Decolonising the Common Law: Reflections on Meaning and Method

AUCKLAND UNIVERSITY LAW REVIEW SYMPOSIUM 2020

EESVAN KRISHNAN*

I INTRODUCTION

We have long heard calls, though now more frequent and urgent by the day, for the decolonisation of our criminal justice system, our corrections system, our family court, our judiciary, our legal profession, our law schools.[1] A hui convened in July last year had as its theme "*Ināia Tonu Nei — now is the time. We lead, you follow*".[2] Attendees said that the justice system was continuing to harm Māori, more than any other grouping in Aotearoa, and the work of decolonisation had to start immediately.[3] They called, for example, for the abolition of the current prison system, for better access to justice for Māori, and, more generally, for the devolution of money and power so that Māori, not the Crown, would lead the change.[4]

What we do not tend to hear so often are calls for the decolonisation of the common law. Although not necessarily framed in those terms, one exception is the debate on the relationship and engagement between tikanga Māori and the common law[5] — a debate enlivened, spectacularly, by the recent decision of the Supreme Court in the Peter Ellis case. The Court held that the appeal against Mr Ellis's conviction is to continue despite his recent death,[6] after hearing argument that this was important for seeking to restore

* Barrister, Blackstone Chambers (London). This article is, with minor changes, the text of a lecture given at the Auckland University Law Review Symposium 2020, hosted at the University of Auckland on 1 October 2020. The author gives his sincere thanks to the organisers of the Symposium, AULR Editors-in-Chief Jodie Llewellyn and Louis Norton. Sincere thanks also to Aditya Basrur and Max Harris for their thoughtful comments; the usual disclaimer applies.

1 See, for example, *Ināia Tonu Nei: Hui Māori Report* (Ministry of Justice, July 2019) [*Ināia Tonu Nei*] at 9; and, as for law schools, see Jacinta Ruru and others *Inspiring National Indigenous Legal Education for Aotearoa New Zealand's Bachelor of Laws Degree Phase One: Strengthening the Ability for Māori Law to Become a Firm Foundational Component of a Legal Education in Aotearoa New Zealand* (Michael & Suzanne Borrin Foundation, August 2020).

2 *Ināia Tonu Nei*, above n 1, at 4.

3 At 23.

4 At 12–14, 16, 21–22, 24–25 and 28.

5 See, for example, Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1; Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" [2015] NZ L Rev 1; and Ruru and others, above n 1, at 26–30. For another, international example of a call for the decolonisation of the common law, see Emile Zitzke "A decolonial critique of private law and human rights" (2018) 34 SAJHR 492.

6 *Ellis v R* [2020] NZSC 89.

and uphold the mana of the late Mr Ellis and his family.[7] It is a mark of *some* progress in our legal system that the possibility of tikanga being prayed in aid of Mr Ellis, a Pākehā, was first raised by a Pākehā judge, Glazebrook J.[8] We await the Supreme Court's reasons, which will no doubt break new ground. Pending those reasons, I will say little more about that specific topic.

More generally, however, there tends to be silence on decolonising the common law. Perhaps because there are other, more pressing priorities, not least the criminal justice and corrections systems. And perhaps because, to outsiders, the common law is a less *visible* projection of Anglo power than other legal institutions.

It falls to us, as insiders — law students and professionals — to train a spotlight on the common law. Why? As the dominant source of law before our age of statutes, the common law must have played *some* role in the project of colonisation and the maintenance of white privilege and power (see below for a good example: the doctrine of act of state). We are accustomed to treating the common law as an exemplar of objectivity and rationality, in contrast to the wiles of "custom", but at least in its origins the common law was simply *European* customary law.[9] So there is at least a case for arguing that the common law, like any other legal institution today, requires decolonisation. But what would it mean or look like to decolonise the common law? How is it to be achieved?

II DECOLONISATION

There is, of course, a rich and sophisticated literature on the theory and praxis of decolonisation, with which any proper, scholarly treatment of this topic would need to engage. My ambition here is far more modest, as I will explain. There are, however, a few points from the literature, about the *meaning* of decolonisation, that I need to draw upon to suggest the terms of the debate.[10]

First, what decolonisation is *not*.[11] Obviously, decolonisation does not involve a simplistic turning back of the clock or "shooing out" of the coloniser. Nor is decolonisation a mere slogan, a virtue signal, a metaphor or a consciousness-raising device.[12] Decolonisation is "not about tweaking the

7 *Ellis v R* [2020] NZSC Trans 19.

8 *Ellis v R* [2019] NZSC Trans 31 at 20.

9 Zitzke, above n 5, at 499.

10 To those like me at the beginning of a journey of understanding, I commend to you the essays by Moana Jackson and others in Rebecca Kiddle and others *Imagining Decolonisation* (Bridget Williams Books, Wellington, 2020).

11 Ocean Ripeka Mercier "What is decolonisation?" in Rebecca Kiddle and others *Imagining Decolonisation* (Bridget Williams Books, Wellington, 2020) 40.

12 Mercier, above n 11.

existing colonial system to make it more Indigenous-friendly or a little less oppressive".[13] In its simplest sense, Moana Jackson has argued that decolonisation is the "reclaiming of the right of Indigenous peoples to once again govern themselves in their own lands".[14] So, whatever decolonisation requires in a particular sphere — whether it is argued to be the return of land, the revitalisation of indigenous education and language, the changes to the justice system I mentioned earlier, the transformation of our constitution[15] and so on — at a fundamental level decolonisation must involve the taking back by indigenous people of power and control.

I have to say at the outset that I have no special learning or expertise to offer, or lived experience to draw upon, in exploring this topic. I am not Māori, and in Aotearoa it is for Māori to set the agenda and lead the conversation on decolonisation. I confess that I came to this topic by accident. I came across some old and strange authorities about the British Raj in India in the course of my practice last year — when working on a case about the rightful chairman of the Libyan sovereign wealth fund (of all things) — and they got me thinking. The perspective I bring is that of (junior) practising lawyer and (amateur) legal historian, of Indian heritage but functionally Pākehā, with all the blind spots those positions carry with them. All in all, almost anyone else would be more qualified than me, but given that this has been a year of shock and disappointment, you will have been primed for those things by now. I hope, after today, to have the chance to learn more, with respect and humility, and then, if invited, to join the conversation.

III THE STORY: COMMON LAW ABORIGINAL TITLE

I would like to tell you a story about the common law and then, using that story as a foundation, to offer some tentative reflections on the two questions I mentioned earlier: what would it mean or look like to decolonise the common law? How is it to be achieved? The story I will tell is about the doctrine of common law aboriginal title,[16] otherwise known as native title. In perhaps the most spectacular development in the common law in the late 20th and early 21st centuries, courts in Australia, Canada, New Zealand and elsewhere recognised that the relationship of indigenous peoples to their

13 Waziyatawin Angela Wilson and Michael Yellow Bird (eds) *For Indigenous Eyes Only: A Decolonization Handbook* (SAR Press, Santa Fe, 2005) at 4 as cited in Mercier, above n 11.

14 Moana Jackson "Where to next? Decolonisation and the stories in the land" in Rebecca Kiddle and others *Imagining Decolonisation* (Bridget Williams Books, Wellington, 2020) 133 at 135.

15 Margaret Mutu and Moana Jackson *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (National Iwi Chairs Forum and Te Wānanga o Waipapa (University of Auckland), 5 February 2016).

16 For brevity, referred to from this point simply as the doctrine of aboriginal title.

traditional lands after colonisation was not simply a matter of politics, but *law*.[17] To be more precise, under certain conditions indigenous peoples were recognised as having enforceable *legal rights*, as a matter of common law, to traditional lands to which they still had the requisite relationship.

The general rise — and, to a degree, fall — of aboriginal title has been told by others,[18] and may well be familiar to you. But the particular angle I will take is less well known, and on some points novel — in particular, where I touch on cases and other developments regarding the Indian subcontinent. I should add that, while I touch on New Zealand cases and examples, this is not a specifically New Zealand perspective. I tell this story, and tell it in a particular way, for this reason. If anything looked like the decolonisation of the common law, it was surely the decision by courts to articulate the doctrine of aboriginal title — to remove aboriginal land rights from politics to the law. But was it?

The Doctrines of Recognition and Continuity

Let us begin here in New Zealand with *Wi Parata v Bishop of Wellington*, the case that everyone loves to hate.[19] As everyone remembers, Prendergast CJ characterised the Treaty as a "simple nullity".[20] But we do not tend to remember that the court looked beyond our shores to find legal justification for putting Māori in their place.

Quite deliberately, the Court in *Wi Parata* set a precedent vital to the project of colonising New Zealand.[21] The rule was this: grants of land by the Crown to settlers and others were sacrosanct. In particular, it was not open to Māori to challenge Crown grants on the basis that aboriginal title had not been extinguished. This was, first, the Court reasoned, because the Crown was the "sole arbiter of its own justice" in this field.[22] It was up to the Crown to determine how to discharge its obligation to respect the property rights of so-called "primitive barbarians" lacking any settled system of law or custom, as the Court regarded Māori.[23] This is the idea of aboriginal rights being a matter of politics, not law.

The Court could have stopped there. But, thirty years earlier, in the now celebrated decision of *R v Symonds*, Chapman J had said that aboriginal

17 PG McHugh *Aboriginal Title: The Modern Jurisprudence of Tribunal Land Rights* (Oxford University Press, Oxford, 2011) at 2–3.

18 See, in particular, McHugh, above n 17.

19 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC). But compare David V Williams *A Simple Nullity? The* Wi Parata *case in New Zealand law & history* (Auckland University Press, Auckland, 2011).

20 *Wi Parata*, above n 19, at 78.

21 Williams, above n 19, at 162.

22 *Wi Parata*, above n 19, at 78.

23 At 78.

title was to be respected.[24] Perhaps in light of those remarks, and more generally what was at stake — nothing less than the security of settler title to land — the Court in *Wi Parata* raised a powerful, second, shield to protect the sanctity of Crown grants. The Court held:[25]

> Transactions with the natives for the cession of their title to the Crown are … to be regarded as acts of State, and therefore are not examinable by any Court.

The doctrine, or rather various doctrine*s*, of act of state are not easy to pin down.[26] But, at a (very) high level, they are a set of principles according to which certain kinds of conduct by a state, particularly relating to foreign affairs, are regarded by the domestic courts as immune from their scrutiny. At the time of *Wi Parata*, and indeed still today,[27] some of the leading cases on act of state arose from the consolidation of British rule over the Indian subcontinent; *Wi Parata* cited two such cases for the proposition above.[28]

The Indian act of state cases are striking to modern eyes, perhaps none more so than the 1859 decision of the Privy Council in the Raj of Tanjore's Case.[29] (This was one of the authorities I came across when working on my Libyan case). Under the notorious doctrine of "lapse", the East India Company had seized the princely state of Tanjore and the property of the deceased rajah following his death without a male heir. The Rajah's widow claimed that she was entitled at least to his *private* estate and effects, as opposed to what was truly *public* property.[30] On the Rajah's death, we are told, the Company had gone so far as to seize, for example, "numerous female jewels and trinkets" and "children's carriages".[31] The issue for the court was the character of the seizure: was it an act purporting to be lawful, or simply a "seizure by arbitrary power on behalf of the Crown"?[32] The latter: it was "extremely difficult" to discern any legal basis for the seizure, the Court observed — this was simply an exercise of brute sovereign power and therefore an act of state over which it had no

---

24 *R v Symonds* (1847) NZPCC 387 at 390 as cited in *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [510], n 615.

25 *Wi Parata*, above n 19, at 79.

26 See, for example, the observations in *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964 at [33] per Lord Mance and [118] per Lord Neuberger (with whom Lord Wilson, Baroness Hale, and Lord Clarke agreed).

27 See, for example, *Mohammed v Ministry of Defence* [2017] UKSC 1, [2017] AC 649 at [25] per Baroness Hale (with whom Lord Wilson and Lord Hughes JJSC agreed); and *Belhaj*, above n 26, at [128] per Lord Neuberger.

28 *Nabob of the Carnatic v East India Company* (1793) 2 Ves Jun 56; and *Doss v Secretary of State for India in Council* (1875) LR 19 Eq 509. *Doss* in turn cited the Raj of Tanjore's Case (*The Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo 22, 15 ER 9), discussed below.

29 *Kamachee Boye Sahaba*, above n 28.

30 At 33–34.

31 At 42.

32 At 77.

jurisdiction.[33] This reasoning, it may interest you to know, remains controversial to this day. In 2014, an English High Court judge regarded it as a "perverse doctrine under which the executive can be held to account if it purports to act legally, but not if it openly flouts the law".[34] Lord Sumption, hearing the appeal in that case, was more sanguine.[35]

The Rajah's widow was not alone in resorting to the courts. As Paul McHugh has put it, the doctrine of act of state was developed by the common law in response to the "natural litigiousness of the angry, frustrated, and frequently mistreated nawabs";[36] that is, the rulers of the princely states of India, enmeshed in complicated relations with the East India Company and the Crown and, in many cases, sovereign in name only. There is a whole series of cases from the late 18th to early 20th centuries in which act of state shielded the East India Company's, and later the Crown's, conduct from judicial scrutiny.[37]

Returning to *Wi Parata*: what did any of this have to do with the sanctity of Crown grants in New Zealand? Good question: *Entick v Carrington* had made clear that there can be no act of state by the Crown against its own subjects;[38] and so it took some fancy footwork for the Court to justify invoking act of state against Māori, subjects of the Crown from 1840.[39]

That rule, however — no act of state against the Crown's own subjects – did not stand in the way of a more radical deployment of act of state against aboriginal title. The foundation for that deployment would be series of Privy Council appeals from India in the first half of the 20th century,[40] which I will call the Doctrine of Recognition Cases. Citing among other authorities the Raj of Tanjore's Case, the Doctrine of Recognition Cases held, in essence, that a change of sovereignty was an act of state that

33 At 77–86.

34 *Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) at [400].

35 *Mohammed*, above n 27, at [86].

36 PG McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, Oxford, 2004) at 84.

37 See the authorities discussed in McHugh, above n 36, at 114–115 and n 238; and Amanda Perreau-Saussine "British Acts of State in English Courts" (2007) 78 BYBIL 176 at 184–218, which includes an analysis of how these authorities have been treated by modern English courts. See further *Secretary of State for India in Council v Bai Rajbai* (1915) LR 42 Ind App 229; *Vajesingji Joravarsingji v Secretary of State for India in Council* (1924) LR 51 Ind App 357; and *Secretary of State for India v Sardar Rustam Khan* [1941] AC 356.

38 *Entick v Carrington* (1765) 2 Wils KB 275, 95 ER 807; and PG McHugh "A history of Crown sovereignty in New Zealand" in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past — A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 189 at 194.

39 The Court, at 78–79, reasoned as follows. On one hand, the Crown had the exclusive right to extinguish aboriginal title. On the other hand, the Crown had what the Court described as the "correlative" duty as "supreme protector" of Māori in dealings with settlers. Given that right and that duty, the Crown owed something in the nature of a *treaty* obligation to Māori — who therefore stood, in that respect, as *foreigners* to the Crown, thus bringing act of state into play.

40 *Bai Rajbai*, above n 37; *Vajesingji Joravarsingji*, above n 37; and *Sardar Rustam Khan*, above n 37.

wiped clean the slate of property rights — that is, save for any rights that the Crown, in its absolute discretion, chose to *recognise*. This was what scholars have called the doctrine of *recognition*.[41]

The Doctrine of Recognition Cases were not, on their facts, cases about aboriginal title — they were cases in which those who had been granted land rights by the rulers of princely states sought to enforce those rights, post-annexation, against the Crown. But, as later courts would appreciate, the Doctrine of Recognition, on its face, ruled out any prospect of aboriginal title being enforced as legal rights. Whether or not the customary rights of an aboriginal community to its land survived annexation by the Crown depended on whether the Crown, in its discretion, chose to recognise such rights.

What is quite strange is that more or less the same time as articulating the Doctrine of Recognition, the Privy Council, in an appeal from Nigeria, appeared to have held the very opposite, this time in a case squarely concerning aboriginal title. In *Amodu Tijani v Secretary, Southern Nigeria*, the Court said: "[a] mere change in sovereignty is not to be presumed as meant to disturb rights of private owners".[42] In contrast to the Doctrine of Recognition, this is the doctrine of *continuity*.[43] Old (pre-annexation) property rights are presumed to continue, notwithstanding annexation by the Crown, unless and until lawfully extinguished.

One might well wonder how the Privy Council, at more or less the same time, came to articulate two apparently contradictory doctrines.[44] That is a matter for another day. What matters for our story, however, is how Commonwealth courts responded to the conflicting lines of authority — the Doctrine of Recognition, on the one hand, and the Doctrine of Continuity on the other — when cases were brought in the late 20th century asking the courts to declare that aboriginal title persisted and could be enforced as a matter of common law.

Common Law Aboriginal Title

In Australia and Canada, the Doctrine of Recognition would win the first battles. In the early 1970s, courts held that no aboriginal title was enforceable unless and until recognised by the Crown.[45] The Indian Doctrine of Recognition Cases were key parts of the courts' reasoning.[46]

---

41 Kent McNeil *Common Law Aboriginal Title* (Clarendon Press, Oxford, 1989) at 162–171.

42 *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) at 407.

43 McNeil, above n 41, 171–174.

44 Compare *Oyekan v Adele* [1957] 1 WLR 876 (PC) at 788, an attempt by Lord Denning (obiter) to reconcile the two doctrines. For criticism of this attempt, see McNeil, above n 41, at 175.

45 *Milirrpum v Nabalco* [1972–73] ALR 65 (NTSC); and *Calder v Attorney-General of British Columbia* (1969) 8 DLR (3d) 59 (BCCA).

46 *Milirrpum*, above n 45, at 223–227; and *Calder*, above n 45, at 71–73 and 103–104.

That victory would be short-lived — at least in Canada. In 1973, in the first of the landmark aboriginal title judgments, the Canadian Supreme Court in *Calder v Attorney-General* held that aboriginal title *could*, in principle, exist at common law. One judge distinguished the Indian act of state cases on their facts and held that the Doctrine of Recognition was "wholly wrong".[47]

Some 20 years later, the High Court of Australia in *Mabo v Queensland (No 2)* would come to the same conclusion, rejecting the Doctrine of Recognition Cases. Setting the stage for this reversal, Brennan J observed that the theory of absolute Crown *ownership* of newly-annexed land would make indigenous peoples intruders in their own homes — exposed to the deprivation of the religious, cultural and economic sustenance which the land provides.[48] Although the law was the "prisoner of its history", the Judge continued, it was "not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies".[49] In any event, citing in particular *Amodu Tijani*, the Judge held that the "weight of authority" supported the Doctrine of Continuity.[50] The concurring judgment of Deane and Gaudron JJ explained precisely why the doctrine of act of state was irrelevant in this part of the common law.[51] The establishment of a colony was indeed an act of state; but a claim for aboriginal title at common law did not challenge that. It sought only instead to vindicate rights that arose under the common law introduced once the colony was established.[52]

As for New Zealand, despite the early promise shown in *R v Symonds*, for various reasons[53] the doctrine of aboriginal title emerged much later: first, in the celebrated fisheries rights case of *Te Weehi v Regional Fisheries Officer*[54] and then, in full force, in *Attorney-General v Ngati Apa*.[55] Citing *Amodu Tijani*, among other authorities, the Court of Appeal in *Ngati Apa* affirmed the Doctrine of Continuity.[56] Indeed, so far as land above the high water mark was concerned, the Crown had not argued otherwise.[57]

As Paul McHugh has documented, at the end of the 20th century and the beginning of the 21st, the doctrine of aboriginal title travelled to other former theatres of British imperialism. Courts in Tanzania in 1994, Malaysia

47 *Calder v Attorney-General* [1973] SCR 313 at 416 per Hall J (dissenting).
48 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 28–29.
49 At 29.
50 At 55.
51 At 81–82.
52 This reasoning was foreshadowed to a degree in *Salaman v Secretary of State in Council of India* [1906] 1 KB 613 (CA) at 639–640 per Fletcher Moulton LJ (dissenting in part).
53 See McHugh, above n 17, at 98 and 100.
54 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).
55 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).
56 At [15] per Elias CJ. See also [143] per Keith and Anderson JJ and [183], [204] and [208] per Tipping J.
57 At [48].

in 1996, South Africa in 2003, Botswana in 2006 and Belize in 2007 recognised the doctrine, or at least its substance, and articulated its role typically alongside statutory and constitutional protections for indigenous rights.[58] Decisions such as *Mabo* have been influential.[59]

That is not at all to say that the world has been set to rights. The controversy and political backlash sparked by the landmark decisions was fierce, as no New Zealand audience will need reminding. In some jurisdictions, obtaining a court judgment was one thing but securing government compliance another.[60] In Australia and Canada, which had been at the vanguard, the courts themselves, finding themselves enmeshed in the weeds of rights-design and under external pressures, retreated into more constrained, conservative reasoning.[61] The story is complex, not least because there is a broad story of legislative interventions and out-of-court mechanisms and settlements, and I cannot do it justice here. But, to touch on a few highlights: in Australia, the common-law basis of aboriginal title was eclipsed by an elaborate and technical jurisprudence under the Native Title Act 1993, under which, as interpreted by the courts, the bar for *proving* aboriginal title, for example with evidence of continuity of a people's connection with the land, was set so high as to have a "devastating effect" on claims, on one account.[62] More generally, the law is complex, the procedures cumbersome, and the costs forbidding.[63] As for Canada, again the story is complex but it was not until 2014 that the Supreme Court actually issued a declaration of full aboriginal title over a piece of land, as opposed to lesser rights in or relating to land.[64] Finally, and obviously, in every jurisdiction much aboriginal title had already been lost, whether through ostensibly consensual sales, confiscations or other processes. To be sure, some significant sums of money have changed hands, some significant rights have been recognised, increasingly as a result of out-of-court settlements. And it is unlikely that any of that would have happened without the fire lit by the landmark decisions and their descendants. But, for McHugh, the jury is still out on whether aboriginal title has delivered, or can deliver, meaningful justice and political change for indigenous peoples.[65]

---

58 McHugh, above n 17, at ch 4. Kenya is a notable exception: at 219–221.

59 At 191–192, 201 and 211.

60 At 194, 202 and 212.

61 This paragraph draws from McHugh, above n 17, at ch 3.

62 McHugh, above n 17, at 132.

63 See Australian Law Reform Commission *Connection to Country: Review of the Native Title Act 1993 (Cth): Final Report* (ALRC Report 126, April 2015).

64 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257. See David M Rosenberg and Jack Woodward "The *Tsilhqot'in* Case: The Recognition and Affirmation of Aboriginal Title in Canada" (2015) 48 UBC Law Rev 943 and the other contributions to that issue of the University of British Columbia Law Review.

65 McHugh, above n 17, at ix–x.

India

What about India, about which the aboriginal title literature is curiously silent? India is not only, by some distance, the world's largest common law jurisdiction. It is also home to indigenous tribal peoples, or Adivasi, who comprise as much as 8.6 per cent of the total population.[66] Displaced from commonly-held lands by both the British Raj and Independent India in the name of conservation and development, and impoverished and marginalised throughout,[67] Adivasi had seen little of the protection of the common law. On one measure (extent of management of forest land), Adivasi are among the worst-off indigenous peoples in the world.[68]

For a brief window, however, it looked as if India might be the first common law jurisdiction expressly to abandon the Doctrine of Recognition, clearing a path for the recognition of aboriginal title. In a decision as early as 1954, a few years after independence in 1947, the Indian Supreme Court neatly side-stepped the Doctrine of Recognition Cases.[69] Bose J held that, whatever the position pre-independence, the Indian Constitution had changed everything. In "one magnificent sweep", it no longer allowed the government to deprive Indian citizens of their property rights simply by announcing that it did not recognise those rights.[70] The rights in this case had been granted by rulers of princely states to their relations, on the eve of the merger of those states with the Union of India. That merger was no act of state, the Judge observed, but a collaborative, democratic exercise.[71] The same Judge observed in another, later, case that it would be a pity to continue to follow decisions reflecting an "older Imperialism", meaning the Doctrine of Recognition Cases.[72]

But 10 years later, the Indian Supreme Court (by a 6:1 majority) would reverse itself, in a case on similar facts.[73] The Indian Constitution made no difference, the Court held, because under the Doctrine of Recognition, which was still good law in India, no rights arose in the absence of recognition.[74] In other words, this was not a case of deprivation

66 Namita Wahi and Ankit Bhatia *The Legal Regime and Political Economy of Land Rights of Scheduled Tribes in the Scheduled Areas of India* (Centre for Policy Research, 2018) at 10.

67 There is an extensive literature. See, for example, Alf Gunvald Nilsen *Adivasis and the State: Subalternity and Citizenship in India's Bhil Heartland* (Cambridge University Press, Cambridge, 2018).

68 Deirdre N Dlugoleski "Undoing historical injustice: the role of the Forest Rights Act and the Supreme Court in departing from colonial forest laws" (2020) 4 Indian Law Review 221 at 223.

69 *Singh v State of Uttar Pradesh* MANU/SC/0025/1954.

70 At [41].

71 At [43].

72 *Dalmia Dadri Cement Co Ltd v Commissioner of Income Tax* MANU/SC/0084/1958 at [29].

73 *State of Gujarat v Vora Fiddali Badruddin Mithibarwala* MANU/SC/0031/1964. The reversal was foreshadowed in *Promod Chandra Deb v State of Orissa* MANU/SC/0092/1961. For critical comment, see SK Agrawala "The Doctrine of Act of State and the Law of State Succession in India (Based on *Promod Chandra Deb v The State of Orissa*)" (1963) 12 ICLQ 1399.

74 See, in particular, *State of Gujarat v Vora Fiddali Badruddin Mithibarwala*, above n 73, at [25]–[44] per Ayyangar J.

of property rights; there were no rights to deprive. Counsel for the purported rights-holders had squarely challenged the continuing authority of the Doctrine of Recognition Cases: those authorities were "conditioned by Britain being an Imperialist and expansionist power"; they were wholly out of place in independent India and under its Constitution.[75] The Court disagreed. The "British practice" — as the Doctrine of Recognition was characterised — had not proved to lead to injustice. It had struck a "just balance between the acquired rights of the private individual and the economic interests of the community".[76] The Doctrine of Recognition was not merely a device of colonial powers to enrich themselves at the expense of a new colony's inhabitants.[77] Under a doctrine of continuity, by contrast, extinguishing grants of rights — rights presumed to have continued post-independence — would be a long and laborious process that may be onerous or even impossible, for being contrary to the Fundamental Rights section of Constitution.[78]

To put that point in some context, briefly: among the Fundamental Rights in the Indian Constitution was the right to property — in summary, a prohibition on the compulsory taking of property other than for a public purpose and on the payment of compensation.[79] Since Independence, the right to property had been the site of repeated battles in the courts as landowners challenged land reform legislation; that is, legislation designed to distribute land and land rights more equitably without having to pay full compensation. The legislature had amended the right to property three times by that stage, twice in response to adverse court decisions.

It is against this fraught legal and political context that in this, and many other decisions to follow (up to the present day),[80] the Indian courts gave the legislature a free hand to recognise, or not to recognise, historic grants of land and other rights made by the rulers of the old princely states. One assumes that the Doctrine of Continuity would have exposed the state to a quite staggering liability for compensation had it chosen to extinguish such rights.

The repeated affirmation of the Doctrine of Recognition may go a long way to explaining why there appears to have been only one attempt, in 1997, to persuade the Indian courts to follow *Mabo* and recognise aboriginal title at common law.[81] The *Mabo* argument was "extreme", the Court said,

---

75 At [45] per Ayyangar J.
76 At [60] per Ayyangar J.
77 At [212] per Mudholkar J.
78 At [212] per Mudholkar J.
79 See Namita Wahi "Property" in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds) *The Oxford Handbook of the Indian Constitution* (Oxford University Press, Delhi, 2016) 943, from which this paragraph is drawn.
80 See, for example, *Qucxova Sinal Cundo v Union of India* (HC Bombay) MANU/MH/0104/1998; and *Institute Menezes Braganza v State of Goa* (HC Bombay) MANU/MH/0418/2002.
81 *Samatha v The State of Andhra Pradesh* MANU/SC/1325/1997 at [207].

and counsel, seeing the way the wind was blowing, appears to have abandoned the point.

The Canadian case law had suggested a way to distinguish the Doctrine of Recognition Cases on their facts.[82] But given how deeply the doctrine had been embedded in Indian jurisprudence by this time, the prospects for a carve-out for aboriginal title alone were dim.

When something resembling aboriginal title emerged, it came not from the courts but from the legislature — or, rather, from a long and spirited public campaign that eventually moved the legislature to act.[83] In 2006, the Indian Parliament passed the Forest Rights Act.[84] The preamble declared that it sought to remedy the "historical injustice" of both colonial and independent India failing to recognise Adivasi rights in ancestral forest lands. The Act introduced a procedure for recognising and vesting in tribes a range of rights to occupy, use, and manage forest land.

The Act is no dead letter. According to the latest government figures, some two million individual and community titles have been recognised over some five million hectares of land.[85] But, according to a recent empirical study, implementation of the Act has been uneven and remains incomplete.[86] Other commentators are more critical.[87] On any view, there are recent and very significant headwinds to the Act achieving its aims, not least a recent Supreme Court order that threatened to evict millions of forest-dwellers.[88] As with common law aboriginal title, it seems the jury is still out on what the Forest Rights Act has and ultimately will achieve.

---

82 At 405–406 per Hall J (dissenting): in the Doctrine of Recognition Cases, the origin of the claim being asserted was a grant from a previous sovereign, whereas aboriginal title had its origin in antiquity; the doctrine of act of state had no application to the latter.

83 See Manshi Asher and Nidhi Agarwal *Recognizing the Historic Injustice: Campaign for the Forest Rights Act 2006* (National Centre for Advocacy Studies, 2007). Compare Nilsen, above n 67, at 254.

84 Or, to give the Act its full name, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006.

85 Indian Ministry of Tribal Affairs *Status report on the implementation of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 for the period ending 31.03.2019* (2019) at 3.

86 Jocelyn I Lee and Steven A Wolf "Critical assessment of implementation of the Forest Rights Act of India" (2018) 79 Land Use Policy 834 at 843.

87 The literature is extensive. See, for example, Rajesh Bhattacharya, Snehashish Bhattacharya and Kaveri Gill "The Adivasi Land Question in the Neoliberal Era" in Anthony P D'Costa and Achin Chakraborty (eds) *The Land Question in India: State, Dispossession, and Capitalist Transition* (Oxford University Press, New York, 2017) 176 at 185–186. Compare Nilsen, above n 67, at 257–258.

88 Dlugoleski, above n 68, at 240–242.

IV REFLECTIONS

The story I have told you is just one story of the common law, the repository of a million stories across time and space. And one must always guard against the tendency to over-generalise from one, very particular, story. But, for me, it provokes some reflections — tentative and provisional on further thought and research — about the idea or project of decolonising the common law.

A Long Journey …

First, that the journey to decolonisation is likely very long indeed. Did cases like *Mabo* or *Calder* and their descendants decolonise at least that part of the common law? On one hand, the Crown is no longer the sole arbiter of its own justice in dealing with aboriginal lands. The Indian act of state cases, that plainly greased the wheels of empire to some degree, have been sidelined in this field (save in India itself). The breakthrough decisions have had some practical consequences, inside and outside the courts. That is all correct. But, on any view, the measure of justice that has actually been secured has been relatively modest, very late, and has required an enormous and sustained cost and effort by indigenous peoples and their allies. The law has been made a little more indigenous-friendly, a little less oppressive, but can we really say that there has been a taking back of power and control, if that is the hallmark of decolonisation? To a limited degree, in some places and times, but not generally.

At best, this is decolonis*ing* (the verb), a step on a very long journey. Some would not go even that far, the argument being that the very notion of common law aboriginal title, premised as it is on indigenous peoples having lost their sovereignty to the Crown, reinforces tropes of colonisation;[89] in other words, that the doctrine of aboriginal title is a fig leaf for colonisation, not its conscience.

If this is the best that can be said about what looked on its face to be the leading example of the decolonisation of the common law, what does that mean for the prospects of the project more generally?

Indeed, the continuing effects of colonisation may lengthen the path to decolonisation. Consider the Indian example. Are we driven to conclude that the Indian post-independence decisions that went the other way — that affirmed the Doctrine of Recognition and described the *Mabo* analysis as "extreme" — were somehow neo-colonial? On one analysis, yes. The colonised, or at least the elite thereof, took the place of the colonisers in perpetuating a doctrine under which aboriginal and other land rights

89 John Borrows "The durability of *Terra Nullius: Tsilhqot'in Nation v British Columbia*" (2015) 48 UBC Law Rev 701 at 702–703.

remained a matter of political contestation rather than law.[90] But context is everything, and some care is needed in the analysis here. Those decisions were driven at least in part to give the fledgling state the latitude to decide what property rights to recognise, whether those rights had been conferred by autocratic princes or held by Adivasi as a matter of their customary law. That is not for a moment to give Independent India a free pass for its treatment, often appalling, of Adivasi.[91] But the legacy of British colonisation — an impoverished, fragile, fractious state, constrained in its own ability to do justice to its citizens — is obviously part of the story, at least in the first years of independence. Whether that is a valid excuse today is another matter altogether.

… of Uncertain End

My second reflection is that we should be clear-eyed and appropriately sceptical about the ability of the common law to decolonise itself. That is likely asking more of the common law than it could ever deliver.

On one hand, as the modern aboriginal title cases make clear, one should not underestimate the ability of the common law to change direction, sometimes sharply. The story I told you is one of the best examples of this in modern times. Cases like *Mabo* and *Ngati Apa* were like thunderclaps (and like thunderclaps warned of the fiercest of storms to come). They did not come out of a clear sky, of course. The courts were not immune to shifts in popular consciousness following land marches and other protests. And the courts were able to make a sharp correction because the Doctrine of Continuity, on which aboriginal title rested, was not novel. It drew upon not only *Amodu Tijani* but also upon dicta in 17th century decisions on the English conquest of Ireland and Wales.[92] Old authorities can cast a long shadow on the law, but one can also find a spark that illuminates a different path. Sometimes inspiration can be found in surprising places. As David V Williams has noted, for all the modern invective against *Wi Parata*, no one thought to explore the use that could be made of Prendergast CJ's observation that the Crown is the "supreme protector" of Māori.[93] That has echoes, does it not, of the fiduciary duty recognised by the Supreme Court in *Proprietors of Wakatū v Attorney-General*?[94] There is also the influence of international law — such as, in this field, the United Nations Declaration on

90 For an argument along these lines, see Chhatrapati Singh *Common Property and Common Poverty: India's Forests, Forest Dwellers and the Law* (Oxford University Press, Delhi, 1986) at 26–34.

91 See again Nilsen, above n 67.

92 See McNeil, above n 41, at 173–174.

93 Williams, above n 19, at 170–171.

94 *Proprietors of Wakatū*, above n 24. This is not an aboriginal title case and so not discussed here, but obviously more generally relevant to the topic of decolonising the common law.

the Rights of Indigenous Peoples.[95] And of course human rights law may influence the courts' attitude to old authorities and what the common law should now be. In 2014, in the leading English decision on "Crown act of state", Lord Neuberger observed that the introduction of human rights may cause courts to reflect on the appropriateness of decisions given even 50 years ago.[96]

For Lord Neuberger, the superior courts have the duty to develop the common law where appropriate[97] — a *duty*, note, not merely a power. But there is a crucial limitation: that duty "must be exercised in a cautious, principled, and coherent way", he observed.[98] That, I think, cuts to the heart of why we should question the ability of the common law to decolonise itself. So far, we have been thinking about the common law only as a body of judge-made rules, but of course it is also a system of thought and action. And that system works slowly, carefully, constrained by authority and by what Brennen J in *Mabo* called the "skeleton of principle which gives the body of our law its shape and internal consistency".[99] And, generally, the common law is also constrained by the cases that are brought to the courts and what is required to resolve the issues in dispute.

So significant change happens rarely, and takes *time*. As Janet McLean has observed, it often takes a very long time for the common law to respond to major political change. It has its own "distinct pace and rhythms", something she calls "law time".[100] And, as Williams has noted, the "law time" in the case of aboriginal title has been very long indeed.[101] Finally, that response, when it comes, can come in fits and starts, with no guarantee of linear progress. We saw that in the aftermath of the breakthrough aboriginal title cases in Australia and Canada, where the courts retreated from the vanguard.

Fundamental legal change is far more likely to occur outside of the courts. We saw that with the Forest Rights Act in India, a legislative response to a public campaign. There are, of course, examples closer to home, such as the statutory recognition in 2017 of the Whanganui River as a legal person.[102] (Whether such legal change achieves change on the ground, and whether that change in any event amounts to decolonisation, are of course different questions).

---

95 See Susan Glazebrook "The Declaration on the Rights of Indigenous Peoples and the Courts" (2019) 25 Auckland U L Rev 11.

96 *Mohammed*, above n 27, at [101].

97 *Çukurova Finance International Limited v Alfa Telecom Turkey Limited (No 4)* [2013] UKPC 20, [2016] AC 923 at [122].

98 At [122].

99 At 29.

100 Janet McLean "Ideologies in Law Time: The Oxford History of the Laws of England" (2013) 38 Law & Social Inquiry 746 as cited in David V Williams "Fiduciary Duty Remedies Stripped of Historical Encumbrances" [2019] NZ L Rev 39 at 49–50.

101 Williams, above n 100, at 50.

102 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

It has been said in the context of decolonisation more generally that the master's tools will never dismantle the master's house.[103] It has been argued that incremental and pragmatic legal and political responses will only "partially" address concerns about the "shaky" legitimacy of the New Zealand state, and that what is required is "deliberate, fundamental and transformative constitutional change".[104] If decolonisation of the New Zealand common law requires the establishment of a *bijural* legal system — one in which Kupe's law and Cook's law coexist equitably[105] — that is not something the common law is itself likely to be able to achieve.

All that said, I wonder if finding or making better or different tools is part of the journey of decolonising the common law. In June of this year, the Waitangi Tribunal found that the Crown regime for only partially funding claims under the Marine and Coastal Area (Takutai Moana) Act 2011 — the replacement for the Foreshore and Seabed Act 2004 — breached the Crown's Treaty duty of active protection.[106] By analogy, improving access to justice may be a necessary — even important — first step towards decolonisation. In our system, advances in the common law do not come out of nowhere: they come because lawyers bring cases and push at the boundaries of what was thought possible. That requires a properly-funded and accessible legal aid system, where one does not exist. Liberalising rules on standing may also be necessary.[107]

Decolonising Common Lawyers

This point about focusing on the *system* of the common law, not just the substance of judge-made rules, leads me to my third and final reflection. A key part of decolonising the common law is surely decolonising common law*yers* — that is, the legal profession — and a key part of that is surely decolonising law schools.

That is a big and difficult topic in its own right,[108] on which I'll make only two points. First, that this focus on law schools underscores that decolonisation may be as much a *re*constructive as a *de*constructive exercise. Or, as Moana Jackson has argued, perhaps the idea of "decolonisation" — a

103 Audre Lorde "The Master's Tools Will Never Dismantle the Master's House" (Penguin Books, London, 2018).

104 Claire Charters "The Elephant in the Court Room: An Essay on the Judiciary's Silence on the Legitimacy of the New Zealand State" in Simon Mount and Max Harris (eds) *The Promise of Law: Essays marking the retirement of Dame Sian Elias as Chief Justice of New Zealand* (LexisNexis, Wellington, 2020) 91 at 99.

105 Ruru and others, above n 1, at 37–38.

106 Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Wai 2660, 2020) at 81–86.

107 Compare the phenomenon of "public interest litigation" in the Indian courts. See Shyam Divan "Public Interest Litigation" in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds) *The Oxford Handbook of the Indian Constitution* (Oxford University Press, Delhi, 2016) 662.

108 The literature is extensive. For a recent New Zealand contribution, see Ruru and others, above n 1.

concept like colonisation imported from somewhere else — should be replaced with the ethic of *restoration*.[109] What needs to be taught, how, and to whom, to make future common lawyers better equipped to recognise and name the effect of colonisation and identify constructive ways forward?

My second point is more specific, about the value of studying legal history. Maitland, the eminent English legal historian, wrote in 1896:[110]

> The only direct utility of legal history … lies in the lesson that each generation has an enormous power of shaping its own law. I don't think that the study of legal history would make men fatalists; I doubt that it would make them conservatives. I am sure that it would free them from superstitions and teach them that they have free hands.

Much like the study of jurisprudence, it can be difficult while a law student to see the point of studying legal history. There is so much work, and so much more obvious utility, in getting to grips with what law *is*, to bother much about how we have got here. But, legal history reminds us that we have free hands to develop the common law, to the extent we can, to decolonise or to restore. Or at least understanding our history might move us to hold our hands up and admit that there is a problem that the common law itself may not be able to solve.

109 Jackson, above n 14.

110 Maitland in a letter to Dicey (c 1896) quoted by CHS Fifoot in *Maitland, A Life* (Harvard University Press, Cambridge (Mass), 1971) at 143 as cited in McHugh, above n 17, at 338.