all returns of lands as promised in the 1153 Treaty of Winchester should be deemed to have been accomplished by the judges of Henry’s time.

³⁵² Hale, *supra* note 121 at 3.

as Acts of Parliament, because such laws did not have a beginning of which the law can take notice, but they continue their legal force “by meer immemorial Usage or Custom”. In Britain today, local legal custom and common law consists generally of law that predates 1189.³⁵³ And it is rebuttable through proof that it could not possibly have existed at some particular time since then. The rationale is understandable (in the English context) for holding to the 1189 date in respect of customs that have gone with land that has been part of the realm since that time. But what of possessions that have been acquired since then? English case law suggests that in respect of more-recent acquisitions of territory, the time of “legal memory” should be differently determined.³⁵⁴

In *Isle of Man v. Mylchreest* (1897)³⁵⁵ the Crown had granted out a lease of the mines and minerals under a certain estate, by virtue of which the lessees proceeded to work the clay and sand there. In the normal course of the common law the Crown could claim the right to mines and minerals by royal prerogative, and could grant them away. Mylchreest, however, obtained a judgment in the Chancery Court of the Isle to restrain the workings, on the ground that the right to mine the sand and clay belonged to him (Mylchreest) by right of local legal custom. The Crown appealed to the JCPC. The decision hinged on whether the alleged local custom to extract clay and sand for commercial and other purposes excluded the royal prerogative. The judgment notes that in earlier times the Isle of Man was subject to the kings of Norway, and later came under the sovereignty, at different periods, of the kings of England and of Scotland. The Isle of Man had most recently become subject to the English Crown when gained by conquest from the Scots in the reign of Edward III (1327-77). And even so, the lords of the Island continued to be kings in their own right from that time until the reign of Edward IV (1461-83), when Thomas Lord Derby renounced that

³⁵³ But see *Mylchreest* (1879), *supra* note 19, discussed below. The strict requirements pertaining to “time immemorial” can be adjusted in some instances to meet local historical circumstances. *Halsbury's* says generally that copyhold and other manorial customs are subject to the same tests for validity as other local customs. But there can be differences in the application of the tests, such as a more flexible standard of legal reasonableness in the case of copyhold tenures. *Halsbury's Laws of England*, vol. 12(1) 4th ed., *supra* note 327 at 190, para 642.

The rule as to immemorial existence is not applied strictly in the case of copyhold. As a matter of history, it is certain that copyhold tenure did not exist as such in 1189, before the introduction of court rolls, and yet this is no longer an objection to its presumed immemorial existence since it can be regarded for this purpose as a continuation of villeinage tenure.

Copyhold tenure was extinguished by statute in the 20th century, but some local incidents of such tenure remain.

³⁵⁴ In India the English common law rule of time immemorial, in the English sense, is not required to establish a custom. It is sufficient that the court is satisfied of the reasonableness, certainty and existence for a sufficiently long time to have become the customary law of the place, and that the practice was considered to be followed as of right. (*Halsbury's Laws of England*, vol 17, 4th ed., (London: Butterworths, 1976) “Scottish, Irish and Commonwealth Cases” at 10, para. 16, citing *Prannath Kundu v. Emperor* (1929), I.L.R. 57 Calc. 526 (India).

³⁵⁵ *Supra* note 19.

title.³⁵⁶ Since the common law presumes local customs to continue upon the assertion of the sovereignty (of the English Crown), the court found it unnecessary to inquire into the existence of the alleged custom from an earlier period in which English sovereignty was not itself in effect, or even from when another king (albeit subject to the English Crown) held the Island. Sir Montague Smith said for the court,

In considering whether the custom is ancient and immemorial, the question is not encumbered by the arbitrary rule of the English law, which has fixed [1189] as the period of legal memory. From the evidence that the custom has existed beyond legal memory, it may, their lordships think, be presumed to have had an origin, if that were necessary to be found, before the grant of Henry IV [1399-1413] ... How much earlier it is unnecessary to inquire. *It is sufficient to say that the evidence warrants the presumption that the custom grew up with the consent of the former Lords of the Manor of Man at a time when they were free to give consent.*³⁵⁷

Two important points are revealed in the *Mylchreest* judgment. First, the date from which a local legal custom must be shown to have originated can vary according to the time and circumstances of the assertion of sovereignty. That is, the cut-off date can be no earlier than the date at which British sovereignty was asserted; and even later where pre-existing governing entities retain their powers, rights and prerogatives in full, albeit being subject to the British Crown. Second, the principle was reaffirmed that minor prerogatives³⁵⁸ of the Crown are determined/constrained by the existence of local legal custom that already occupies the legal space which the common law, on which royal prerogatives ordinarily rest, would otherwise occupy.³⁵⁹

³⁵⁶ *Ibid.* at 301.

³⁵⁷ *Ibid.* at 304 [emphasis added]. It is also interesting to note that the court held the custom to be valid. And therefore the royal prerogative, which ordinarily would be upheld elsewhere in the realm, was not valid.

³⁵⁸ *I.e.* those prerogatives that do not go to the heart of the monarchy or to the constitution of government or law. See discussion of major/minor prerogatives above at 65 ff.

³⁵⁹ See (e.g.) the cases of *Lord Advocate v. Balfour* (1907), 45 Scottish Law Reporter 372 [hereinafter *Balfour* (1907)], and *Lerwick* (1903), *supra* note 210. *Balfour* concerned a right to fish for salmon. By the common law of Scotland, that right ordinarily “vested in the Crown as a patrimonial and beneficial right, and remained with the Crown unless expressly or constructively granted out to the subject”: *Balfour* at 374. Clearly, the royal prerogatives are not everywhere the same throughout the Crown’s dominions because that prerogative does not exist in England, for instance. And granting a private right to fish is contrary to *Magna Carta*. Yet even within Scotland, the right of salmon fishing does not exist in all places.

It certainly cannot be maintained that the partial adoption of the feudal system in matter of tenure has so affected the whole of the Orkneys as to bring those parts which have not been feudalised under the Scots law of salmon fishing rights. (*Balfour* at 377.)

In *Lerwick* it was held that the Crown does not hold radical title to a particular piece of land in Shetland. The Crown’s right there is merely one of sovereignty and not of property. Together the three cases demonstrate that it is not an inherent right or prerogative of the Crown to take or alienate minerals (*Mylchreest*), fish (*Balfour*) or land itself (*Lerwick*), where constrained by local custom. In order for a minor royal prerogative to

In the context of Aboriginal custom in Canada (especially Metis practices and rules/laws) such a remote date as 1189 is inappropriate from both a practical viewpoint and a legal one. By the *Constitution Act, 1982* "Aboriginal" in Canada includes Metis people.³⁶⁰ A strict enforcement of the 1189 requirement would mean that the Metis people would be excluded from the application of the doctrine, because Metis as a social group cannot possibly have existed until five centuries or more later. In Canada and other overseas places colonized by the British, there are political considerations that do not necessarily hold for Britain. For one, in Britain sovereignty had been asserted long before the time of Richard I, but not so in the overseas colonies. Since the state of legal affairs in Canada was of no legal political or social or economic concern to England before the time of contact, it is not reasonable to set the date of legal memory before that time. It goes almost without saying that the time of contact must vary according to the group in question, and how we define "contacted". Indeed, there are good social, political and legal reasons to set such a limitation as no earlier than the time when sovereignty was asserted.

As the *Mylchreest* ruling suggests, a legal principle was valid so long as the persons upon whose consent the validity depended were free to give their consent. For present purposes, therefore, the time of legal memory should be the time at which that freedom legally ended. Otherwise, Aboriginal peoples would be denied the capacity to adjust their respective legal regimes in response to emerging political, social and economic realities in the decades or centuries between contact and the assertion of sovereignty. The rule of law and the doctrine of continuity require that if a law existed for them at the time sovereignty was asserted, then it is presumed to continue in legal force unless and until altered by a positive act by a competent legal actor. To set the time limit for the origin of Aboriginal legal custom back to the time of contact (or to 1189) would imply that the assertion of sovereignty had a retroactive legal effect, such that evolution of local law would be deemed to have been frozen centuries before British sovereignty over the place had even been asserted. Such must surely be an absurd legal conclusion.

If the principle is applied, that the time of immemorial custom dates from when the "lords" of the place (to use the language of *Mylchreest*) were free to consent to the local customs, then the door is open to recognize Aboriginal law-ways that arguably have arisen since 1189. Two examples come to mind: the Iroquois Confederacy (Haudenosaunee) constitution, and the law ways of the Metis. The Iroquois Constitution, *Gayanashagowa*³⁶¹ is reputed to have been established some time in the fourteenth or fifteenth century – after 1189 but before European contact. If the 1189 restriction were to be applied, then those provisions of the constitution which relate to the Confederacy itself would be doctrinally

prevail in case of conflict, local custom must first have been extinguished. The prerogative itself is not sufficient to extinguish custom, except where local law is explicitly altered upon conquest.

³⁶⁰ *Constitution Act, 1982*, *supra* note 59, s. 35(2).

³⁶¹ *Supra* note 304.

inadmissible as customs *per se*, though other some other provisions might arguably be merely the formalized statement of law ways that were already established custom among the member Nations of the more recent Confederacy. In the Iroquois case, other grounds for recognizing the laws in their constitution also exist, such as where they have been recognized in treaties and grants.³⁶²

The law ways of the Metis people are especially problematic if the 1189 rule is applied. But if the time of "legal memory" is set at the assertion of British sovereignty, then the legal hurdles in establishing their customary law are not insurmountable. The Metis in Manitoba, for instance, made treaties in the mid-nineteenth century with neighbouring peoples on the prairies, including the Sioux, at a time when such peoples were admittedly free to give their consent to such treaties. Those treaties were not for the soil itself, but rather for the use of the land. And Metis customs at the assertion of sovereignty applied to the use of that land, not to the soil itself. Therefore there could be no conflict with arguments that feudal laws³⁶³ applied, whether or not the restrictions on alienation included in (e.g.) the *Royal Proclamation of October 7, 1763* are found to apply. The customary practices of the Metis on the lands over which they made treaties could arguably be covered because the "lords" of the place (i.e. the Indian peoples) were free to give their consent to them.³⁶⁴ Rights that were vested in the Metis before sovereignty should therefore be legally presumed to continue except where extinguished by statute

Courts in Canada have generally taken the relevant time for establishing Aboriginal rights as being the assertion of British sovereignty. That moment in time is also not unreasonable for the purpose of establishing Aboriginal legal custom because the common law had no application in Canada before then. The year 1189 is completely arbitrary in the context of Canada because it leads to the same absurd conclusions as setting the cut-off date at the time of contact. The doctrine of continuity says that the important question is the state of the Aboriginal law at the time when their right to determine their own law ended – and that time is the unequivocal assertion of British sovereignty over the particular part of Canada in question. That is the law that is presumed to continue. Any law that may have existed a day or a thousand years before that time is, for the purposes of the continuity rule, beyond legal memory. Accordingly, it is not such as the law can take notice.

³⁶² See generally chapter 4.

³⁶³ Here I refer to the feudal notion that sovereignty entails a presumed royal right of radical title in all real property. But see (e.g.) *Balfour* (1907), *supra* note 359, *Lerwick* (1903), *supra* note 210 and above at 66 for case law respecting rebuttal of that presumption locally. In *Lerwick* the court held that local legal custom prevented the application of such feudal law, and consequently that the Crown's right in the land in question was a right of sovereignty, and not of property.

³⁶⁴ *Mylchreest* (1879), *supra* note 19 at 304.

b) certainty

To be a valid custom, the common law requires that it must have certainty in a number of crucial respects.³⁶⁵ The alleged custom must be certain in respect of the general nature of its legal terms. That is, the custom must reflect clearly the rule or principle which underlies it, so that the rights which the custom gives can be identified with certainty. Courts must be able to say with regard to practices that *this* observance or right is within the legal custom, and *that* one, though perhaps widespread and/or popular, is outside it. There must also be certainty in respect of the locality where the custom is alleged to exist, and must be limited to some recognized division of land. The boundaries of the locality may vary with time, but they must be clearly definable at any given moment, as where land is accreted or eroded at the edge of a waterway.³⁶⁶ Finally, there must be certainty as to which category or class of persons the custom is alleged to affect; and the custom must be limited to those persons, though the number of persons affected by the custom may vary over time.³⁶⁷ It is the *category* of such persons that must be set out with sufficient certainty. The rationale behind the limitation as to persons and locality is that if the practice had the other elements of a “custom” but were common to the whole realm or to the entire public, then it would not be a “custom” but rather the general common law itself. A custom is not uncertain with respect to locality or persons merely because it is observed in more than one place, or that it is exercised on occasion by strangers to its lawful exercise.³⁶⁸ Nor is it uncertain merely because it is not invariable in every part.³⁶⁹ *Halsbury’s* observes that a customary requirement to pay a sum of money may vary over time with changes in the value of money.³⁷⁰ But in such cases the alleged custom must be to pay a reasonable (i.e. factually reasonable) amount, rather than a specific sum. Certainty of custom does not prevent the mode of exercising the underlying right(s) from varying or evolving to suit modern circumstances, as when technological advances enable modern ways of performing tasks that are the subject of immemorial custom.³⁷¹

³⁶⁵ For a broad overview of certainty in respect of legal custom see *Halsbury’s Laws of England*, vol. 12(1) 4th ed., *supra* note 327 at 167, para 615.

³⁶⁶ *Ibid.* at 168, para 616; *Mercer v. Denne* (1904), *supra* note 55 at 556 ff.

³⁶⁷ *Ibid.* at 552.

³⁶⁸ *Hammerton v. Honey* (1876), *supra* note 55 at 604.

³⁶⁹ *Mercer v. Denne* (1904), *supra* note 55 at 552.

³⁷⁰ *Bryant v. Foot* (1868), L.R. 3 Q.B. 497 at 508; *Halsbury’s Laws of England*, vol. 12(1) 4th ed., *supra* note 327 at 177, para. 625.

³⁷¹ See text below accompanying footnote 401.

c) reasonableness

In order for a custom to be valid it must be reasonable. It is very important to note that “reasonableness” in the present context is not the same as might be assessed in the often-referred-to “reasonable person test”. Rather, it is legal reasonableness, as apparent to one who is particularly trained in the law. Parker J. described the nature of this kind of reasonableness in *Johnson v. Clark* (1907):

The words “reasonable or not unreasonable” imply an appeal to some criterion higher than the mere rules or maxims embodied in the common law, for it is no objection to a custom that it is not in accordance with those rules or maxims. On the other hand, it is not the reason of the average human being to which an appeal is made. Littleton says of customs: “Whatsoever is not against reason may well be admitted and allowed”; and on this Sir Edward Coke comments: “This is not to be understood of every unlearned man’s reason, but of artificiall [sic] and legal reason warranted by authority of law”: Co. Litt. 62a.³⁷²

Some case law suggests that reasonableness of a custom is a question of law and not of fact.³⁷³ But since the question of reasonableness often turns on matters of fact, legal reasonableness may be more properly termed a question of fact and law. The trier of fact may, however, inquire whether the custom greatly affects private property rights and, if so, require proportionately strong and convincing evidence.³⁷⁴ The time for assessing legal reasonableness of a custom is the time when it was established.³⁷⁵ Reasonableness is not something that must be proven, but is a legal presumption. It is sufficient if no good legal reason can be raised against it.³⁷⁶ It may therefore be more accurate to characterize the test as one of “unreasonableness”, with the onus of proof on the party seeking to refute the alleged custom, assuming the other required elements of custom will have been proven.

³⁷² *Johnson v. Clark* (1907), [1908] 1 Ch 303 at 311.

³⁷³ *Bastard v. Smith* (1837), 2 M. & Rob. 129 at 135, 174 E.R. 238 [cited to M. & Rob.]; *Tyson v. Smith* (1838), *supra* note 336 at 98: “[reasonableness] is a question which it belongs to the judges of the land to determine”. *Halsbury’s Laws of England*, vol. 12(1) 4th ed., *supra* note 327 at 167, para 614 characterizes reasonableness of custom as a question of law.

³⁷⁴ *Bastard v. Smith* (1837), *supra* note 373 at 135. It should be remembered, however, that “proportionately strong and convincing” should not be interpreted to mean beyond reasonable doubt, because that standard will be virtually impossible to meet for most instances of alleged custom, and would in effect displace the presumption of the custom’s legal validity.

³⁷⁵ *Mercer v. Denne* (1904) and (1905), *supra* note 55; *Shaw v. Poynter* (1834), 2 Ad. & El. 312 at 324, 111 E.R. 121 (K.B.) [cited to Ad. & El.].

³⁷⁶ *Blackstone’s Commentaries*, *supra* note 5, “Introduction” at 67.

Grounds for holding a custom unreasonable.

A custom is not unreasonable merely because it runs against a rule of the common law³⁷⁷ because customs, as exceptions to the common law, are by definition contrary to it. That is why custom must be proven and the common law does not. If the rule in the alleged custom were the same as the common law, then it would indeed be the common law itself, and not a custom. However, customary law should not be so contrary to the fundamental principles of justice embedded in the common law that the custom undoes justice itself.³⁷⁸ An alleged custom that benefits only an individual and is contrary to the public³⁷⁹ good is presumed not to have had a reasonable beginning, and is not therefore a valid custom.³⁸⁰ A custom can be ruled unreasonable if its terms imply that it began by mere indulgence, or from an arbitrary use of power.³⁸¹ Customs that benefit a large portion of the community may be held reasonable if they do not unduly or unjustly restrict the rights of the public or an individual³⁸², but not if they unjustly or disproportionately burden some individuals for the benefit of others,³⁸³ or if they would destroy the subject matter of the right.³⁸⁴

³⁷⁷ *Tyson v. Smith* (1838), *supra* note 336 at 98; *The Case of Tanistry* (1608), *supra* note 227 at 88.

³⁷⁸ *Campbell v. Hall* (1774) *supra* note 150 at 741-42; *Johnson v. Clark* (1907), *supra* note 378 at 311-13; *Halsbury's Laws of England*, vol. 12(1) 4th ed., *supra* note 327 at 163, para 611. Customs that are fundamentally unjust would be caught by the rule against unreasonableness. But in such cases it is the unjustness/unreasonableness that is fatal to the alleged custom, and not the degree of variation from the common law.

³⁷⁹ For the purpose of determining the legal reasonableness of an Aboriginal custom, it is important to carefully consider its context. The "public" that ought to be considered is the particular society in which the practice originated and has been followed.

³⁸⁰ *Tyson v. Smith* (1838), *supra* note 336

³⁸¹ *Johnson v. Clark* (1907), *supra* note 378 at 309 per Parker J.; *Beckett (Alfred F.) Ltd. v. Lyons* (1966), [1967] 1 Ch. 449, [1967] 1 All E.R. 833 at 839 (C.A., U.K.). Slavery, though practiced by many indigenous societies (including some in the Americas), would not likely be judged legally reasonable where force is/was used in capturing slaves, and where it is/was not seen as law by those from whom the slaves were taken. The common law will hold a custom legally unreasonable where it is grounded in an arbitrary use of power.

³⁸² *Ibid.*; *Mercer v. Denne* (1905), *supra* note 55.

³⁸³ *Wollanston v. Newcastle-Under-Lyme Borough Council*, [1940] 3 All E.R. 101 (H.L.).

³⁸⁴ *Halsbury's Laws of England*, vol. 12, 4th ed., *supra* note 53 at 8, para. 413. Note also the parallel between the concern against destroying the subject matter of a right under the doctrine of custom, and Lamer C.J.'s observation that "elements of aboriginal title create an inherent limitation on the uses to which the land ... may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a

For the purpose of determining the legal reasonableness of customary law, it is important to consider the word "public" in its proper context. The "public" that ought to be considered is the particular society in which the practice originated because, as noted above, the time for assessing the legal reasonableness is the time when it was established. This means that the interests of historical newcomers are not considered for the purpose of reasonableness because those interests were non-existent at the material time.³⁸⁵ But as noted above, newcomers' vested rights are important respecting the standard of proof required to recognize the custom: where a legal custom negatively affects property rights, the trier of fact may require proportionately strong and convincing evidence of it.³⁸⁶ If the continued application of a custom is considered socially, politically or economically unacceptable (as distinct from legally unacceptable), then it is a matter for the legislatures and not the courts to change. The terms "unduly" and "unjustly" suggest that competing interests must sometimes be reconciled. This requires considering each Aboriginal custom in its own cultural context. *Halsbury's* notes,

A custom which might otherwise be held unreasonable on the ground that it would prejudice or benefit some individuals more than others may nevertheless be upheld if there is some consideration or *quid pro quo* to compensate for the prejudice or to merit the benefit. The consideration may be public or private. A public consideration may be provided by a benefit conferred on the community at large.³⁸⁷

Reconciling unequal but complementary rights, duties and prerogatives in a cross-cultural context often requires an educated and sensitive approach that goes beyond merely looking for identical treatment of parties. Consider the complex balancing of gender-specific provisions, for instance, in *Gayanashagowa*, the customary constitution that guided the governance of the Haudenosaunee, or Six Nations (Iroquois) Confederacy, before the *Indian Act* system was imposed by executive act in 1924.³⁸⁸ Custom provides that

parking lot.): *Delgamuukw* (1997), *supra* note 260 at 1089.

³⁸⁵ "Whether a [legal custom] would be reasonable, if now introduced for the first time, is not the question, but whether it was so anciently": *Shaw v. Poynter* (1834), *supra* note 375 at 325. Note the parallel with the test whether legislation is a reasonable limit under s. 1 of the *Charter of Rights and Freedoms*. The test of the legislature's intent is assessed as of the time of the legislation's enactment: *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 334-335.

³⁸⁶ *Bastard v. Smith* (1837) *supra* note 373 at 135.

³⁸⁷ *Halsbury's Laws of England*, vol. 12(1) 4th ed., *supra* note 327 at 165, para. 613.

³⁸⁸ *Gayanashagowa*, *supra* note 304 was upheld by a Six Nations government which was recognized in succession by the British, colonial and Canadian governments – an unbroken relationship lasting three and a half centuries. In 1924 the Canadian government withdrew its recognition at the Six Nations Reserve, and installed a new elected band-council: Douglas Sanders, "Aboriginal Rights: The Search for Recognition in International Law" in Menno Boldt and J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 299. A vigorous debate continues within the Six Nations whether the *Indian Act* system or the "longhouse" system has present day legitimacy. It is not

only men may serve as civil chiefs. On the face of it, the custom may appear unreasonable in that it disentitles women. On the other side of the balance, however, is the rule that only women may choose who is to be such a chief, or Lord on behalf of their lineage. And they decide if and when (in most circumstances) their Lord is to be removed from office. If, however, a Lord commits murder, it is the Lords (all men) who depose the guilty one, and remove from his female relatives the right to choose the next Lord. They then transfer the Lordship title to a sister family, whereupon the women of the sister family have the proprietary right to the Lordship title. And those women choose another Lord.³⁸⁹

Some balancing of competing interests in the Canadian context will inevitably intersect with section 15 of the *Charter of Rights and Freedoms*, which provides *inter alia* for equality of protection and benefit of the law and equal treatment by it, without discrimination, etc. When applied to Aboriginal customary law, section 15 should be interpreted in light also of section 25, which provides that the *Charter* should not be construed so as to derogate from "any aboriginal, treaty or *other rights or freedoms* that pertain to the aboriginal peoples of Canada [emphasis added]". The "other rights or freedoms" should be taken as including such as arise under customary law. Where local legal custom does not treat women and men identically, the equality provision in section 15 does not automatically extinguish the local custom. On the other hand, section 25 should not automatically protect any and sundry practice that is alleged to pertain to an Aboriginal people. Instead, the justness of the distinction in relative burden or benefit should be addressed in its proper cultural context. If the distinction is unduly or unjustly made, then the allegation of custom has not been proven, and the custom must be ruled bad without the need to resort to section 15. Alternatively, if the distinction is not unreasonable in its context, then its reasonableness and section 25 should protect it. The important point is that mere distinction on the basis of characteristics enumerated in section 15 should not in itself render a custom void. The test should not be whether the treatment, benefit or protection is identical, but rather whether the distinction is unfair in view of countervailing treatments, benefits and protections that prevail in the cultural context in which the custom is observed.

d) continuity.

A custom must have continued uninterrupted from its beginning in time immemorial in order to retain its validity. But it is not necessary to actually exercise the custom if no

my purpose here to promote one system or another, but to point out the complex balance that has evolved in indigenous systems of law and governance over centuries and millennia. It is the prerogative of the peoples involved to choose for themselves whether or not to assert their customs.

³⁸⁹ *Gayanashagowa*, *supra* note 304, ss. 17-20.

occasion arises to do so.³⁹⁰ Mere “user”, or practice is not custom, but may be evidence of custom. If there is an interruption in the right itself, even for a short time, the custom ceases to exist in law. However, the cause of the interruption of practice (as distinct from interruption of the right) may be relevant to proving the continuity of the custom itself.

[W]hen there has been an interruption or disturbance of the [practice], acquiesced in by the persons who are alleged to be entitled to exercise the right, and who have not either by legal or illegal means attempted to prevent the disturbance or interference, and the disturbance or interruption has not been for a short time, but for many years, it is a strong presumption that there never was any such law as alleged at all.³⁹¹ The effect of such interruption is merely to make the custom more difficult to prove.³⁹²

On the other hand, the failure to dispute does not in itself invalidate infringement because there may be many different reasons for such failure other than an acknowledgment of the lawfulness of the infringement.³⁹³ In the context of Canadian First Nations, enactments that historically restricted access to courts should not be construed as extinguishing a local custom or right so long as there was no evidence of legislative contemplation of that end. Other plausible explanations are that access to other legal fora were possible, or that the legislative goal was to avoid what it considered as frivolous or vexatious claims. Interruption of a practice should therefore be seen as an evidentiary issue rather than as a point of law. If a legal custom is found, then interruption of the *practice* (as distinct from the underlying customary right) has no bearing on its continued legal validity.

Where there is disturbance or interference with the exercise of a customary right, legal remedies may be available. In *Brocklebank v. Thompson* (1901) Joyce J. endorsed the following passage,

An indictment does not lie on behalf of a class or section of the public for an obstruction of a local right, which does not affect the public in general ... and therefore the only remedy is by action which any person who is within the custom may bring in respect of his interest in the right [and the obstruction of the right] irrespective of special or particular damage sustained by him individually.³⁹⁴

On that basis, the judge went on to say, “[I]f the defendant presses for it, I think he is entitled to a mandatory injunction”. This means that in principle, an individual could sue for

³⁹⁰ *Scales v. Key* (1840), *supra* note 17 at 823: “Mere non-user cannot affect a custom, where the question, whether it should be put in force or not, does not appear to have arisen.” (*per* Littledale J.); *Mercer v. Denne* (1904), *supra* note 55 at 556.

³⁹¹ *Hammerton v. Honey* (1876), *supra* note 55 at 603.

³⁹² *Mercer v. Denne*, *supra* note 55; *New Windsor Corp. v. Mellor*, [1974] 2 All E.R. 510 at 517 [hereinafter *New Windsor v. Mellor* (1974)], *aff’d* [1975] Ch 380 (C.A.).

³⁹³ See *e.g. Entick v. Carrington* (1765), *supra* note 123.

³⁹⁴ *Brocklebank v. Thompson* (1901), *supra* note 55 at 355.

a remedy. Typically in Canada, however, actions respecting Aboriginal rights or title are commenced by collective plaintiffs.

Continuity is presumed if the custom can be proven to have existed at some definite time in the past. The onus then shifts to the party seeking to disprove the custom that it has since been legally extinguished.³⁹⁵ This means that the opportunity to practice or enjoy a custom may be disturbed, sometimes for years, without extinguishing the custom.³⁹⁶ In *New Windsor v. Mellor* (1974),³⁹⁷ for instance, there was evidence that the inhabitants of a locality had used a small piece of land called Bachelors' Acre, as a commons for sports and pastimes for more than two hundred years by right of custom. But from 1875, upon wrong advice from the town clerk, the borough had refused to recognize the right of the town's inhabitants to use the land for recreation. In 1972 the land was being used partly for a school's sports ground and partly as a parking lot. The borough government, owner of the land, planned to convert the site into a multi-story parking lot. A local resident objected, and caused the land to be registered as a "commons", thereby preventing the proposed development. Despite nearly a century of interference with the enjoyment of the right, the courts upheld the customary right of the inhabitants and rejected the borough government's challenge.

There may be no occasion to exercise a right for many years without the continuity of a custom being disturbed. Continuity is presumed if the custom can be shown to have existed at some definite time in the past. The onus then arises in the party seeking to disprove the alleged custom to show that it has since been legally extinguished. In 1840 the enjoyment of a customary right was upheld despite the fact that no instance of the enjoyment of the right could be shown since 1689 – a century and a half. At issue was an ancient custom by which the court of mayor and aldermen of the City of London could, after a by-election, examine the fitness for office of any person elected, and give judgment. The authority of that court was challenged. In *Scales v. Key* Lord Denman C.J. *per curiam* upheld the authority on the basis of local legal custom:

The finding of the jury that the custom had existed till 1689, was the same in effect as if they had found that it had existed till last week, unless something appeared to show that it had been legally abolished.³⁹⁸

³⁹⁵ *Mercer v. Denne* (1904) and (1905), *supra* note 55; *Hammerton v. Honey* (1876), *supra* note 55.

³⁹⁶ *Blackstone's Commentaries*, *supra* note 5, "Introduction" at 66-67. See also *Scales v. Key* (1840), *supra* note 17 at 823.

³⁹⁷ *New Windsor Corp. v. Mellor* (1974), *supra* note 392.

³⁹⁸ *Scales v. Key* (1840), *supra* note 17 at 825-26.

In *Van der Peet* (1996) Madame Justice McLachlin recognized that in Canada a similar principle of continuity applies with respect to Aboriginal rights:

The continuity requirement does not require the aboriginal people to provide a year-by-year chronicle of how the event has been exercised since time immemorial. Indeed, it is not unusual for the exercise of a right to lapse for a period of time. Failure to exercise it does not demonstrate abandonment of the underlying right. All that is required is that the people establish a link between the modern practice and the historic aboriginal right.³⁹⁹

Canadian courts have also recognized a distinction between the subject matter of a right and the enjoyment of it in other cases as well. In *R. v. Sparrow* (1990), the Supreme Court of Canada distinguished between regulating the enjoyment of the aboriginal right "to fish for food and social and ceremonial purposes" and extinguishing that right.

[H]istorical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but is also incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy can however regulate the exercise of that right, but such regulation must be in keeping with s. 35(1).⁴⁰⁰

The *Sparrow* (1990) case also dealt with the question of the form or manner in which a practice is exercised. The court ruled that a change in the manner of exercising a right does not change or extinguish the right itself. This approach is consistent with the approach that English courts have taken historically. The English Court of Appeal Chancery

³⁹⁹ *Van der Peet* (1996), *supra* note 166 at 636.

⁴⁰⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 at 403, [1990] 4 W.W.R. 410, [1990] 3 C.N.L.R. 160 [hereinafter *Sparrow* (1990) cited to D.L.R.]. Government policy can never justify the infringement of any legal right. In the case of *Re the Will and Codicils of the Late Emperor Napoleon Bonaparte* (1853), 2 Rob. Ecc. 606, 163 E.R. 1429 (Prerogative Court) [hereinafter *Re Bonaparte* (1853)] Sir John Dodson J. maintained the separation of policy from law, and of the executive from the judiciary. The British Secretary of State for Foreign Affairs had applied for a decree that the original will and codicils of deceased French Emperor be turned over to him personally, for delivery to the French Government. He argued that the application should be complied with on the ground of public policy. Dodson J. held that he did not have the power to grant the application according to "the precise form of the prayer."

Undoubtedly this Court, as all other Courts, is desirous to carry into effect the views of Her Majesty's government; nevertheless, it must not venture to go beyond the limits of legal authority. *In a country governed by settled laws, it is necessary for Courts to be guided by those laws, and not by the will and desire of a government.* [emphasis added]

And so the court's decree was that the requested papers be turned over to the Secretary of State, but that he place them in proper custody with the appropriate French *legal* authorities, and not send them to the French *political* authorities. Dodson J. ordered that the exact terms of the decree be observed by the Secretary of State, and not the terms as requested in the Government's application.

Division in *Mercer v. Denne* (1905)⁴⁰¹ considered an argument that the ancient custom of permitting local fishers to use certain places on the waterfront property of others to tan and dry their nets did not extend to the modern method of oiling the nets and leaving them out to dry for a longer period than historically was done. After ruling that the custom as alleged was valid, the court held that the use of a modern method of drying nets will not deprive the fishers of the benefit of the custom, provided there was not an unreasonable burden thereby imposed on the landowner. The decision in *Sparrow* (1990) to reject the “frozen rights” approach, and to permit the evolution of “existing aboriginal rights” to evolve over time, is therefore quite consistent with earlier leading decisions of English courts on point of custom, though no English cases were cited in this regard.⁴⁰²

While the interruption of the enjoyment of a right does not destroy the custom itself, the right is extinguished if there has been an interruption in the very subject matter of the customary right. Blackstone points out that an alleged revival of a custom will give it a new beginning, which will be within living memory, upon which the alleged custom will be void.⁴⁰³ This is not to say that rights that were embodied in custom must necessarily be extinguished when the custom itself is extinguished. Where an act of parliament has embraced and confirmed a right which previously existed by custom, the right becomes a statutory right and is extinguished as a legal custom,⁴⁰⁴ unless the act intends merely to confirm the right as custom.⁴⁰⁵ But where the customary right has been raised to a statutory right, it does not re-emerge upon repeal of the statute,⁴⁰⁶ though the custom would not be affected by the repeal if the statute had merely recognized and confirmed the custom.⁴⁰⁷ In Britain, there is a rule that a custom is not destroyed by being embodied in a by-law of an ancient corporation, as are some cities.⁴⁰⁸ The principle might be extended to traditional governments of some First Nations, but there is of course no case law on point in Canada. It is doubtful whether *Indian Act* band councils or modern governments established by treaty

⁴⁰¹ *Mercer v. Denne* (1904) and (1905), *supra* note 55.

⁴⁰² *Sparrow* (1990), *supra* note 400 at 396-397.

⁴⁰³ *Blackstone's Commentaries*, *supra* note 5, “Introduction”, at 66.

⁴⁰⁴ *New Windsor Corporation v. Taylor* (1898), [1899] A.C. 41 (H.L.) [hereinafter *New Windsor v. Taylor* (1898)].

⁴⁰⁵ *Truscott v. Master and Wardens of the Merchant Tailors' Company* (1856), 11 Ex. 855 at 866, 156 E.R. 1079 (Exch.) [hereinafter *Truscott* (1856) cited to Ex.] *per* Crompton J.

⁴⁰⁶ *New Windsor v. Taylor* (1898), *supra* note 404.

⁴⁰⁷ *Ibid.* See also *Halsbury's* (4th ed.) vol. 12 para 443 re confirmation of a custom by statute.

⁴⁰⁸ *City of London* (1610), *supra* note 61; *R. v. Ludlam* (1725), 8 Mod 267, 88 E.R. 190 (K.B.); *Chamberlain of London v. Compton* (1826), 7 Dow. & Ry. 597 (K.B.) [hereinafter *London v. Compton* (1826)]; *Shaw v. Poynter* (1834), *supra* note 375.

or other process could qualify as analogs of “ancient corporations” due to the fact that those modern institutions have not, by definition, existed since time immemorial.

The notion that inclusion in a statute can extinguish legal customs has implications for future actions of Aboriginal governments. They would be advised to be very careful of formally codifying their customary law. Codification risks rendering customary law incapable of meeting the “time immemorial” requirement, rendering the practice legally unenforceable as custom, though enforceable as statute. Further, codified law may have to meet jurisdictional challenges which custom does not have to meet. Third, since codified practices would no longer qualify as “local common law” they would not be available as common law defences under Criminal Code section 8(3), as will be discussed below. Of course the question of such extinguishment turns on whether such codification is accomplished by an instrument that can be considered as a statute. Incorporation in a bylaw is another question entirely.

A simple statute can extinguish a local legal custom by specific intent and execution or by necessary implication, though customs that are also Aboriginal or treaty rights have constitutional entrenchment. But on the other side of the codification argument is the point that bylaws enacted by Aboriginal governments do not have the status of “statute”, any more than a by-law enacted by a municipal corporation. Ordinarily, bylaws must not derogate from the common law. But in cases involving certain ancient cities, English courts have noted that bylaws that are contrary to the common law can prevail if they are grounded in immemorial legal custom, but not otherwise.⁴⁰⁹ Dangers remain in codification, however. There is the possibility that Aboriginal communities may come to rely on bylaws to the extent that the substance of customary law becomes obscured or forgotten. If bylaws are made that run contrary to customary laws there is the risk that respect for one or the other or both may diminish.

Aboriginal Rights and the Constitution

Notably, section 35 of Canada’s *Constitution Act, 1982* reads, “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” That reference is not only a confirmation of rights, but also a confirmation of First Nations as peoples in their own right, rather than an extinguishment and reinvention of them in statutory form. Section 25 of the *Charter of Rights and Freedoms* gives added protection to such rights by declaring “The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.” The words, “other

⁴⁰⁹ *City of London* (1610), *supra* note 61; *London v. Wood* (1701), *supra* note 167; *London v. Compton* (1826), *supra* note 408, per Bayley J. (at 601), Holroyd J. (at 602) and Littledale J. (*ibid.*); *Leicester v. Burgess* (1833), *supra* note 20; *Harrison v. Godman* (1756), 1 Burr. 12, 97 E.R. 161 (K.B.).

rights or freedoms” should be construed as including immemorial legal custom, as encompassed by the common law doctrine.

Extinguishment

As noted above, in Canada customary law should be distinguished from Aboriginal rights, though they may overlap. The common law in Canada is that Aboriginal rights (at least to land) may be extinguished by surrender. While an Aboriginal *right* may be extinguished other than by act of parliament, it is unclear whether customary *law*, which gave rise to some of those rights independently of the common law, can be extinguished by surrender. Canadian case law on point may not exist, though English case law may offer some guidance.

Consider the example of lands held by copyhold tenure – that is, lands held by right of local customary law, evidence of which appears in copies of the records of customary manorial courts (courts baron).⁴¹⁰ That tenure *was* conditional upon the continued performance of services and duties to the lord of the manor by local legal custom. Lands held by an individual by such tenure could be conveyed to another by surrendering them to the lord of the manor to the use of such other person “and his heirs”, or for life, or for a term of years, as governed by local custom and not by the common law. The subsequent tenant would continue to hold the land “so long as he doth his services and duties, and performs the customs of the manor.”⁴¹¹ Clearly, the surrender did not extinguish the custom by which the original tenant held his estate, though it ended his right to claim the benefit of that custom. The role of the custom was to fix the nature and extent of the right to hold land, and the conditions under which the right might continue. Local custom could, however, limit the manner and form of the surrender.

Halsbury's says that in law a custom cannot be altered by agreement because the newly modified custom could not possibly have an immemorial origin.⁴¹² According to doctrine, there is no other way to extinguish custom than by Act of parliament.⁴¹³ General words in a statute, however, are insufficient, unless they give plain directions to do something

⁴¹⁰ Tenure of lands by copyhold was not abolished until January 1, 1926, as provided in the *Law of Property Act, 1922* (U.K.).

⁴¹¹ *Combes' Case* (1613), *supra* note 299 at 76b.

⁴¹² *Halsbury's Laws of England*, vol. 12(1) 4th ed., *supra* note 327 at 174, para 621. See also *Blackstone's Commentaries*, *supra* note 5, “Introduction” at 66.

⁴¹³ *Johnstone v. Connolly* (1869), *supra* note 1; *Hammerton v. Honey* (1876), *supra* note 55 at 604; *Wyld v. Silver*, [1962] 1 Ch. 243, [1962] 3 All E.R. 309 (U.K.); *New Windsor v. Mellor* (1974), *supra* note 392; *Perry* (1996), *supra* note 329; *Matson* (1995), *supra* note 17.

which is wholly inconsistent with the custom,⁴¹⁴ or are repugnant to its continued existence.⁴¹⁵

Proving custom – Evidence

Hammerton v. Honey (1876) is a leading case on proving customary law.⁴¹⁶ General common law is usually proved by case law and authoritative writings, but such means are seldom available to prove custom. This is particularly true in the case of peoples who have an oral tradition, as with Aboriginal peoples in the Americas and many other places. Custom in England is generally proved by showing the practice of it. Such practice must reveal a rule that is reasonable, certain, and has existed since time immemorial without interruption in order for it to be an exception to the general common law. But what kind of evidence is required to prove a custom, as distinct from the general common law? Jessel M.R. offered this guide for cases in Britain.

The usual course is this: persons of middle or old age are called, who state that in their time, usually at least half a century, the usage has always prevailed. That is considered, in the absence of countervailing evidence, to show that the usage has prevailed from all time.⁴¹⁷

Hammerton v. Honey has continued to be a leading case respecting custom from the beginning to the end of the 20th century.⁴¹⁸

Recent Canadian cases on Aboriginal rights have also addressed the question of evidence of oral tradition, in the context of the hearsay rule. In *Van der Peet* (1996) and *Delgamuukw* (1997) the Supreme Court of Canada held that the hearsay rule must be relaxed for the purpose of admitting the oral traditions of Aboriginal peoples. In view of the long-established rule in the common law of proving customary law, the recent decisions in Canada are no innovation, but rather a rediscovery of an established common law principle. If the oral testimony of elders in Britain is sufficient to prove customary law, then it would be contrary to the principles of justice to hold Aboriginal claimants to a higher standard. To do so would deny them equality before and under the law, and equal protection and benefit

⁴¹⁴ *Green v. R.*, [1876] 1 App. Cas. 513 (H.L.).

⁴¹⁵ *Evans v. Birmingham Corporation* (1853), 21 L.T.O. 182, 17 J.P. 422, 1 C.L.R. 858 (Q.B.).

⁴¹⁶ *Supra* note 55.

⁴¹⁷ *Ibid.* at 603.

⁴¹⁸ This case was cited with approval by the Court of Appeal Chancery Division in *Mercer v. Denne* (1905), *supra* note 55 in respect of its recitation of the law of custom, and by English courts into the 1990s. E.g. *Steed* (1996), *supra* note 329; *Sunningwell* (1999), *supra* note 237; *Perry* (1996), *supra* note 329.

of it, as guaranteed by section 15 of the *Charter of Rights and Freedoms*.⁴¹⁹ Increasingly, oral histories are being admitted in a principled manner.

There are other ways to prove custom in court. As noted above, it is well established that courts must consider legal custom⁴²⁰, but only where it is specifically pleaded.⁴²¹ Where customs have been previously pleaded, judicial precedent is admissible to prove alleged customs.⁴²² Once customary law is proven to exist, or to have existed at some certain time in the past, there is a presumption in law that it continues in legal effect in that place, unless it can be shown to have been legally abolished.⁴²³

Written records have been useful in England for proof or disproof of legal custom, especially where the writings relate particularly to customary law. The court rolls of manorial courts can provide precedents for modern application, and a single instance may suffice. In some places in England there have been written surveys of the customs of manors. These *customals* or *customaries*, can be particularly persuasive as to the existence of legal custom. On the other hand, where such a record purports to be comprehensive, the omission of a particular custom may be compelling evidence against its existence. This again shows both dangers and advantages in making written collections of customs. On the one hand, a written collection, once admitted and proven as authoritative, might make proof of local custom easier. The text of such a collection may, however, provide grounds for the opposite party to argue that the alleged custom is not valid because it is in opposition to another custom in the collection.⁴²⁴ In such case, there is the danger that neither custom would be accepted by the court as proven. And if the collection is revealed to be comprehensive, the customs contained there might be rendered easier to prove, while others that are not contained could be rendered more difficult. While making written collections of custom may not be formal codification, such might have the effect of *de facto* formalization, with the result that customs that were not contained are frozen out of judicial consideration.

⁴¹⁹ *Canadian Charter of Rights and Freedoms*, *supra* note 59, s. 15. Section 15 should be used as a shield to protect rights, but not as a sword to carve them away on the mere basis of different, though not unfair, treatment. See discussion of sections 15 and 25 above at 120.

⁴²⁰ *Anonymous – Case 104* (1706), *supra* note 334.

⁴²¹ *Hunt v. Hargill* (1719), *supra* note 342.

⁴²² *Falmouth* (1828), *supra* note 331; *Hammerton v. Honey* (1876) *supra* note 55.

⁴²³ *Scales v. Key* (1840), *supra* note 17 at 825-26.

⁴²⁴ See *supra* note 348 and accompanying text.

How do the various forms of law fit together?

The common law rule is that statutes in derogation of the common law or custom must be construed strictly, even where the subject matter of the enacted law is explicit. Even licences pursuant to statute are not sufficient to justify infringement of custom unless the statute sanctions the infringement in the clearest possible terms. In *Leicester v. Burgess* (1833)⁴²⁵ there had been a bylaw enacted in the Borough of Leicester, pursuant to immemorial local custom, that no one other than a burgess of the borough (or his widow) could carry on the business of an alehouse keeper there. A statute, however, purported to make it lawful in any part of England for any licenced person to sell such beverages by retail in any premises specified in the licence, and concluded, "Any thing in any Act or Acts heretofore made, or in force at the time of the passing of this Act, to the contrary notwithstanding".⁴²⁶ The defendant had applied for and received such a licence, and began to carry on the trade of alehouse-keeper and victualler, within the terms of the licence. He was charged under the bylaw and claimed the benefit of the statute and licence, arguing that the statute effectively extinguished the bylaw. Denman C.J. held that, given the general purport of the Act, it could not apply to places where by local custom the trade was restricted.⁴²⁷ Littledale J. held that since the enabling clause made no reference to local customs, the clause could not alter them.⁴²⁸ Parke J. concurred on the basis that the statute could only take away the restrictions imposed by former statutes.⁴²⁹ Patteson J. also concurred, saying if it had been intended that such local customs be extinguished, the statute would have expressly noticed them.⁴³⁰ In a similar case two years earlier, the King's Bench held that a hawker's licence under a general statute did not give the privilege of selling goods in the borough of Hertford, where by a by-law made pursuant to charter and ancient custom, strangers were not permitted to trade.⁴³¹ The approach of construing the statute strictly was not novel or revolutionary, but rather an application of a far more ancient principle: "for by general words the law will never enable any for his benefit, whom the law has disabled."⁴³² Clearly, customary law is recognized as a local exception to the common law, but subject to strictly construed statute. Precedence of laws can be seen graphically in figure 7 below.

⁴²⁵ *Supra* note 20.

⁴²⁶ *An Act to Permit the General Sale of Beer and Cider by Retail in England, 1830* (U.K.) 1 W. 4.

⁴²⁷ *Leicester v. Burgess* (1833), *supra* note 20 at 252.

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.* at 253

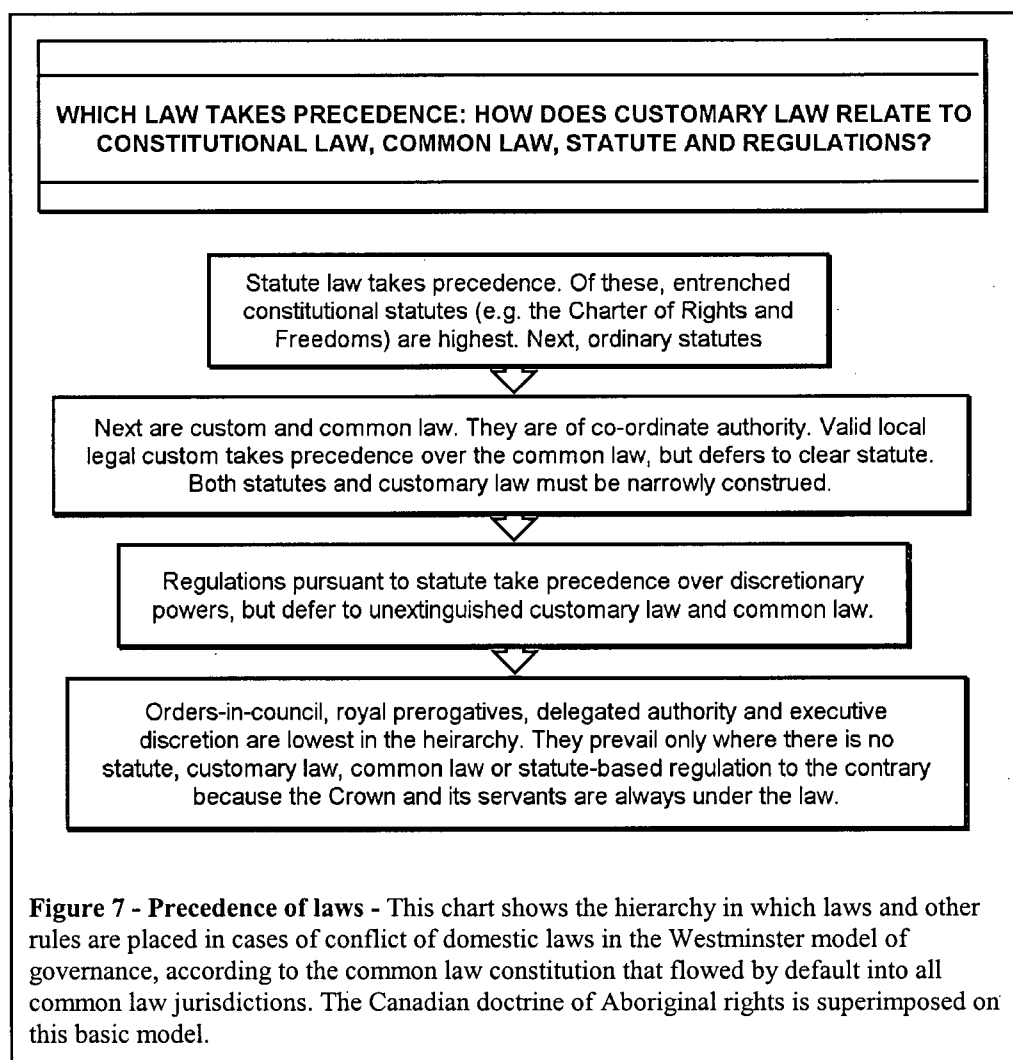
⁴³⁰ *Ibid.* at 254.

⁴³¹ *Simson v. Moss* (1831), *supra* note 60.

⁴³² *Doctor Hussey's Case* (1611) 9 Co. Rep. 71b at 73a, 77 E.R. 838 (K.B.) *per* Lord Coke.

Custom's legal toolbox in the 21st century

Before applying the doctrine of legal custom in Canadian law, it is appropriate to review some principles that guide that application. Legal custom can be identified by its essential attributes: it must be ancient, continuous, certain and reasonable. Where local custom is proven, it displaces the presumptions of the common law on the narrow point to which it applies. The Crown must recognize and accommodate rights under both local legal custom and the common law. The Crown must not infringe them and cannot extinguish them except where authorized by statute in the most certain terms. Statutes that infringe customs must be construed strictly; and extinction can only be implied where it is necessary and unavoidable for the statute's purpose. Statutes that do not extinguish legal customs *ex proprio vigore* cannot delegate authority to do it. These principles are as valid for Canadian common law and governance in the 21st century as when King John affirmed them in *Magna Carta*.



Chapter 6 – Modern Application: Decolonializing the Common Law

It is difficult for a non-Aboriginal person to discuss the application of the common law doctrine to the customs of a particular First Nation for several reasons. First, a generic approach to local customs is impossible because those of each Nation can only be understood in the cultural context of that Nation. For this reason it would be equally difficult for a Mic Mac from Burnt Church, New Brunswick to truly represent the legal customs of the Sto:lo people at Musqueam, on the Fraser River, in British Columbia. And given the hundreds of different Nations of indigenous peoples in Canada, any attempt on my part to speak for them all could only be superficial. Second, although the common law has many centuries of case law and written commentary in the public record, knowledge of local legal customs rests with the various peoples themselves, or with identifiable sub-groups among them. Some of that knowledge is known to the whole group, some only to women or only to men, or to those who have been initiated into particular ceremonial societies. I would therefore be disrespectful of them, and wilfully blind to my own limited understanding, if I presumed to speak on their behalf here. And were I to attempt it, I must inevitably misrepresent them in some way. Third, it is for the people directly affected by local custom to decide for themselves whether to offer it in argument in mainstream courts or publish it in a scholarly medium. In many cases it is considered extremely inappropriate to express those norms except in traditional fora or under specified circumstances.⁴³³ For those reasons I have mostly confined my discussion in this thesis to the common law itself, and referred to local custom only to illustrate the treatment that the common law requires mainstream courts to give it.

Although some of my examples draw on cultural traits that may be common to a number of different peoples in a cultural area or beyond, I reiterate the caution against a generic approach to the legal customs of different peoples. As Rupert Ross has pointed out, it is more realistic to expect differences between cultures than to expect sameness.⁴³⁴ A presumption of sameness obscures those differences. And it is differences between the ancient law ways of local indigenous communities and the general common law that the common law attempts to accommodate through the doctrine of local legal custom. It is also important to recall Pospisil's caution that when we apply terms from the mainstream law to non-mainstream legal rules or institutions, we should not blithely import general or particular assumptions that are inapplicable in the local context. The common law doctrine of custom is not a template of pigeonholes into which local customs may fit if they can be appropriately trimmed, but rather a self-imposed limit by which the common law trims itself to fit local circumstances.

⁴³³ Australia, Law Reform Commission, Report No 31, "The Recognition of Aboriginal Customary Laws" (Canberra: Australian Government Publishing Service, 1986) addresses practical considerations of receiving evidence of custom and preventing unjustified exposure of privileged traditional knowledge. See esp. chapters 24 and 25. But the Report is not a good source for studying the common law doctrine of legal custom.

⁴³⁴ Rupert Ross, *Dancing With a Ghost: Exploring Indian Reality* (Markham, Ontario: Octopus Publishing Group, 1992).

With the foregoing in mind, this chapter will address whether, where and how the common law doctrine of legal custom can be applied in a modern context. Not surprisingly, customary law is often associated, when found, with core social institutions and activities, including those associated with kinship, resources, land, sometimes water, governance and trade.⁴³⁵ And it is on a few examples from those areas that this discussion will concentrate. In family law we will consider marriage and divorce, parent-child relationships, and customary adoption. And the discussion of legal custom in governance will explore some options for self-government and intergovernmental relations between Crown governments and those of subject peoples. But first it is necessary to distinguish between sometimes-confused or misconstrued terms, in the context of historically-recent constitutional developments.

Custom distinguished from Aboriginal rights.

In 1982 Aboriginal and treaty rights were "enshrined" in Canadian constitutional law by being made the subject of section 35 of the *Constitution Act*, 1982.⁴³⁶ I will not attempt to discuss the doctrine of Aboriginal rights that has been delineated by Canadian courts, or parallel developments in other countries except as necessary to distinguish it from legal custom. The two doctrines have much in common, but are not interchangeable. They each have their own purposes and functions, and are adjudged by different tests. The presumption of legal continuity protects pre-existing legal custom by virtue of the very fact that it is law. It acts against the establishment of a legal desert. It supports the common law notion that a law or legal right -- any law or legal right -- is presumed to continue unless and until explicitly extinguished. The doctrine of Aboriginal rights, on the other hand, appears to value Aboriginal societies in their own right -- rather than merely the laws which prevail(ed) in such societies. In other words, cultural pluralism *per se* has its own value. For this reason, the doctrine of Aboriginal rights protects practices which are necessary for the continuance of distinctive Aboriginal societies, whereas the principle of continuity protects their ancient customary laws as such without inquiring into the distinctiveness of the societies that observe them, or the role of those laws in maintaining the societies. Instead, continuity of legal custom depends only on two broad questions. First, was there such a customary right

⁴³⁵ There may also be a religious association with some of those institutions. But no exploration of those associations will be undertaken here.

⁴³⁶ *Constitution Act (1982)*, *supra* note 59, s. 35 provides:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada.
- (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

or law in place in the society when sovereignty was asserted;⁴³⁷ and second, has that custom been since lawfully extinguished.⁴³⁸ The existence or non-existence of an Aboriginal right or valid legal custom cannot therefore equate to the existence or non-existence of the other.

The Supreme Court of Canada in *R. v. Van der Peet* (1996) held that an activity that is claimed as an Aboriginal right must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.⁴³⁹ The court noted that those features which make a First Nation distinctive, as distinguished from those which are true of every society or which are only “incidental” or “occasional” to the Aboriginal society, warrant protection under section 35(1) of the *Constitution Act, 1982*. This provision reflects a political will on the part of mainstream governments to entrench prior existing rights on the basis that they sustain pre-existing distinctive cultures, and that those cultures have a right to continue. In legal terms it means that claimants of an Aboriginal right must demonstrate that the custom or tradition is a defining and central attribute of their culture.⁴⁴⁰ But what about those practices and rights that had the force of law before the assertion of sovereignty, but are not culturally distinctive? Is a customary law extinguished upon the assertion of British sovereignty merely because it does not relate to the distinctiveness of the group alleging it? The answer is no. Under the common law doctrine of custom there is no requirement that a legal custom *per se* must relate to the distinctiveness of the group to whom it applies. Such a rule has not been posited through eight centuries of consistent jurisprudence respecting the continued application of local law, notwithstanding recent Canadian jurisprudence on the separate question of Aboriginal rights. Custom and Aboriginal rights are thus assessed by different criteria. Customary law derives its modern effectiveness from the fact that *it is law*. But since the doctrine of Aboriginal rights focuses on the distinctiveness of indigenous cultures, it is apt to favour cultural curiosities at the expense of culturally indistinct ones. In a recent typical example, the Supreme Court of Canada dismissed an Aboriginal rights claim on the basis that, “[E]ven if Mohawks did occasionally trade goods across the St. Lawrence River with First Nations to the north, this practice was not on the evidence a ‘defining feature of the Mohawk culture’ or ‘vital to the Mohawk’s collective identity’ in pre-contact times.”⁴⁴¹ Having found no Aboriginal right, the court expressly declined to address questions of extinguishment, infringement or justification. The court did not address the separate and

⁴³⁷ Embedded within this question is the requirement that the alleged custom possess the four required elements of immemorial origin, continuity, reasonableness and certainty, as discussed in chapter five. Onus of proof is on the party alleging the custom.

⁴³⁸ Onus of proof is on the party alleging that the custom has been extinguished.

⁴³⁹ *Van der Peet* (1996), *supra* note 166 at 549 (per Lamer C.J., with La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.)

⁴⁴⁰ *Ibid.* at 553.

⁴⁴¹ *Mitchell v. Canada (M.N.R.)*, (2001) 199 D.L.R. (4th) 385 at 420; 269 N.R. 207, [2001] 3 C.N.L.R. 122, online: QL (SCJ) [hereinafter *Mitchell* (2001) cited to D.L.R.], *per* Binnie J.

alternative ground that the right to carry goods across the St. Lawrence River might exist as a matter of customary law, as distinct from an Aboriginal right.⁴⁴² Assuming a valid legal custom were found, extinguishment and infringement would properly still be at issue. Conflating Aboriginal rights with customary law effectively foreclosed consideration of the latter in *Mitchell v. Canada* (2001).

Aboriginal rights are also communal in nature, in that they are possessed by the group, although they may be exercised by individuals. While Anglo-Saxon legal customs once had their primary basis in communal rights, the emphasis has shifted over the last millenium and a half toward individual rights. Today the doctrine of custom has no requirement of communalism, though there is much case law on community lands held as commons in Britain. And any individual covered by a custom may commence an action where his/her customary right is infringed.⁴⁴³ Typically in Canada, actions respecting Aboriginal rights or title are commenced by collective plaintiffs.

Although legal customs and Aboriginal rights are each distinct legal concepts, there can be some overlap between the two. Where the practice has the required attributes of a legal custom but does not meet the "integral to a distinct culture" test, then it is not constitutionally protected by section 35 against infringement by statute, and no special justification of the statute is required. But where a valid legal custom is essential to maintaining the distinctiveness of the Aboriginal culture that observes it, then the custom itself can be protected as incidental to an Aboriginal right. There are two important consequences of the distinction between the concepts. First, statutes that infringe Aboriginal rights or the customs on which they depend must meet the *Sparrow* (1990) tests, while "mere" customs can be infringed or extinguished by any clear and plain, constitutionally valid statute. Second, customs that are not Aboriginal rights can have an independent existence *qua* customs, without having to meet the *Van der Peet* (1996) test.

⁴⁴² Customary trade arrangements with ancient and institutionalized particulars are known between different Aboriginal groups. On the northwest coast, for example, trade was conducted between Haida of the Queen Charlotte Islands and neighbouring Tlingit or Tsimshian on the mainland and other islands under the protection of formal relationships between chiefs of equivalent moieties or phratries. Those putative kinship ties bound those individuals, their lineages, clans and heirs, and prohibited warfare between them. Most of Tlingit traditional territory is on the American side of the international border between British Columbia and Alaska. A strong case can be made for such trade as a right under customary law, though it might or might not be so culturally distinctive as to qualify as an Aboriginal right. See Margaret B. Blackman, "Haida: Traditional Culture" in W. Suttles, ed., *Handbook of North American Indians*, vol 7 *Northwest Coast* (Washington: Smithsonian Institution, 1990).

⁴⁴³ *Brocklebank v. Thompson* (1901), *supra* note 55 at 355.

Customary law and the *Charter*

On its face, the *Charter* is directed specifically toward the legislative, executive and administrative branches of government⁴⁴⁴ by the terms of s. 32(1).⁴⁴⁵ However, when reading that section with s. 52(1) of the *Constitution Act, 1982*, the Supreme Court of Canada expresses “no doubt” that the *Charter* also applies to the common law, in that the common law must be applied in a way that reflects *Charter* values.⁴⁴⁶ Still, any contemplated repudiation of or tampering with a common law rule will doubtless be carefully and strictly considered, in view of the fact that the fundamental principles of the common law have been centuries in their development and refinement in the pursuit of fundamental justice. Given that it is the duty of courts “to see that the common law reflects the emerging needs and values of our society”⁴⁴⁷, then how can the doctrine of legal custom be reconciled with the *Charter*? After all, local legal custom by its very nature varies from the common law, and selectively confers rights, doesn’t it? Good questions. And they deserve answers.

Even in mainstream law, legal rights attach differently to individuals, according to age, place, citizenship, past behaviour, inheritance, and countless other factors. The Canadian federation was built with regional variation in laws in mind from the start, as suggested by the multiplicity of provincial and territorial jurisdictions, the differences between the terms of union for the respective provinces and territories, and the provisions for the continuation of various sets of rights that are peculiar to certain provinces. It is inevitable that some local customary laws will conflict with some *Charter* provisions, such as the s. 15 equality guarantees. But it is important to consider that the *Charter* itself contemplates a measure of legal pluralism in respect of rights. For instance, section 25 limits the application of the *Charter* where there is a conflict between *Charter* rights and

⁴⁴⁴ “It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation”: McIntyre J. (with Dickson C.J. and Estey, McIntyre, Chouinard and Le Dain JJ.) in *Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.] v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 598-99, 33 D.L.R. (4th) 174, online: QL SCJ [hereinafter *Dolphin Delivery* cited to S.C.R.].

⁴⁴⁵ Section 32 (1) provides that the *Charter* applies,
(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

⁴⁴⁶ *Dolphin Delivery* (1986), *supra* note 444 at 592, *per* McIntyre J. See also *R. v. Swain*, [1991] 1 S.C.R. 933 at 968; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835;

⁴⁴⁷ *R. v. Salituro* (1991), *supra* note 446 at 678:

“The courts are the custodians of the common law, and it is their duty to see that the common law reflects the emerging needs and values of our society.”

freedoms on the one hand, and Aboriginal interests on the other, including “any aboriginal, treaty or other rights or freedoms” [emphasis added] that presently exist or may in the future.⁴⁴⁸ “Other rights or freedoms” are also protected against derogation in a broader context without reference to Aboriginal peoples, by section 26 of the *Charter*.⁴⁴⁹ Such general language is clearly broad enough to encompass legal rights which, though not part of the common law itself, are recognized by the clearly enunciated common law doctrine of local legal custom. That is, the *Charter* can be used as a shield to protect legal rights and freedoms, but not as a sword to extinguish others, or to prevent their being exercised. Therefore, where *Charter* rights appear to conflict with customary rights, they will require careful judicial consideration.

Given that *Charter* rights and freedoms are not absolute, resort to *Charter* s. 1 may be required. That section provides for reasonable limits, prescribed by law, provided they are demonstrably justified in a free and democratic society. I suggest that customary law, being law, can prescribe such a limit. And the reasonableness of such a limit is inherent in the validity of the custom itself. Recall that an alleged custom cannot be found valid if it fails to pass the reasonableness test because its legal reasonableness is an essential part of the assessment of its validity.⁴⁵⁰ That is, where a valid legal custom infringes a *Charter* right or freedom, it is arguable that the custom is, by its very nature, a reasonable limit prescribed by law.⁴⁵¹ Of course, each case must be decided on its own merits. And where rights are in conflict, resort to the reasonableness of the respective rights may not always

⁴⁴⁸ Section 25 provides,

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

⁴⁴⁹ “The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights and freedoms that exist in Canada.”

⁴⁵⁰ See the discussion of legal reasonableness above in chapter five at 117 ff..

⁴⁵¹ For an illustration of a potential conflict of customary law with *Charter* s. 15 see discussion of gendered division of customary legal rights and prerogatives in chapter five at 120.

assist.⁴⁵² It may be helpful to take guidance from *Bastard v. Smith* (1837),⁴⁵³ where the principle was enunciated that where other rights are greatly impacted by a legal custom, the trier of fact may require proportionately strong and convincing evidence of it.⁴⁵⁴

Customary family law in modern application

Anthropologists and sociologists consider the family as a core institution which gives a culture its distinctiveness. The Anglo-Saxon peoples' early concept of family had an immense impact on the laws and governmental institutions that they and their successors developed. Group membership was determined, understandably, by their rules of kinship. Generations that descended from a common male ancestor were, when they went into Britain, the basic social and political unit. As the society became more complex and more numerous, kin-based group membership based on support for an elder kinsman gave way to subjection of individuals to a monarch, and later to citizenship in a country or state. Nevertheless, ancient Anglo-Saxon patriarchal rules of family governance continue to be embodied in notion of the king or queen as *parens patriae*, or figurative parent of the country. And to the extent that kinship is a central factor in the rules of a society, kinship is reflected in its core values and rules. But whereas early Anglo-Saxon families were characterised as patriarchal and patrilineal (government by males, tracing kinship and descent through the male line), alternative indigenous models of family have developed in the Americas and elsewhere along patrilineal, matrilineal, bilateral, cognatic and other themes. Each of those models is locally intertwined with the social, political and religious institutions, laws and economies of Native peoples. In those colonial places where indigenous family institutions were acknowledged, the legal and political implications of those models have sometimes been acknowledged also, and accommodated in government policy.⁴⁵⁵ But although it was sometimes politically inexpedient afterwards to disregard indigenous customary rules of marriage, adoption, inheritance, lineage and property, courts have never been bound by mere government policy, without a clear statute.

⁴⁵² Recall from chapter 5 that the legal reasonableness of a custom is presumed by the common law. And when challenged, such reasonableness must not be assessed as if the customary law were being newly legislated, but at the time of its inception. A custom, as with a statute, is not unreasonable merely for infringing a *Charter* right, any more than either is unreasonable for being contrary to the common law. The difference is that the onus of justifying an impugned statute is on the party defending it, while the onus is on the challenger of a custom to prove its unreasonableness.

⁴⁵³ *Supra* note 373.

⁴⁵⁴ Although the rule in *Bastard v. Smith* (1837) was stated in respect of property rights, there is no principled reason against extending it to other rights that may be infringed.

⁴⁵⁵ Recall, for instance, that conveyances between the Mississauga, the Crown and the Iroquois referred by implication to the legal and political role of women in those indigenous societies. See above at 95 ff.

Canadian case law on marriage customs

The cultural centrality of the institution of the family is arguably one of the reasons why both customary marriage⁴⁵⁶ and customary adoption rules have been judicially noticed as Aboriginal rights as recognized in s. 35(1) of the *Constitution Act, 1982*.⁴⁵⁷ The validity of customary marriage was recognized long before 1982, however. In *Connolly v. Woolrich* (1867) and *Johnstone v. Connolly* (1869)⁴⁵⁸ Quebec courts upheld the validity of an 1803 wedding by Cree custom at Rat River in distant Athabaska country between a Hudson's Bay Company employee (William Connolly) and a Cree woman Suzanne. The two continued as husband and wife for almost thirty years, during which they had many children. In 1831 Suzanne and several of their children accompanied William to Quebec, where they lived as acknowledged husband and wife. After a time William married Julia Woolrich in a Roman Catholic ceremony without divorcing Suzanne, though he continued to support Suzanne for his life. William Connolly died in 1849, leaving all of his considerable property in Upper and Lower Canada to Woolrich and their two children. The plaintiff Connolly was a child of the first marriage (with Suzanne) who sued for half of William's estate. The decision hinged on the validity of the commencement of that marriage according to Cree custom.

At trial Monk J. had no hesitation in holding that the political and territorial rights, laws and usages in the Athabaska Territory and the Hudson Bay Company lands continued in full force and effect, even after the HBC Charter of 1670.⁴⁵⁹ And even if, *per arguendo*, that Charter did introduce the common law to the region, he opined that it applied only to those who were under the Company. He held that the common law "did not apply to the Indians, nor were the native laws or customs abolished or modified."⁴⁶⁰ This strange pronouncement is only half-correct in law, though other Canadian judges have joined Monk J in his confusion. The first part is wrong because the common law is *presumed* to apply to all of the Crown's subjects by default of statute or local custom to the contrary. The second part is correct – that local laws and customs were unaffected by the HBC Charter, because the Charter was merely a prerogative instrument with no authority to change them. And in

⁴⁵⁶ The reader should keep in mind the distinction between marriage in the sense of the ceremony that attends entering into the state of matrimony (i.e. the solemnization of it, or the wedding), and marriage in the sense of the institution that is entered into. Canadian case law on Aboriginal marriage customs deals with the commencement of the union only. As for the validity of various cultural models of marriage, Canadian courts have simply made legally unsustainable assertions that models that are contrary to the common law model are *ipso facto* invalid.

⁴⁵⁷ *Re Tagornak Adoption Petition* (1983), [1984] 1 C.N.L.R. 185 (N.W.T. S.C.). See also the discussion of *Manychief v. Poffenroth* (1994), below at 143 ff.

⁴⁵⁸ *Supra* note 1.

⁴⁵⁹ *Connolly v. Woolrich* (1867), *supra* note 1 at 87.

⁴⁶⁰ *Ibid.* at 95.

any event, there is nothing in the HBC Charter that indicates a clear and express intent to extinguish any of them, nor is it necessary for accomplishing the Charter's purpose, even if such prerogative authority existed.

On appeal, Badgley J.⁴⁶¹ upheld the validity of the marriage according to Cree custom on the basis that it was the law of the place – albeit customary law – and because, he reasoned, the common law did not run in Rat River at the time. He acknowledged local legal custom as a source of law, but only insofar as the content was not contrary to the common law. That is, he did not assess the validity of the marriage according to Cree law as such, but rather whether Cree customary marriage there had the common law requirements of voluntariness, exclusivity and permanence. Since the common law would have come to the same conclusion (had it applied) the Cree custom marriage must therefore be legally valid. On the other hand, he noted wrongly in obiter several times that had the local customary law hypothetically been contrary to the common law, it would not have been valid.⁴⁶² This ratio is unsustainable in the common law, though in the result he came to the legally correct decision. A legal custom is not invalid merely for being contrary to the common law. Further, the ratio was logically flawed because if the common law did not apply, then local custom could not have been rejected for being hypothetically contrary to it. In spite of legal and logical flaws in the *Connolly* cases, they are important because first, they acknowledge the principle that customary laws in territories under the Crown's sovereignty continue to apply, and second because they recognize certain limits to prerogative authority and the resistance of legal customs to extinguishment.

“[It] is manifest, that the mere exclusive right of trading in furs with the inhabitants of the licenced country, does not interfere with the local or national customs of those people. The legislative power alone can change the local law, and substitute, by its mere power, some other.”⁴⁶³

Aboriginal customs with respect to the solemnization of marriage has tended to be recognized and applied in Canadian jurisprudence,⁴⁶⁴ but only to the extent that they are analogous to the common law model. That is, the common law has been substituted as the measure of the custom's validity. Therefore it is not truly customary law that is being applied, but rather the common law, with a superficial semantic twist.. If customary law were truly being considered, then the common law would be relied on only for the tests to assess the custom's validity. And equivalence to the substance of the common law is not

⁴⁶¹ *Johnstone v. Connolly* (1869), *supra* note 1. *McKay J. substantially concurred.*

⁴⁶² E.g. if local custom permitted polygamy.

⁴⁶³ *Ibid.*, at 219.

⁴⁶⁴ *R. v. Bear's Shin Bone* (1899), 4 Terr. L.R. 173 (N.W.T.C.A.); *Connolly v. Woolrich* (1867), *supra* note 1; *R. v. Nan-E-Quis-A-Ka* (1889), 1 Terr.L.R. 211, 2 C.N.L.C. 368 (N.W.T.S.C.) [cited to Terr. L.R.]; *R. v. Williams* (1921), 30 B.C.R. 303 (B.C.S.C.); *Re Noah Estate* (1961), 32 D.L.R.(2d) 185 (N.W.T.Terr.Ct.).

part of those tests. Local variation does not repudiate the common law generally. Variation from the common law is inherent in the argument that local legal custom is an exception to it. The issue becomes not whether there is a variation from the common law, but whether the variation has legal force. This in turn depends on the reasonableness of the custom in its own cultural context. If the custom is valid according to the common law tests discussed in chapter five, then the variation has legal effect as a consequence. The common law requires judges to properly apply such custom, if they find it valid, instead of the common law.

The *Connolly v. Woolrich* approach was followed in the case of *R. v. Nan-E-Quis-A-Ka*, (1889)⁴⁶⁵ – another case purportedly recognizing customary marriage, but in reality only recognizing such outward manifestations as conform with the common law. An Indian man had been charged with assault. Two women, both of whom he acknowledged as his wives, were called as witnesses. At trial Wetmore J. rejected the material evidence of the first wife, Maggie, on the ground that neither husband nor wife was competent or compellable at the time as a witness against the other. But he accepted the evidence of the second wife, Keewasens, holding that no such second marriage was possible under the common law, and that she was therefore a competent witness.⁴⁶⁶ The reported judgment concerns the propriety of rejecting Maggie's further evidence, which issue in turn hinged on the validity of her marriage by local legal custom.

The 5-member panel of the court *en banc* observed that English law pertaining to marriage did not apply to Indians, then proceeded to selectively apply the substance of the common law regardless. It reasoned that under the common law, mere consent constitutes marriage where there is no governing statute;⁴⁶⁷ and therefore marriage "by mutual consent and according to Indian custom . . . is a valid marriage, providing that neither of the parties had a husband or wife . . . living at the time."⁴⁶⁸ The court did not consider whether the practice met the common law test of custom, or whether local legal custom may be lawful authority for practices that are contrary to the common law itself. Instead it simply held that polygamy was contrary to the common law, despite having ruled that English law did not apply. In doing so it simply substituted common law in the place of custom, in violation of the rule that an alleged legal custom is not unreasonable merely for being contrary to the common law.⁴⁶⁹ If a practice is valid where it accords with the common law, but invalid

⁴⁶⁵ *R. v. Nan-E-Quis-A-Ka* (1889), *supra* note 464 at 213-214.

⁴⁶⁶ Note that the criminal Code prohibition against polygamy did not appear until the *Criminal Code*, S.C. 1892 c.29.

⁴⁶⁷ *Nan-E-Quis-A-Ka* (1889), *supra* note 464 at 214.

⁴⁶⁸ *Ibid.* at 215.

⁴⁶⁹ *Case of Tanistry* (1608), *supra* note 227; *Tyson v. Smith* (1838), *supra* note 336; *Lockwood v. Wood* (1844), *supra* note 331; *Hammerton v. Honey* (1876), *supra* note 55.

where it varies, then there is no actual difference between that approach and applying the common law from the beginning. The court's approach was therefore merely to apply the common law in semantic disguise. By substituting the common law for local custom, the court exceeded its jurisdiction because the common law itself does not permit the substitution. The correct approach is to assess the validity of the custom on its own merits. If the custom is valid, then it rebuts the common law presumption and is the governing rule on that point of law, in that place, for all persons within the custom. If the custom is not valid, then the common law presumption stands and is the governing rule..

In the result, the court in *R. v. Nan-E-Quis-A-Ka* (1889) ruled that one local custom – marriage by local custom – was valid, without applying the common law tests of its validity. And it ruled that another custom – marriage to more than one person at a time – was not valid, without even pretending to consider the alleged custom on its own merits. In effect, the court said to the people of the Aboriginal accused, “You can do things your way, as long as you do them our way.” In other words, the law ways of the accused were accepted as long as they were merely quaint, exotic variations on common law themes, but no further. Given that the doctrine of custom had not entered the colonial legal lexicon, it is not surprising that arguments based on the doctrine were not advanced by legal counsel at trial; and it is unlikely colonial courts would have willingly endorsed it. Neither did the court consider the possible effect of customary law on court procedure – that is, whether the customary laws of the place would have permitted a spouse's evidence to be heard in the circumstances.⁴⁷⁰ In the event, however, such pleadings were not possible because the accused was unrepresented when the question of the exclusion of evidence was argued.⁴⁷¹ Had the case arisen in England, lawyers and courts there would have considered the validity of marriage by local custom as not depending on the common law of marriage, but instead only on whether the practice bears the attributes required of any other legal custom. The *Nan-E-Quis-A-Ka* decision could not have withstood an appeal on this point of law to the Judicial Committee of the Privy Council.

Conflation of legal custom with other legal concepts.

The lack of judicial exposure to the doctrine of local legal custom has led to a failure to address it in a consistent, principled manner, a misapplication of the common law, and to a conflation of custom with the notionally related but separate and distinct concept of

⁴⁷⁰ Local custom has been used to decide some matters of judicial procedure since Glanvill and Bracton. *Glanvill*, *supra* note 137 at 14, 15, 24, 57, 100-101; Bracton, *supra* note 12, vol. 2 at 381, 382, vol 3 at 295, 387-390, vol. 4 at 49-50, 54, 130, 284; *Combes' Case* (1613), *supra* note 299. Since the social and institutional underpinnings of the common law rule excluding spouses would be absent in many Aboriginal cultures, the application of that rule itself could be called into question if, hypothetically, there were a local custom that permits or requires the testimony of spouses.

⁴⁷¹ *R. v. Nan-E-Quis-A-Ka* (1889), *supra* note 464 at 212.

Aboriginal rights. The more-recent case of *Manychief v. Poffenroth* (1994)⁴⁷² illustrates some of the difficulties. The narrow issue was whether the plaintiff was a “wife” within the meaning of Alberta’s *Fatal Accidents Act*, and therefore eligible to receive survivor benefits.

In 1981 Delia Mae Manychief, a treaty Indian and member of the Blood band, met Darrel Daniels, a Metis and not a member. Within a year they considered living together. But before doing so they first obtained her parents’ consent and their willingness to accept Daniels into their family. This legitimized the union in the eyes of the Blood community. A year later they had a daughter, and lived together as a family for eight years, until Daniels died in 1990. Manychief applied for accident compensation as a “wife” under Alberta’s *Fatal Accidents Act*.⁴⁷³ At the time of the accident the word “wife” in the statute did not include common law wives.⁴⁷⁴ Manychief argued, however, that if marriage by Indian custom was an Aboriginal right, then she could therefore bring herself within the *Fatal Accidents Act*. McBain J. observed,

It is arguable that marriage by Indian custom is an aboriginal right, and that a claim based on the resulting marital status is an exercise of that right. If this is the case, that status is recognized, affirmed, and guaranteed by s. 35 of the Constitution Act.

1982, provided it had not been properly extinguished prior to 1982.⁴⁷⁵

This position is well stated, since boundary maintenance and control of group membership and of the intra-group status of its members is necessary for any group to maintain its integrity and distinctiveness. He observed, “It is also logical that marriage by custom would have been integral to the determination of status and membership in the blood community.”⁴⁷⁶ He continued, saying that “marriage by Blood custom would have been protected by the common law and is now protected by the constitution.”⁴⁷⁷ On that basis he ruled that a wife from an Aboriginal marriage by Blood custom would be recognized by the *Fatal Accidents Act*. The question then became whether the relationship between the plaintiff and the deceased qualified as marriage by custom. But he found that the relationship in question lacked a “distinct aboriginal dimension”; and on that basis held that Manychief was not a “wife” under the Act.

There are serious flaws in the judgment that flow from McBain J.’s confusion in three areas. First, he conflated local legal custom with Aboriginal rights. Second, he conflated the solemnization of a marriage with the existence of a state of matrimony. And

⁴⁷² *Manychief v. Poffenroth* (1994), [1995] 3 W.W.R. 210, (1994) 25 Alta. L.R. (3d) 393, (1994) 164 A.R. 161, [1995] 2 C.N.L.R. 67 (Alta. Q.B.) [cited to W.W.R.].

⁴⁷³ *Fatal Accidents Act*, R.S.A. 1980, c. F-5.

⁴⁷⁴ *Manychief v. Poffenroth* (1994), *supra* note 472 at 219 ff.

⁴⁷⁵ *Ibid.* at 221.

⁴⁷⁶ *Ibid.* at 222.

⁴⁷⁷ *Ibid.* at 223.

third, he confused the existence of an Aboriginal or customary right with the form or manner in which they are exercised. By failing to distinguish between these separate issues, he failed to properly address any of them.

Aboriginal rights and legal customs of the Blood people

The Aboriginal right in question was the right of the Blood people to recognize marital status, among their own members, by their own rules. Boundary maintenance and control of group membership and of the intra-group status of its members is necessary for any group to maintain its integrity and distinctiveness. It is the integrity and distinctiveness of the historically prior culture that is important. But the distinctiveness and integrity of a culture does not depend on the distinctiveness of each of the mechanisms by which the culture is maintained. Otherwise, a failure to possess or maintain sufficient distinctiveness in the method or mechanism must then entail the extinguishment of the underlying right. But a right cannot be assessed according to the manner in which the exercise of the right is regulated.⁴⁷⁸ The Supreme Court in *Sparrow* (1990) also held that Aboriginal rights are affirmed in their contemporary form, and are not “frozen” in the form they were traditionally exercised. Similarly, the mode of exercising a custom can change over time without touching the essential nature of the custom.⁴⁷⁹

Perhaps due to his flawed understanding both of legal custom and of Aboriginal rights,⁴⁸⁰ McBain J. was inconsistent in *Manychief* in applying the legal rules on which he relied. If the distinctiveness he sought pertained to an Aboriginal right, then it should have been a distinctiveness in the Aboriginal culture in question, and not to manner in which the culture exercises its right. And he seems to have conflated the solemnization of marriage by custom with the question of whether a state of matrimony existed between the woman and man under customary law. He looked for an exotic ceremonial flourish at the commencement of the marriage, and seized on the lack of one to hold against the marriage’s validity: “The relationship in question really shows no distinct aboriginal dimension.” In the result, he found that since the solemnization of the marriage lacked the exotic indicia of

⁴⁷⁸ *R. v. Sparrow* (1990), *supra* note 400.

⁴⁷⁹ *Mercer v. Denne* (1904 and 1905), *supra* note 55.

⁴⁸⁰ In fairness, it should be pointed out that McBain J. relied heavily on the reasoning from the British Columbia Court of Appeal in the cases of *Delgamuukw v. B.C.* (1993), *supra* note 3, *R. v. Gladstone*, [1993] 5 W.W.R. 517 and *R. v. Van der Peet*, [1993] 5 W.W.R. 459. McBain J. lacked the guidance of the Supreme Court of Canada, which reversed *Gladstone* in [1996] 2 S.C.R. 723, overturned the reasoning in *Delgamuukw* in 1997, *supra* note 260, though remitting that case back for trial, and clarified the doctrine of Aboriginal rights substantially in *Van der Peet* (1996), *supra* note 166.

former times, the marriage did not therefore have the sanction of local legal custom.

It appears to me the relationship in the case at bar was nothing more than the type of common-law relationship one frequently sees in the non-native community. It was different in nature and scope from the traditional form of customary Indian marriage both substantively (ie: parents pre-arranging the marriage) and procedurally (ie: the selection-approval-delivery acceptance sequence).⁴⁸¹

McBain J.'s reasoning paralleled that of the courts in *Johnstone v. Connolly* (1869) in crucial respects first in confusing the solemnization of marriage with the state of matrimony; and second in applying common law criteria rather than the provisions of the legal custom to assess the validity of the marriage. He even relied on the judgments in the *Johnstone v. Connolly* cases to identify common law criteria. But in doing so he set a test that was impossible to meet. McBain J. reasoned that a valid marriage requires *inter alia* voluntariness⁴⁸² in the marriage partners. His view of the facts was that under Blood custom of the time when the community's Elders were young, a woman had no choice whether or not to accept the man that had been chosen to be her husband.⁴⁸³ If the marriage in question had commenced according to what he understood to be Blood custom, McBain J. would therefore have held himself bound to rule in favour of the custom because it had the exotic and "distinct aboriginal dimension" of being prearranged and involuntary. But at the same time, he would be bound to rule against it because it was too exotic and distinct (i.e. involuntary) to conform with the common law requirements of marriage. This paradox results first from applying common law criteria to the substance of customary law, which by definition is distinct and at variance from the common law, and second from equating matrimony with the ceremonial flourishes which often accompany its commencement.

A better approach with respect to custom and Aboriginal rights is to consider each on its own merits. If a valid custom is found, then the Aboriginal rights aspect can be considered, if necessary. With respect to marriage customs, the existence of the state of matrimony should be considered as a separate and distinct question from the solemnization of the commencement of it. The common law requires not that the substance of a customary law – for example the institutional model of matrimony – conform to the common law model, but rather that the custom that gives rise to the local model must meet the requirements of a legal custom. Those requirements, as discussed in chapter five, are immemorial origin, continuity, certainty and reasonableness. If the validity of the customary marriage requires a particular form of solemnization, then it must be a *customary* requirement and not something that the common law imposes from outside – it being *ultra vires* the common law to do so. Judges

⁴⁸¹ *Manychief* (1994), *supra* note 472 at 231-32.

⁴⁸² *Ibid.* at 220.

⁴⁸³ *Ibid.* at 217.

must not expand a custom beyond its strict terms.⁴⁸⁴ As an exception to the common law, custom must be construed narrowly, or risk throwing the common law itself into confusion. The role of the common law is only to supply the procedure by which the validity of local custom is assessed. After assessing alleged custom on the basis of whether it possesses the four essential criteria, the rule of law requires judges to either take the legal custom as found and apply it, or hold it to be a legal nullity and instead apply the law in the ordinary fashion.

Disposition of marital property upon divorce, etc.

Aboriginal women are particularly disadvantaged with respect to the disposition of marital property upon a divorce, if the property is located on an Indian reserve. While provincial laws of general application apply to Indians in most other respects by virtue of section 88 of the Indian Act, section 91 (24) of the *Constitution Act, 1867* assigns exclusive jurisdiction to the federal Parliament in all matters pertaining to "Indians, and Lands reserved for the Indians". This means that whereas most provincial legislation provides for an equal division of marital assets upon divorce, judges are denied the authority to apply that legislation to land on reserves.⁴⁸⁵ There is no mechanism in the *Indian Act* for the forced resolution of competing claims of parties to land, even where they are jointly entitled to a Certificate of Possession.⁴⁸⁶ Other federal law is silent on the matter. Indian women have often been left literally and figuratively out in the cold because historically the usual practice has been for lands on reserves to be registered in the man's name, following the imposed Anglo-Saxon presumption of patriarchal tenure and family structure. The BC Supreme Court has held that BC's *Partition Act* cannot apply to jointly held reserve land.⁴⁸⁷ Although arguably distasteful in some respects, that part of the ruling is correct in law. But the court also ruled that the equivalent common law right to partition, received as common law by British Columbia statute in 1858, was unavailable. Its ratio was that the Canadian

⁴⁸⁴ In *Smart v. Smart* (1881), *supra* note 20, a custom had been alleged, and accepted as valid, providing for the descent of property by a means that was contrary to the common law. The difficulty was that no one could be found as customary heir who was within the strict terms of the local custom. The plaintiff argued, in effect, that general principles could be extracted from valid legal customs, in such a way as to extend the benefit of the local custom to him by analogy. Bacon V.C. stated the rule as follows at 170-71:

I know of no mode of construing customs but the literal mode. ... None of the authorities shew that the Court is at liberty to depart from the literal sense of the words, or to supply others in their place. Finding the plaintiff outside the terms of the custom, the court held that the inheritance must therefore descend according to the course of the common law.

⁴⁸⁵ In *Derrickson v. Derrickson* (1986), *supra* note 328, the Supreme Court held that provincial legislation dealing with the division of family assets is constitutionally inapplicable to lands or houses on Indian reserves.

⁴⁸⁶ *Darbyshire-Joseph v. Darbyshire-Joseph*, [1998] B.C.J. No. 2765. online: QL (BCJR) (B.C. S.C.).

⁴⁸⁷ *Simpson v. Ziprick* (1995), 126 D.L.R. (4th) 754 [hereinafter *Ziprick* (1995)].

Parliament "modified" the received English law by enacting the *Indian Act*. And since the *Indian Act* does not expressly provide for partition, therefore Parliament must have intended that Indians should not be able to partition their holdings.⁴⁸⁸ I submit that denial of the right of partition is plainly an error in law, even if such an intent were the overt policy of the government of the day. Without the express sanction of Parliament the policy could have no legal effect where it infringes either common law rights or local legal custom.⁴⁸⁹ There can be no extinguishment of common law or customary law by mere failure to mention it.

⁴⁸⁸ *c Ibid.*, at paras 33-34. The denial of the common law right of partition in the case is plainly and simply bad law. The cases cited in support of the ruling were not on the question of the *common law* right of partition, but whether *provincial statutes* of similar legal substance apply on reserves. Thankfully, *Ziprick* (1995) has not been cited in any published decision (as of July 29, 2001). The *Indian Act* can only extinguish the common law by mere implication if it is impossible to construe the *Indian Act* narrowly without extinguishing the common law on point. That is, such extinguishment must be necessary in order to give effect to the statute. Hogg (1996), *supra* note 48 states at 584, "The governing canon [of statutory interpretation] is that 'statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a 'strict' construction'." Driedger, *supra* note 327 at 211 expresses the principle as a presumption that the Legislature does not intend to make any substantial alteration of the law beyond what it explicitly declares either in express terms or by clear implication. Another expression of the principle is a presumption against any intention by Parliament to interfere with vested rights. In illustration, Driedger cites (at 183) the following passage from *Spooner Oils* (1933), *supra* note 327 at 638 (per Duff C.J.):

A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (*Main v. Stark* [(1890) 15 App. Cas. 384, at 388]), unless the language in which it is expressed requires such a construction. The rule is described by Coke as a 'law of Parliament' (2 Inst. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.

And as Lord Radcliffe for the court in *Canada (A.G.) v Hallet and Carey*, [1952] 3 D.L.R. 433 (JPC Canada) at 446-47 observed,

If is fair to say that there is a well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a 'strict' construction. To deny Indians a common law right of partition is arguably a denial of equality "before and under the law" and of the "equal protection and equal benefit of the law without discrimination based on [an enumerated ground]" contrary to *Charter of Rights and Freedoms* section 15. While the *Charter* does not strictly apply to judgments of a court, judges are nevertheless bound by the law, and must fashion their judgments in accordance with *Charter* values: *Dolphin Delivery* (1986), *supra* note 444. Judges may modify the expression of a common law principle in order to make it consistent with *Charter* values (*R. v. Salituro* (1991), *supra* note 446 at 675; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para 85). But the ruling in *Ziprick* (1995) dismissed the applicability of an element of the common law itself, and did so in a racially discriminatory manner. That dismissal was on the mere basis of a casually implied, race-based extinguishment of the right, where in any event an express extinguishment is required. I submit that the ruling in *Ziprick* (1995) on the extinguishment of the common law right of partition would have been overturned on appeal, and that the correct ruling is that partition of joint interest in property on a reserve is available as of right. The decision was appealed ultimately to the Supreme court of Canada. But nowhere in the judgments in appeal was the common law right of partition addressed.

⁴⁸⁹ *Re Bonaparte* (1853), *supra* note 400.

The court erred in construing general words in a statute to implicitly extinguish a common law right. It is contrary to the fundamental common law presumption of the continuity of law. In effect, it invokes the "recognition theory", whereby vested rights continue only so long as they are officially noticed.⁴⁹⁰ Continuing the logic, however, the absurd result is that every *Indian Act* person must either prove by express statute, or be denied, all of the common law rights, remedies and prerogatives that the law presumes in the rest of us, as well as all that vest under customary law. On the other hand one might argue with equal logic that since Parliament did not expressly provide for the denial of the common law right, then parliament must have intended therefore that it should continue. To invoke the recognition theory here undermines the very purpose for which the common law emerged in the first place. That purpose was not to change or extinguish laws, but to establish a set of legal presumptions in order to prevent just such a legal vacuum as in *Ziprick* (1995). The common law cannot therefore construct a legal vacuum by presuming that failure to expressly recognize any given law indicates an intention to extinguish it. And without express statutory language, the onus is on the alleging party to prove that any implicit extinguishment was necessary for the purpose of the statute. The need to prevent band members from partitioning land among themselves is a hard argument to make, especially in light of government assimilation and "betterment" policies. Alternatively, a claim may lie in a customary presumption that a wife, for instance (where such custom exists locally) is presumed entitled to the land, and that a man's estate there was beneficial only, terminating upon divorce or his death.

I contend that common law and customary law are available to address the disposition of marital assets on reserves. Section 20 of the *Indian Act* provides that an Indian may possess land on an Indian reserve only if allotted by the band, with the approval of the Minister. While the provision makes no reference to common law or legal custom, the Minister has authority and a duty to act according to them, except where otherwise mandated by statute. The same principles apply with respect to Indian Act band councils. The *Act* does not create a legal desert, rendering vested rights vulnerable to the whim of a transient majority on a band council (however well-intentioned) if there is a pre-existing, legally valid set of rules to govern an issue. The Indian Act does not prevent band councils from administering *Indian Act* allotments according to common law or customary law principles. The practical questions then become whether their application is appropriate in the circumstances, and whether there is the political will for those functionaries to act.

Adoption

Adoption is another area where courts have generally accepted, in principle, the

⁴⁹⁰ Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 191 ff; Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases" (1992) 21 Man. L.J. 343; Hon. Mr. Justice Lambert, "Van der Peet and Delgamuukw: Ten Unresolved Issues" (1998) 32 U.B.C. L. Rev. 249.

validity of Aboriginal customs.⁴⁹¹ Many consequences can flow from adoption, including membership in an Aboriginal band, clan or other group, a right to succession of property, a right or duty of child support, the right to survivor's benefits under an insurance plan, the authority to act in a child's best interest, and more. Some Aboriginal customs also provide for the adoption of non-infants into a family, House, clan, band, or Nation. A need can arise, for example, when the membership of a group or sub-group has become too small to meet all of its institutional requirements, in which case outsiders may be adopted in to fill the vacant posts. *Gayanashagowa*, the constitution of the Iroquois Confederacy, provides mechanisms and procedures for adopting individuals, families, or groups of families, where motivated by "esteem or other feeling".⁴⁹²

In 1972 the Northwest Territories Court of Appeal upheld the adoption of an Inuit child by immemorial custom despite the failure to comply with Territorial adoption ordinances.⁴⁹³ This was a ruling under common law, even before recognition of legal custom in adoption of children was expressly mandated by statute. The ruling has been criticized as without basis in law, but I disagree. Customary adoption has been recognized as having legal force since as early as 1850 in pre-Confederation colonial statutes.⁴⁹⁴

Some Canadian jurisdictions, such as British Columbia, the Northwest Territories, and Canada have recognized customary adoption by legislation.⁴⁹⁵ Such legislation only *refers* to adoption, however, and does not define it or provide criteria by which alleged custom can be identified or assessed for validity. The Northwest Territories *Aboriginal Customary Adoption Recognition Act*, ACARA, specifically identifies custom in this context as law in its own right, and clearly intends that customary adoption law, where found, will continue. Alternatively, one can proceed under the *Adoption Act*.⁴⁹⁶ *S.K.K. v.*

⁴⁹¹ *Re Adoption of Katie E7-1807* (1961), 32 D.L.R. (2d) 686 (N.W.T. Territorial Ct.); *Re Beaulieu's Adoption Petition* (1969), 3 D.L.R. (3d) 479 (NWT Territorial Ct.); *Re Deborah E4-789, Kitchoolak and Enooyak v. Tuktoo*, [1972] 5 W.W.R. 302 [hereinafter *Re Deborah* (1972)] (N.W.T.C.A.), aff'd 27 D.L.R. (3d) 225; *Re Wah-Shee* (1975), 57 D.L.R. (3d) 743 (N.W.T.S.C.); *Tagornak* (1983), *supra* note 457.

⁴⁹² *Gayanashagowa*, *supra* note 304, ss. 66-70.

⁴⁹³ *Re Deborah* (1972), *supra* note 491. This judgment sanctioned and applied similar, previous judgments of lower courts: *Re Katie's Adoption Petition* (1961), 38 W.W.R. 100, 32 D.L.R. (2d) 686 (N.W.T. T.C.); *Re Beaulieu's Petition* (1969), 67 W.W.R. 669, 3 D.L.R. (3d) 479 (N.W.T. T.C.).

⁴⁹⁴ *Indian Lands Protection Act, 1850* (Lower Canada), *supra* note 2, s.5 provided that for the purpose of that statute, "Indian" included anyone who had been adopted in infancy by an Indian.

⁴⁹⁵ *Adoption Act* RSBC 1996, c. 5 s. 46; *Aboriginal Custom Adoption Recognition Act* S.N.W.T. 1994, c.26; *Indian Act* R.S.C. 1985, c.I-5 s.2 [definition of "child"].

⁴⁹⁶ *Adoption Act* S.N.W.T. 1998, c.9.

*J.S.*⁴⁹⁷ concerned an application for interim child support from an Inuit child's biological father, following a custom adoption by the child's maternal grandmother. At issue was whether the *Adoption Act*, which severs the former parental relationship, operated to relieve the man of an obligation to support the child.⁴⁹⁸ Schuler J. held that adoptive parents who are entitled to rely on Aboriginal custom are given two options. One is to have the custom adoption recognized under ACARA. The other, which can also apply to what may have begun as a customary adoption, is to petition for an order under the *Adoption Act*. The procedures under the two Acts are very different. Given that ACARA seeks to preserve customary law with its own rules and consequences, he held that the two different procedures can give rise to different consequences with respect to maintaining, altering or extinguishing the parental relationship that existed before the adoption.⁴⁹⁹ Schuler J. acknowledged that the consequences of a customary adoption may sometimes be the same as provided by the *Adoption Act*, but allowed that local custom can impose responsibilities that are not required by statute. An order under ACARA does not change or substitute anything for the parental consequences of a customary adoption, but simply recognizes that an adoption has already taken place. Determining the consequences of an adoption by custom therefore requires evidence of the customary law of the community or locality in which the adoption took place. In the proceedings before him, no evidence of customary law was advanced in support of the application. Schuler J. therefore rightly dismissed the application for interim support, leaving the matter to be determined at trial.

British Columbia's *Adoption Act*⁵⁰⁰ also recognizes adoption by the custom of an Indian band or community, but does so problematically. In addition, British Columbia courts have applied the statute with correct outcomes, but with disturbingly faulty

⁴⁹⁷ *S.K.K. v. J.S.*, [1999] N.W.T.J. No. 94 (N.W.T.S.C.), online: QL (NWTJ).

⁴⁹⁸ Section 7 provides,

- (1) For all purposes, as of the date of the making of an adoption order,
 - (a) the adopted child becomes the child of the adoptive parent and the adoptive parent becomes the parent of the adopted child as if he or she were the natural parent; and
 - (b) the adopted child ceases to be the child of the person who was his or her parent before the adoption order was made and that person ceases to be the parent of the adopted child.
- (2) Paragraph (1)(b) does not apply to the person who was both a parent of the adopted child before the adoption order was made and the spouse of the adoptive parent.
- (3) The relationship to one another of all persons, whether the adopted child, the adoptive parent, the kindred of the adoptive parent, the parent before the adoption order was made, the kindred of that former parent or any other person, shall for all purposes be determined in accordance with subsections (1) and (2).

⁴⁹⁹ *S.K.K. v. J.S.* (1999), *supra* note 497 at para 24, per Schuler J.

⁵⁰⁰ *Adoption Act* (B.C.), *supra* note 495, s.46 provides,

- 46 (1) On application, the court may recognize that an adoption of a person effected by the custom of an Indian band or aboriginal community has the effect of an adoption under this Act.
- (2) Subsection (1) does not affect any aboriginal rights a person has.

reasoning. In *Re B.C. Birth Registration No. 1994-09-040399*,⁵⁰¹ Grist J. ordered that an adoption according to the customs of an Aboriginal community have the same effect as an adoption under the BC statute. He properly considered the child's cultural identity in determining her best interests.⁵⁰² In making his determination, however, Grist J made the following observation:

Adoptions in modern Canadian society, authorized by statute, have the effect, not always intended, of severing the child's relationship with the biological parents and substituting new ties with the adoptive parents. In Aboriginal societies, studies have shown that adoptions not only create new ties with the adoptive family but carry on the ties with the natural family. While adoptive parents become the primary care givers, the child still maintains and benefits from contact with his or her natural extended family.⁵⁰³

The difficulty with this admittedly sympathetic observation, is that it is a generic approach, based on a questionable premise. While the reference to continuing parental legal ties is undoubtedly true in many Aboriginal societies, it is not necessarily true of all. The danger is that applying it indiscriminately as a presumed fact can have the effect of substituting a generic pseudo-custom for the actual custom of a society in which the substitution is culturally inappropriate and legally improper.

A more disturbing comment in obiter is that "the relationship created by custom must be understood to *create* fundamentally the same relationship as that *resulting* from an adoption order under Part 3 of the Act".⁵⁰⁴ Grist J refers in this context to the provision in section 37 that an adoption under the Act has the consequence that the former parents cease to have "any parental rights or obligations" with respect to the child. Other kinship relations follow the newly established parental relationships. This is certainly the understanding of most non-Aboriginals. And it is often the case under some Aboriginal customs, but not all. But this provision does not extinguish, by implication, local legal custom that provides otherwise. On the contrary, the purpose of the reference to local customs is to recognize, not extinguish them. Recognition under the Act does not *create* new relationships, but *recognizes* relationships that were created by legal custom. A better approach is to hold that recognition of a custom adoption acknowledges an *alternative* to an adoption under the statute. If substantial differences were not tolerated, then there would be little or no purpose in enacting the provision in the first place. Moreover, if adoption by custom is an Aboriginal

⁵⁰¹ *Re B.C. Birth Registration No. 1994-09-040399*, [1998] 4 C.N.L.R. 7, (1998) 45 R.F.L. (4th) 458 (BC SC) [hereinafter *Re BC Birth Registration* (1998)].

⁵⁰² *Adoption Act* (B.C.), *supra* note 495, s. 3(2) provides, "If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests."

⁵⁰³ *Re BC Birth Registration* (1998), *supra* note 501 at para 10, citing Vertes J. in *C.A.D. v. V.G.*, [1992] N.W.T.R. at 236 (S.C.).

⁵⁰⁴ *Re BC Birth Registration* (1998), *supra* note 501 at para 15.

right, then the British Columbia legislature was not competent to extinguish it; nor did it indicate any intention to do so. And such extinguishment is not necessary for the narrow purpose of the provision – indeed, extinguishment is antithetical to legal recognition of a custom.

Some other provisions of the B.C. statute have the potential to conflict with customary law, though there is no explicit intention to extinguish. For example, under the Act the adoption does not affect any interest in property or rights vesting in the child prior to the adoption order.⁵⁰⁵ In the mainstream society this poses no great problem, and is usually in the child's interest, without injustice to others. But in some Aboriginal societies, property or other rights can vest according to clan membership, to the exclusion of other clans. In such instances the statute applied *holus bolus* on a superficial reading would have the effect of disrupting fundamental principles under which those societies function. Such cannot have been the intention of the legislature. The obiter comment that recognition of customary adoption must create "fundamentally the same relationship" as that resulting from an order under the Act should be interpreted by analogy only. As with any analogy, the correspondence between the model and the facts is imperfect. To disregard the differences between customary adoption and the statutory model is to dismiss custom adoption from the outset, and subvert the intention of the legislature. A better approach is to accept that adoptions effected by legal custom may (or may not) have different consequences from adoptions effected by the statute. As discussed above,⁵⁰⁶ the latter approach was used in the Northwest Territories case of *S.K.K. v. J.S.* (1999), where Schuler J. held that in the NWT statutory adoptions and customary adoptions may have different consequences where customary adoption law requires it. The British Columbian approach and that of the Northwest Territories cannot be distinguished on mere differences between the statutory regimes: they each contain essentially the same provisions. The chief difference is that the provisions are included in two NWT statutes, but only one in BC.

In a later BC case Meiklem J. came closer to the mark when he observed that the BC statute,

does not require proven symmetry between the effects of adoption by aboriginal custom adoption and adoption under the Act ... [But] the Court must obviously be satisfied that it is recognizing an adoption already effected, and not creating a fundamentally different relationship or status.⁵⁰⁷

The phrase "fundamentally the same relationship" should be taken to mean the establishment of a new parental relationship, having certainty as to the identity, duties, rights and obligations of the parties, and not necessarily the severance of the previous ones if legal custom dictates

⁵⁰⁵ *Adoption Act* (B.C.), *supra* note 495, s. 37(6).

⁵⁰⁶ See above at 150 ff.

⁵⁰⁷ *Prince v. Duncan (Public Trustee of)*, [2000] B.C.J. No. 1471, [2000] 4 C.N.L.R. 249 at 257-58 (BC SC), online: QL (BCJ) [cited to C.N.L.R.].

otherwise. And the consequences of adoption should be construed in the context of the society in which the adoption takes place.⁵⁰⁸ Despite this shortcoming, Meiklem J. adverted to *Halsbury's Laws of England* for the essential doctrinal attributes of legal custom. He found it sufficient to address the question of the custom's certainty⁵⁰⁹ only, without attending to its immemorial origin, continuity or reasonableness. And on the question of certainty he held against the alleged custom because there was no evidence of it aside from the bare assertion by the applicants, who asserted the custom in order to claim the estate of a deceased man, to the exclusion of the man's sibling. Due to the presence of a "potent self-interest", the judge properly required corroboration in order to find the assertion convincing.

Legal custom as defence in criminal matters

There is scope in Canada's *Criminal Code*⁵¹⁰ for customary law to bring individuals within the *Code* where custom confers duties, such as parental responsibilities, or to exclude them where custom provides legal justification or excuse. A duty can arise, for instance, in certain familial relationships, or where a person in need is under the charge of another. We have already seen that custom can give rise to familial relationships, and govern attendant duties. Section 215 provides that parents are responsible for providing the necessities of life for their children; married people must provide the same for their partners; and everyone must provide such things for persons under their charge who, by reason of enumerated grounds, are unable to withdraw from that charge, and are unable to provide for themselves. And s. 219 provides that anyone is criminally negligent who omits to do a duty that is imposed by law, and in doing so shows wanton or reckless disregard for the lives or safety of other persons. For the purpose of criminal negligence, "duty" includes a duty that arises under common law. I submit that such duties as the *Code* contemplates, include some that arise by custom, such as exist in parents who adopt by custom, or spouses who marry by custom. Who could suggest that they are any less responsible for criminal neglect simply because their duties are "merely" customary?⁵¹¹

The *Criminal Code* also provides that common law justifications or excuses for an act, or defences to a charge, continue in effect except as altered by statute.⁵¹² One such

⁵⁰⁸ Of course, contained within the assessment of the custom's validity is the test of its reasonableness, as discussed above in chapter 5 above at 117 ff.

⁵⁰⁹ That is, certainty as to its general nature, the locality where it is alleged to apply, and the persons it is alleged to affect. See chapter 5 at 116.

⁵¹⁰ *Criminal Code*, R.S.C. 1985, c. C-46.

⁵¹¹ Remember that there are, by definition, no statutory or common law underpinnings to a right or duty that arises by custom, though statute and the common law can both recognize their existence.

⁵¹² *Criminal Code*, *supra* note 510, s.8(3).

defence is a plea of justification, which in effect argues, "I did nothing wrong because I had a right or a duty to act as I did." In *R. v. Morgentaler* (1975), Dickson J. (as he then was) addressed the legal issue of justification. He said, "No system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value."⁵¹³ By this, he was distinguishing non-legal principles from legal ones. In *R. v. Perka* (1984) Wilson J. endorsed that view and added for greater clarity: "This statement, in my view, is clearly correct if the 'higher social value' to which the accused points is one which is not reflected in the legal system in the form of a duty."⁵¹⁴ The existence of a customary law underpinning to a justificatory right or duty, however, is only a threshold test in assessing the larger question of justification: custom establishes only the availability of the defence. Wilson J. went on to observe that the mere observance of a legal duty is not in itself sufficient to justify breaking a law.

[J]ustification must, in my view, be restricted to situations where the accused's act constitutes the discharge of a duty recognized by law. The justification is not, however, established simply by showing a conflict of legal duties. The rule of proportionality is central to the evaluation of a justification premised on two conflicting duties since the defence rests on the rightfulness of the accused's choice of one over the other.⁵¹⁵

Legal custom as justification for trespass

There is precedent for custom grounding a defence against accusations of break and enter, and of trespass, not merely under a colour of right, but rather as a full justification with an enforceable right to do so again. In *Race v. Ward* (1857)⁵¹⁶ the inhabitants of a township had a right by immemorial custom to take water for domestic purposes from a certain water well. The land had anciently been common land, but was converted to private land under enclosure statutes of 1801 and 1809. Under the latter statute special Commissioners were empowered to "set out and appoint" private roads, bridleways, footways, ditches, drains, watercourses, watering places and other things as they saw fit. It also provided that "all roads, ways, and paths" over the newly enclosed lands, except those that had been designated by special Commissioners, "shall be for ever stopped up and extinguished." The well in question, however, was not mentioned in either the statute or in the Commissioners' report. The owner of the land considered that the right of the local inhabitants to use the well had therefore been extinguished by the statute, and proceeded to drain the well and block it up. Some local township inhabitants responded by stopping up the owner's newly installed drain,

⁵¹³ *R. v. Morgentaler* (1975), 20 C.C.C. (2d) 449 at 497.

⁵¹⁴ *R. v. Perka*, [1984] 2 S.C.R. 232 at 274.

⁵¹⁵ *Ibid.* at 277-78.

⁵¹⁶ *Race v. Ward* (1857), 7 El. & Bl. 383 [cited to El. & Bl.].

restoring the well, and clearing away the obstructions. The land owner charged them with breaking and entering, and with stopping up the drain he had installed.

Fee simple is subject to prior vested customary rights

At trial the custom was upheld and the defendants acquitted. The appeal was rejected by a 4:1 majority. In dissent, Hall J. held that “wells” was included in “watering places”, and was therefore extinguished by implication. But the majority held that although the Commissioners had been empowered to *establish* watering places, roads and pathways, they could not *extinguish* customary rights to existing ones, and in any event had made no reference to the well in question. The power to extinguish customary rights was with Parliament only, and could not be delegated. Crompton J. observed that if the Commissioners had hypothetically purported to extinguish the customary right to use the well, they would have exceeded their powers.⁵¹⁷ The majority held that the customary right to take water from the well being unextinguished, the right of access to the well must remain unextinguished also as an accessory right. That is, the commissioners were empowered only within the narrow limits of existing law, and they were required to respect local legal rights except where specifically mandated. The case is interesting also because when the entitlement to the land, including the well, was alienated from the commons and vested in the land owner in fee simple, his use and enjoyment of the land was subject to unextinguished prior vested rights.

Intellectual property, copyright, trademarks, traditional knowledge

Many indigenous societies have legal notions that might be very imperfectly characterized as “intellectual property” rights, in that they confer an exclusive right to produce, use and/or display such intangibles as images, masks, songs, ceremonial regalia, knowledge or names on particular clans, moieties, or phratries families or individuals. Depending on the customs of the society being considered, those rights may or may not be alienated. In mainstream law these notions are sometimes known as intellectual property rights. But there are some profound differences between those notions in customary law on the one hand, and loosely analogous notions as market-based economic legal devices on the other. Whereas copyright and patent protection can be extended to other countries through the device of international treaties, protection by local legal custom applies locally only, within ancient limits. And the rationale underlying the Aboriginal versions has usually little in common with the profit motive underlying market economies.

Consider the hypothetical example of a customary law that limits the display of a particular animal (say, a bear) to members of an identifiable group (say, the Bear Clan).

⁵¹⁷ *Ibid.* at 391.

Such customs are not uncommon on the northwest coast and elsewhere. In the locality covered by the custom, the members of the Bear Clan could bring a legal action to prevent the display or sale of bear images (say, as curios in a tourist-oriented shop, or on postcards) *in the locality of the custom* by strangers, but not elsewhere. This is not to say that a particular image of a bear that has been protected by copyright or trademark registration could be appropriated. The Bear Clan of that locality could not, for instance use the well known image of Yogi Bear.⁵¹⁸ But neither would the ownership of the trademark entitle Hanna-Barbera or its licensee to disregard the local prohibition against its use by anyone other than Bear Clan members – no more than the Disney Corporation could erect a billboard of Mickey Mouse in a place where billboards are forbidden by municipal bylaw. A general right of exclusivity cannot authorize a display where such display is forbidden by specific customary or other local law.⁵¹⁹

Similar reasoning was applied in the case of *Simson v. Moss* (1831).⁵²⁰ In that case a man had been charged under a local bylaw that only freemen of the borough were permitted to trade there. Such a bylaw would have been void as in restraint of trade, except that it had been made in support of a valid local customary law. The defendant argued that he was licenced under a general statute for licensing hawkers. The court rejected his defence, holding that even without an express limiting clause, the statute did not assist him where hawking had been prohibited by law before the act was passed. Applying the same reasoning, it follows that unless there are specific provisions to the contrary, general words of copyright statutes granting exclusive use of images should not be construed so as to permit their use where there is customary law to the contrary. Since customary law can only be extinguished by statute, it is untenable that the mere registration of an image in a domestic or foreign copyright or trademark office can effect the extinguishment of a valid customary law – the right of an indigenous group to control the use of their clan's totem in their own territory. Of course, each such custom must be proven, and each claim assessed on its own merits.

Self Governance and inter-governmental relations

It is arguable that the right of First Nations to govern themselves is an Aboriginal right, as protected by s. 35(1). The argument was sustained in *Campbell v. British Columbia*

⁵¹⁸ In this case the image is a trademark of Hanna-Barbera.

⁵¹⁹ “[F]or by general words the law will never enable any for his benefit, whom the law has disabled”: *Doctor Hussey's Case* (1611), *supra* note 432.

⁵²⁰ *Supra* note 60. See also discussion of *Leicester v. Burgess* (1833) above at 130 ff.

(2000),⁵²¹ where Mr. Justice Williamson said for the British Columbia Supreme Court that [A] right to aboriginal title, a communal right which includes occupation and use, must of necessity include the right of the communal ownership to make decisions about that occupation and use, matters commonly described as governmental functions. This seems essential when the ownership is communal.⁵²²

In this instance, an *inherent* right of self-government has been recognized. In other words, the right to govern the matters contemplated is necessarily incident to the right of Aboriginal title; they are not rights by statute, or by royal grant, or even by custom.⁵²³ Governance rights in respect of Aboriginal title are inherent because they are an inseparable and intrinsic aspect of that title: without the right make governance decisions, Aboriginal title would be meaningless. But what of the form that such self-government takes? The deference of the common law to customary law means that Aboriginal governments are not necessarily limited to those forms that conform to the British-derived model, provided they have the required attributes of valid legal custom. Binding decisions on any given matter in a particular locality might customarily be made by a certain family House, a clan, or by some hereditary official, or by the community or Nation as a whole, or by the initiates into some exclusive sub-group.

Custom as legal authority to govern

In the British colonies and former colonies, the usual working assumption is that authority for institutions of governance must be derived from either royal grant or statute. There is no rule that such must be the case, but it is undeniably true of governmental bodies established by the newcomers. From this assumption flows the view that an exhaustive division of legislative powers in the *Constitution Act, 1867* covers all governmental authority. The flaw in this view is that it disregards local legal custom as an alternative source of governmental authority: customary governance authority does not derive from legislation or royal grant, but from legal custom. This is not to say that wherever there is legal custom there is an alternative authority to govern. But common law cases through the centuries reveal that wherever such authority to govern exists by custom, it receives sanction in the courts. The continuing legal authority of local governments survived Norman rule, the emergence of both the common law, and the later principle that only a royal charter or act of Parliament could legitimize new governments or courts of law. Previously existing governments and courts, in other words, continued to be legitimate. Authority of certain ancient cities to govern their internal affairs without subsequent formal legitimation was recognized, for instance, in the 16th, 17th, 18th and 19th centuries, even where enforcement of by-laws entailed arrest and detention, or by-laws in support of local legal custom were contrary to the common law. The

⁵²¹ *Campbell v. British Columbia (A.-G.)* (2000), (2000) 189 D.L.R. (4th) 333 at 364, [2000] 8 W.W.R. 600, 79 B.C.L.R. (3d) 122, [2000] 4 C.N.L.R. 1 (BCSC), online: QL (BCJ) [cited to D.L.R.].

⁵²² *Ibid.*, at 362.

⁵²³ Inherent rights may also be buttressed by statute, royal grant or by local legal custom.

Court of King's Bench noted that the authority of the City of London to govern itself and to enact legally valid and binding by-laws contrary to the common law was "good by custom, but not by [royal] grant". The distinction is important because, said the court, the Crown had no authority to confer such privilege, though it could derive from immemorial legal custom.⁵²⁴ Customary courts (that is, court whose authority derives neither from statute nor royal grant but only from immemorial custom) have been confirmed in England as late as 1995, though an appeal lies to the regular court system whenever the local legal custom is not observed in matters of substance or procedure. The common law governs points of legal substance or procedure on which local custom is silent, even in customary courts.⁵²⁵

The Anglo-Saxon customs that gave the monarch her role at the centre of the Westminster-model institutions of government also assign her responsibilities. In present times those responsibilities are borne by government ministers, servants, agents, judges, police, municipal councillors. But they are continuing responsibilities nonetheless. They include a duty to acknowledge and accommodate local customary law, where found, and to not act contrary to it except as clearly authorized by statute. Where a government action may impact an Aboriginal right there is a duty of consultation with the First Nation concerned.⁵²⁶ Where a custom of an Aboriginal group also qualifies as an Aboriginal right, the duty to consult is undisputed. But where the custom does not meet the "integral to a distinctive culture" test, there may still be a duty on the part of the Crown to consult Aboriginal parties when its decisions impact matters governed by customary laws. Where the Crown is aware of a local customary law, the Crown as font of justice needs no additional authority to accommodate it. If a local customary law is viewed as contrary to the interest of the public at large, then it remains to the legislature to extinguish it, or in the language of an earlier period, to free the law from its defects. But until such time, no Minister or servant or agent of the Crown is justified in disregarding it.

⁵²⁴ *City of London* (1610), *supra* note 61 at 125a. See also (e.g.) *City of London v. Vanacre* (Hilary Term, 11 Will 3), 12 Mod. 269, 88 E.R. 1314 (K.B.); *London v. Wood* (1701), *supra* note ? at 684, 686; *Wannel v. Camerar' Civit' London* (1725), 1 Strange 675, 93 E.R. 775 (K.B.); *Harrison v. Godman* (1756), *supra* note 409; *London v. Compton* (1826), *supra* note 408.

⁵²⁵ *Matson* (1995), *supra* note 17. Although the custom of the Court of Aldermen to adjudge the fitness of electees to the office of aldermen was upheld, the common law rule was applied at the Court of Appeal that in default of legal custom to the contrary, reasons for judgment must be given.

⁵²⁶ *Delgamuukw* (1997), *supra* note 260, at 1113, per Lamer C.J.C., citing *Sparrow* (1990), *supra* note 400 and *Gladstone* (1996), *supra* note 480. That duty has subsequently been enforced in (e.g.) *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] B.C.J. No. 1880, (1999) 178 D.L.R. (4th) 666, [1999] 9 W.W.R. 645, [1999] 4 C.N.L.R. 1, online: QL (BCJ) (B.C.C.A.); *Cheslatta Carrier Nation v. British Columbia (Environmental Assessment Act, Project Assessment Director)*, [1998] B.C.J. No. 178, (1998) 53 B.C.L.R. (3d) 1, (1998) 4 Admin. L.R. (3d) 22, (1998) 26 C.E.L.R. (N.S.) 37, [1998] 3 C.N.L.R. 1, online: QL (BCJ) (B.C.S.C.); *Haida Nation v. British Columbia and Weyerhaeuser* (2002) (B.C.C.A.), online: <http://www.courts.gov.bc.ca/jdb%2Dtxt/ca/02/01/2002bcc0147.htm>.

Summary

This thesis project was originally conceived as an attempt to develop and propose tests by which Aboriginal customary laws could be identified, and principles by which they could be considered for contemporary application. Intuitively, I sensed a fundamental unfairness that people from a foreign place could come to the new world, live among the established peoples here, and after some centuries declare to their hosts that their pre-existing legal systems had been extinguished at some time in the past by the common law, or by some long-dead European king. The discovery that local customary law takes precedence in modern practice over the common law in the country of the common law's origin, at all court levels from the lowest to courts of appeal, the House of Lords, and the Judicial Committee of the Privy Council was somewhat astounding, to say the least. My task then became to find whether this was a modern development, why the doctrine continues in Britain, why the doctrine is virtually unknown in other common law jurisdictions, and whether its tenets can be applied in this country or in other places to which the common law was extended.

Respect for local customary law is at the heart of the rule of law in the Anglo-Saxon tradition. Indeed, this principle generated the emergence of the common law itself in an era when invention of new law was inconceivable to both those who lived by the law, and those who administered it. In other words, local customary law was the rule locally, and general (common) custom became the rule where local custom could not be found on point. Gradually the common customs of the peoples shaped, empowered and constrained the Crown and the Westminster model of government as the disparate Anglo-Saxon-Danish-Jutish-Norman (etc.) communities consolidated into the British nation-state. Continuity of local legal custom was, by common custom, a condition of voluntary entrance of the communities into the common realm, and a legal presumption where communities were annexed by force or by cession. The practice prevailed for centuries before the emergence of the common law, and for centuries afterward as the British Isles were colonised. By the start of the overseas colonial period, the continuity of local law – whatever its form – had crystallized into a maxim of constitutional law within the common law system. Only a competent legislature – not the Crown or other delegate – can extinguish it, and only by a clear statute. Those rules are central to the common law, upon which all subjects are entitled to rely, in all territories under the Crown's sovereignty, except where altered by clear statute. Moreover, they were affirmed both expressly and implicitly throughout the overseas colonial expansion period, though often subverted in their practical effect.

The common law provides tests by which customary law can be identified and assessed for validity. If an alleged custom is valid, the common law requires that judges and Crown actors give it effect, even where the custom is contrary to the common law. The common law only requires that valid customary law have certainty, reasonableness, an immemorial origin, and an uninterrupted existence. As an exception to the common law, legal custom must be proven, and when proven it must be applied narrowly to the legal

point at issue. Otherwise, customary law and common law have equal force. And where either are infringed by statute, the statute must be narrowly construed. This means that where a statute confers executive discretion, no Crown actor may infringe common law or legal custom unless the statute itself clearly authorizes it.

In modern Canada the argument is absurd that colonists could bring all of the common law that applied to their situation, yet they or their successors could or can disregard that which is inconvenient. The recognition theory – whereby legal custom is valid only so long as it is recognized by a Crown actor – is not a point of law at all. It is merely a non-legal artifact of the colonial enterprise, promoted by self-serving economic interests, and perpetrated in disregard of history and law. And pseudo-recognition of customary law only where it restates the common law is no recognition of it at all. The common law does not displace customary law: it only assesses allegations of it, and fills the legal voids where valid local custom is silent. It remains to us to decolonialise the common law by repudiating those colonialist notions in the same way that common law courts have consistently done in Britain for as long as the common law itself has existed. Courts in Canada can do their part by properly applying the tests that the common law supplies. And where unextinguished, valid customary law is found, they should give it effect as the common law and constitutional statutes require. Due to the immense body of customary law that is possessed by the Aboriginal peoples of Canada and in other places, this study can do more than discuss a general approach to be followed if and when local custom is argued as having current legal application. Detailed accounts of local Aboriginal customs *per se* will have to wait for another project, another time, another reporter.

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