

## SELF-GOVERNMENT AND THE INALIENABILITY OF ABORIGINAL TITLE

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A central tenet of the common law of Aboriginal title is that it is inalienable other than by surrender to the Crown. This rule has been affirmed repeatedly by courts in leading decisions in Canada,<sup>1</sup> Australia,<sup>2</sup> and New Zealand.<sup>3</sup> Indian title has been held to be inalienable in the United States as well,<sup>4</sup> where after the American Revolution it could only be extinguished by the United States acting through Congress.<sup>5</sup> But what is the basis for this restriction on alienation? Did it originate from British colonial policy

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<sup>1</sup> E.g. see *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at 320-22 (Judson J.), 377-79, 381-85 (Hall J., dissenting); *Guerin v. The Queen*, [1984] 2 S.C.R. 335 [hereinafter *Guerin*]; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*]; *Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)*, [2000] 2 C.N.L.R. 330 (B.C.S.C.), at 336, 338-39, affirmed [2001] 1 C.N.L.R. 310 (B.C.C.A.); *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 195 D.L.R. (4th) 135 (Ont. C.A.) [hereinafter *Chippewas of Sarnia*].

<sup>2</sup> *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1 (H.C. Aust.) [hereinafter *Mabo*]; *Mason v. Tritton* (1994), 34 N.S.W.L.R. 572 (C.A.), at 583-84 (Kirby P.); *Commonwealth v. Yarmirr* (1999), 168 A.L.R. 426 (Full F.C.), at 435 (Beaumont and von Doussa JJ.), 496 (Merkel J., dissenting in part).

<sup>3</sup> *The Queen v. Symonds* (1847), [1840-1932] N.Z.P.C.C. 387 (N.Z.S.C.) [hereinafter *Symonds*]; *Nireaha Tamaki v. Baker*, [1901] A.C. 561 (P.C.), at 576, 579. In New Zealand, inalienability is usually described in terms of the Crown's "right of pre-emption" of Maori lands: see *Wallis v. Solicitor-General for New Zealand*, [1903] A.C. 173 (P.C.), at 179, 187-88, and discussion in Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991), 78-80, 101-4, 321-22.

<sup>4</sup> See *Johnson v. M'Intosh*, 8 Wheat. 543 (1823); *United States v. Paine Lumber Co.*, 206 U.S. 467 (1907).

<sup>5</sup> See especially *Beecher v. Wetherby*, 95 U.S. 517 (1877); *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941); *County of Oneida v. Oneida Indian Nation*, 105 S.Ct. 1245 (1985).

that was eventually incorporated into the common law, or are there more fundamental doctrinal or theoretical justifications for it?

Tracing the rule against alienation of Aboriginal title back to the original British colonies on the east coast of North America, one discovers that there was considerable confusion over the validity of private purchases of Indian lands.<sup>6</sup> In the American Colonies, the matter was initially dealt with by legislation enacted by local legislative assemblies.<sup>7</sup> By at least the middle of the eighteenth century, the Imperial government in London had adopted a policy forbidding these purchases, expression of which can be found in instructions to various colonial governors.<sup>8</sup> This policy was applied generally in British North America by the Royal Proclamation of 1763.<sup>9</sup>

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<sup>6</sup> For more detailed discussion, see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), 221-35 [hereinafter *Common Law Aboriginal Title*].

<sup>7</sup> See Roy Hidemichi Akagi, *The Town Proprietors of the New England Colonies: A Study of their Development, Organization, Activities and Controversies, 1620-1770* (Philadelphia: University of Pennsylvania Press, 1924), 22-30; William Christie MacLeod, *The American Indian Frontier* (London: Kegan Paul, Trench, Trubner and Co. Ltd., 1928), 196-207; Marshall Harris, *Origin of the Land Tenure System in the United States* (Ames: Iowa State College Press, 1953), 157-70.

<sup>8</sup> See Lords of Trade to the Governor of New York, 18 September 1753, in Edmund Bailey O'Callaghan, ed., *Documents Relating to the Colonial History of the State of New York* (Albany: Weed, Parsons and Co., 1853-87), vol. VI, 854, and instructions to the governors of New York (1755), Virginia (1756), and several other colonies (1761), in Leonard Woods Labaree, ed., *Royal Instructions to British Colonial Governors, 1670-1776* (New York: D. Appleton-Century Co., 1935), vol. II, §§ 671, 687.

<sup>9</sup> Reprinted in R.S.C. 1985, App. II, No. 1. See Brian Slattery, *The Land Rights of Indigenous Canadian Peoples*, D. Phil. thesis, Oxford, 1979, reprinted by the University of Saskatchewan Native Law Centre, esp. at 310-12; Jack Stagg, *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763* (Ottawa: Research Branch, Indian and Northern Affairs Canada, 1981), esp. at 355-71.

While judges have often referred to the Royal Proclamation when affirming that Aboriginal title is inalienable,<sup>10</sup> it is nonetheless clear that there is a common law basis for the rule as well. In *Johnson v. M'Intosh*, the leading American case on the issue, Chief Justice Marshall gave three reasons for holding private purchases of Indian lands to be invalid, the last and apparently least important of which was violation of the Royal Proclamation.<sup>11</sup> In *Delgamuukw v. British Columbia*, the Supreme Court of Canada repeated the standard view that Aboriginal title is inalienable other than by surrender to the Crown, without even referring to the Royal Proclamation in that context.<sup>12</sup> In Australia, where the Royal Proclamation does not apply, the High Court in *Mabo v.*

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<sup>10</sup> E.g. see *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46 (P.C.), at 53-55 [hereinafter *St. Catherine's Milling*]; *Guerin*, *supra* note 1 at 376-83 (Dickson J.).

<sup>11</sup> *Johnson v. M'Intosh*, *supra* note 4. See discussion in text accompanying notes 106-42, *infra*. A possible reason why the Royal Proclamation has not been given much prominence by American courts is that it was a prerogative document issued by George III that was partly intended to contain the westward expansion of the colonies on the East Coast: on the relationship of the Royal Proclamation and the 1774 *Quebec Act*, 14 Geo. 3, c.83, to the American Revolution, see Jack M. Sosin, *Whitehall and the Wilderness: The Middle West in British Colonial Policy, 1760-1775* (Lincoln: University of Nebraska Press, 1961). According to a prominent Indian law scholar in the United States, "[i]n almost two hundred years of American legal history, the Proclamation has been cited by the United States Supreme Court only eleven times, and usually only as a passing historical reference": Robert N. Clinton, "The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs" (1989) 69 *Boston U.L. Rev.* 329, at 367.

<sup>12</sup> *Delgamuukw*, *supra* note 1 at 1081 (Lamer C.J.), 1126 (La Forest J.). See also *Opetchesah Indian Band v. Canada*, [1997] 2 S.C.R. 119, at 144, where Major J. said that "[b]oth the *common law* and the *Indian Act* guard against the erosion of the native land base through conveyances by individual band members or by any group of members" [emphasis added]. In *Calder*, *supra* note 1, the Court had split evenly on the question of whether the Royal Proclamation even applies in British Columbia. In *Delgamuukw*, while the British Columbia Court of Appeal (1993), 104 D.L.R. (4th) 470, held that it does not apply there, this issue was not addressed directly by the Supreme Court: see La Forest J.'s discussion of the Proclamation at 1131-32, 1133-34; see also per Lamer C.J. at 1056, 1059, 1082.

*Queensland [No. 2]* accepted without question that Native title (as Aboriginal title is called there) cannot be transferred out of the Indigenous community to which it pertains.<sup>13</sup> In New Zealand as well, where the 1840 Treaty of Waitangi between the Maori chiefs and Britain assured the Crown of a right of pre-emption of Maori lands, the Supreme Court in *The Queen v. Symonds* held that the common law would have prevented settlers from acquiring those lands directly in any case.<sup>14</sup>

Given that the general prohibition against alienation of Aboriginal, Indian, Native and Maori title has a common law basis, it is worth considering what legal justifications there are for the rule. That is the main purpose of this paper. As we shall see, two rationales are usually given: first, the need to protect Indigenous peoples from unscrupulous European settlers, and second, the incapacity of the settlers to acquire lands other than by Crown grant.<sup>15</sup> It will be suggested that the first rationale is derived from a British colonial policy that, whatever its justification historically, is paternalistic and acts as an impediment to the economic development of Indigenous lands today. The second rationale, on the other hand, is rooted in principle and has the potential to shed light on the relationship between Indigenous land rights and self-government. Moreover, the second rationale can be used to create space for Indigenous peoples to rely on their own laws to govern the alienability of land rights within their territories, and

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<sup>13</sup> *Mabo, supra* note 3 at 59-60, 70 (Brennan J.), 88, 110 (Deane and Gaudron JJ.), 194 (Toohey J.). This aspect of the *Mabo* decision will be discussed in text accompanying notes 143-50, *infra*.

<sup>14</sup> *Symonds, supra* note 3 at 388-90 (Chapman J.), 393-96 (Martin C.J.).

<sup>15</sup> A third, related rationale is occasionally mentioned, namely "the Crown's desire to control settlement": *Chippewas of Sarnia, supra* note 1 at 168. See generally Sosin, *supra* note 11. See also discussion of Martin C.J.'s judgment in *Symonds, supra* note 3, in text accompanying notes 44-48, *infra*.

thereby facilitate the economic development of their lands without having to surrender them to the Crown. The second rationale will therefore be the main focus of this paper. But first let us look briefly at the protection rationale.

## 1. The Protection Rationale

There can be no doubt that part of the motivation behind the British North American policy of prohibiting private purchases of Indian lands was the protection of the Indian nations. The Royal Proclamation of 1763 stated expressly that the reason why only the Crown could purchase Indian lands was that "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians".<sup>16</sup>

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<sup>16</sup> R.S.C. 1985, App. II, No. 1, at 6. While the Proclamation provided that Indian lands could also be purchased in the name of proprietary governments, the authority of those governments came from the Crown: see William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-69), vol. I, 108, where proprietary governments are described as having been "granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of legislation, which formerly belonged to the owners of counties-palatine; yet still with these express conditions, that the ends for

The Proclamation also stated that it was ... just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having being ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.<sup>17</sup>

The protection of the Indian nations from frauds and abuses therefore went hand-in-hand with the Crown's interests, in particular the security of its North American colonies.<sup>18</sup>

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which the grant was made be substantially pursued, and that nothing be attempted which may derogate from the sovereignty of the mother-country." See also *Pen[n] v. Lord Baltimore* (1745), Ridg. t. H. 332 (Ch.); (1750), 1 Ves. Sen. 444 (Ch.).

<sup>17</sup> R.S.C. 1985, App. II., No. 1, at 5. For further evidence of the protection rationale and discussion of this aspect of the Proclamation, see Slattery, *supra* note 9 at 192-93, 199-203; Stagg, *supra* note 9 at 356-70.

<sup>18</sup> News of the outbreak of Pontiac's War in the spring of 1763 had no doubt reached London by the summer, heightening the need for measures to provide for the security of the colonies by pacifying the Indian nations: see Slattery, *supra* note 9 at 201; Sosin, *supra* note 11 at 64-78.

Canadian case law has accepted the protection explanation for the inalienability of Aboriginal title. For example, in *Guerin v. The Queen* Dickson J. said that the provision in the *Indian Act*<sup>19</sup> for surrender of reserve lands to the Crown goes back to the Royal Proclamation, confirming the "historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties".<sup>20</sup> In *Canadian Pacific Ltd. v. Paul*, a unanimous Court said that "[t]his feature of inalienability was adopted as a protective measure for the Indian population lest they be persuaded into improvident transactions."<sup>21</sup> Similarly, in *Mitchell v. Peguis Indian Band*, La Forest J. said that

... legislative restraints on the alienability of Indian lands are but the continuation of a policy that has shaped the dealings between the Indians and the European settlers since the time of the *Royal Proclamation of 1763*... The sections of the *Indian Act* relating to the inalienability of Indian lands seek to give effect to this protection by interposing the Crown between the Indians and the market forces which, if left unchecked, had the potential to erode Indian ownership of these reserve lands.<sup>22</sup>

These decisions all emphasize the historic policy basis of protecting Aboriginal title lands by making them inalienable other than by surrender to the Crown.<sup>23</sup>

In *Delgamuukw*, the leading case on Aboriginal title in Canada, Chief Justice Lamer affirmed that both protection and settler incapacity are behind the inalienability of Aboriginal title. He put it this way:

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<sup>19</sup> R.S.C. 1952, c.149, now R.S.C. 1985, c. I-5.

<sup>20</sup> *Guerin*, *supra* note 1 at 383; see also per Estey J. at 392.

<sup>21</sup> [1988] 2 S.C.R. 654, at 677. See also *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 [hereinafter *Blueberry River Indian Band*], at 370-71 (McLachlin J.).

<sup>22</sup> [1990] 2 S.C.R. 85, at 129-30; see also 133, 141.

<sup>23</sup> See also *Chippewas of Sarnia*, *supra* note 1, esp. at 164, 168.

Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it. I have suggested above that the inalienability of aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and, therefore, cannot acquire title through purchase from aboriginal inhabitants. It is also, again only in part, a function of a general policy "to ensure that Indians are not dispossessed of their entitlements": see *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 133. What the inalienability of lands held pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value.<sup>24</sup>

Lamer C.J. thus linked inalienability to the inherent limit he placed on Aboriginal title lands that prevents them from being used in ways that are irreconcilable with the attachment to the land that forms the basis for the title.<sup>25</sup> Apparently both are intended to preserve the lands for future generations,<sup>26</sup> which is another way of expressing the protection rationale. However, to the extent that the inherent limit and inalienability are designed to prevent Aboriginal title holders from acting against their own best interests, they contain an element of paternalism that may not be acceptable in Canadian society today.<sup>27</sup>

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<sup>24</sup> *Delgamuukw*, *supra* note 1 at 1090; see also 1081, where Lamer C.J. described inalienability as one of the *sui generis* dimensions of Aboriginal title. La Forest J. expressed the same view at 1126. See also *Hopton v. Pamajewon* (1993), 109 D.L.R. (4th) 449 (Ont. C.A.), at 457-59; *Opetchesah Indian Band v. Canada*, *supra* note 12 at 139 (Major J.).

<sup>25</sup> *Delgamuukw*, *supra* note 1 at 1088-91.

<sup>26</sup> See *ibid.* at 1089, regarding the inherent limit.

<sup>27</sup> On the paternalism behind the inherent limit, see "The Post-*Delgamuukw* Nature and Content of Aboriginal Title", in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) [hereinafter *Emerging Justice?*], 102, at 116-22.

Looking beyond Canada, we can see that the protection rationale has been used in other jurisdictions as well to justify the inalienability of Indigenous land rights. In New Zealand, for example, Chapman J. observed in the *Symonds* case that the exclusive right of the Crown to extinguish Maori title

... necessarily arises out of our peculiar relations with the Native race, and out of our obvious duty of protecting them, to as great an extent as possible, from the evil consequences of the intercourse to which we have introduced them, or have imposed upon them. To let in all purchasers, and to protect and enforce every private purchase, would be virtually to confiscate the lands of the Natives in a very short time.<sup>28</sup>

For Chapman, however, the protection rationale seems to have been based more on principles of morality than of law.<sup>29</sup> As we shall see, the main legal reason both he and Martin C.J. gave for the inalienability of Maori title was the incapacity of settlers to acquire it without the intercession of the Crown.<sup>30</sup>

Historically, the paternalism inherent in the protection rationale for the inalienability of Aboriginal title may have been justified. Differences between Indigenous peoples' relationships with the land and European conceptions of land ownership no doubt resulted in a lack of mutual understanding when transactions took

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<sup>28</sup> *Symonds*, *supra* note 3 at 391. See also *Mabo*, *supra* note 2 at 194, where Toohey J. found support for the protection rationale in Chapman's judgment. While the protection rationale has not been given prominence in Australian jurisprudence (no doubt because there was no equivalent of the North American policy of protection that found expression in the Royal Proclamation of 1763), it was relied upon by the Colonial Secretary, Lord Glenelg, as a reason for denying the validity of John Batman's 1835 purchase of land from Indigenous people in the Port Phillip region of what is now Victoria: see *Common Law Aboriginal Title*, *supra* note 6 at 224-25.

<sup>29</sup> He said that, "[f]rom the protective character of the rule, then, it is entitled to respect on moral grounds, no less than to judicial support on strictly legal grounds": *ibid.*

<sup>30</sup> See text accompanying notes 40-51, *infra*.

place between Indigenous people and European settlers.<sup>31</sup> This in turn led to exploitation, the kind of frauds and abuses that the Royal Proclamation of 1763 was designed to prevent.<sup>32</sup> But while there may have been good reasons for this policy of protection in the past, one may ask whether a restriction on alienation that is based on paternalism is acceptable today. On the other hand, it is of vital importance for Indigenous peoples to preserve the small land bases that they have managed to retain.<sup>33</sup> Inalienability is still an important means of ensuring that more of the lands they hold in common are not lost.<sup>34</sup> For this reason, there is value in a justification for inalienability that does not rely on paternalism. The incapacity of settlers rationale

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<sup>31</sup> On these differences, see Leroy Little Bear, "Aboriginal Rights and the Canadian 'Grundnorm'", in J. Rick Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986), 243; William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 1983), esp. at 54-81; *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services Canada, 1996) [hereinafter *RCAP Report*], vol. II, *Restructuring the Relationship*, pt. II, 424-64.

<sup>32</sup> See text accompanying note 16, *supra*.

<sup>33</sup> In its Report, the Royal Commission on Aboriginal Peoples recommended that the land base of the Aboriginal peoples of Canada be *increased* in order "to facilitate Aboriginal economic self-reliance, cultural autonomy and self-government": *RCAP Report, supra* note 31, vol. II, 574. Moreover, as maintenance of Indigenous land bases is probably essential to cultural preservation, emerging international norms may classify and protect "Aboriginal rights as inalienable human rights": see Paul Joffe, "National Implications and Potential Effects in Québec", in Owen Lippert, ed., *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (Vancouver: The Fraser Institute, 2000), 295, at 307-10.

<sup>34</sup> In the United States, sale of "surplus" Indian lands and conversion of tribal lands into individual holdings that became alienable after a certain time had a disastrous impact on the Indian nations, causing loss of almost two-thirds of their lands in the period when this allotment policy was in place from 1887 and 1934: see D.S. Otis, *The Dawes Act and the Allotment of Indian Lands*, edited by Francis Paul Prucha (Norman: University of Oklahoma Press, 1973), originally printed in 1934 as *History of the Allotment Policy*; Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate Indians, 1880-1920* (Lincoln: University of Nebraska Press, 1984); Charles F.

meets this need. Properly understood, it supports the status of Indigenous nations as self-governing political entities with control over their communally-owned lands and natural resources.

## 2. Incapacity of Settlers and the Political Aspect of Aboriginal Title

### (a) *Jurisprudential Explanations*

We have seen that Chief Justice Lamer, in the *Delgamuukw* case, said that "the inalienability of aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and, therefore, cannot acquire title through purchase from aboriginal inhabitants."<sup>35</sup> One problem with this is that the notion that settlers could only acquire title to land by Crown grant is inconsistent with both practice and precedent in many British colonies. On Pitcairn Island, for example, it appears that the settlers (who were actually the *Bounty* mutineers and their Polynesian companions) did acquire lands for themselves by occupancy that gave rise to valid legal titles without Crown grants.<sup>36</sup> Similarly in British Honduras (now Belize), British subjects occupied lands and acquired good titles as against the Crown, by possession and statutory limitation.<sup>37</sup> In British West Africa and India, Englishmen were able to purchase lands from the local inhabitants.<sup>38</sup> And closer

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Wilkinson, *American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven: Yale University Press, 1987), 19-23.

<sup>35</sup> *Delgamuukw*, *supra* note 1 at 1090: see text accompanying note 24, *supra*.

<sup>36</sup> See *Common Law Aboriginal Title*, *supra* note 6 at 147-57.

<sup>37</sup> See *Attorney-General for British Honduras v. Bristowe* (1880), 6 App. Cas. 143 (P.C.), and discussion in *Common Law Aboriginal Title*, *supra* note 6 at 141-47.

<sup>38</sup> Re West Africa, see H.W. Hayes Redwar, *Comments on Some Ordinances of the Gold Coast Colony* (London: Sweet and Maxwell Ltd., 1909), 25, 75-

to home in what used to be New France, British subjects could acquire lands from the French Canadians, apparently without the intercession of the Crown.<sup>39</sup>

In the *Symonds* case in 1847, the New Zealand Supreme Court provided more detailed explanations of why the British settlers were unable to acquire Maori lands for themselves. Chapman J. held that this "restraint upon the purchasing capacity of the Queen's European subjects" originated from the corollary of the doctrine of tenures that "the Queen is the exclusive source of private title".<sup>40</sup> He elaborated as follows:

Any acquisition of territory by a subject, by conquest, discovery, occupation, or purchase from Native tribes (however it may entitle the subject, conqueror, discoverer, or purchaser, to gracious consideration from the Crown) can confer no right on the subject. Territories therefore, acquired by the subject in any way vest at once in the Crown. To state the Crown's right in the broadest way: it enjoys the exclusive right of

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79; C.K. Meek, *Land Law and Custom in the Colonies*, 2nd ed'n (London: Frank Cass and Co. Ltd., 1949), 169-73; Kwamena Bentsi-Enchill, *Ghana Land Law: An Exposition, Analysis and Critique* (London: Sweet and Maxwell, 1964), 44-48, 60-65; Anthony Allott, *New Essays in African Law* (London: Butterworths, 1970), ch. 9, "Fee Simples in West Africa", 298-338. Re India, see *Freeman v. Fairie* (1828), 1 Moo. I.A. 305; *Mayor of Lyons v. East India Co.* (1837-37), 1 Moo. P.C. 175; K.M. Chatterjea, *The Law Relating to the Transfer of Immoveable Property Inter Vivos* (Calcutta: Thacker, Spink and Co., 1890), 139-40.

<sup>39</sup> See *Drulard v. Welsh* (1906), 11 O.L.R. 647 (Ont. Div. Ct.), reversed on other grounds (1907), 14 O.L.R. 54 (Ont. C.A.). Provisions of both the 1760 Articles of Capitulation of Montreal (Art. 35) and the 1763 Treaty of Paris (Art. 4) provided expressly that French Canadians who decided to return to France or emigrate could sell their property to British subjects: see *Corinthe c. Le Séminaire de Saint-Sulpice* (1911), 21 R.J.Q. (B.R.) 316, affirmed [1912] A.C. 872 (P.C.). These provisions, however, do not appear to have extended to French Canadians who chose to remain in Canada. So the alienability of their lands (which both the *Drulard* and the *Corinthe* decisions seem to have accepted) would presumably have been due to French law, and the common law capacity of British subjects to purchase those lands. In other words, the land rights of the French Canadians were treated as private property, whereas the land rights of the Indian nations were not: see references to the Royal Proclamation of 1763 (issued less than eight months after the Treaty of Paris was signed) in text accompanying notes 9, 16-18, *supra*.

<sup>40</sup> *Symonds*, *supra* note 3 at 391, 388. Note that Chapman acknowledged that this is subject to the "rules of prescription": *ibid.* at 388.

acquiring newly found or conquered territory, and of extinguishing the title of the aboriginal inhabitants found thereon.... The rule, therefore, adopted in our colonies, "that the Queen has the exclusive right of extinguishing Native title to land," is only one member of a wider rule, that the Queen has the exclusive right of acquiring new territory, and that whatsoever the subject may acquire, vests at once, as already stated, in the Queen. And this, because in relation to the subjects, the Queen is the only source of title.<sup>41</sup>

What is particularly interesting about this passage is the way it links title to land and territorial sovereignty.<sup>42</sup> In Chapman's view, the two went hand-in-hand in the colonial context of New Zealand. The settlers could not acquire title to land for themselves because they could not acquire territory. As British subjects, they lacked the capacity to acquire personally that which could only pertain to a sovereign.<sup>43</sup>

Chief Justice Martin, in arriving at the same conclusion in *Symonds* as Chapman J., probed deeper in search of the principle behind the rule that in the colonies British subjects could only acquire title to land from the Crown. He stated the underlying principle in this way: "colonization is a work of national concernment, a work to be carried on with reference to the interests of the nation collectively; and therefore to be

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<sup>41</sup> *Ibid.* at 389-90.

<sup>42</sup> While these are distinct concepts, the feudal foundation of the common law has caused them to be intertwined where the rights and authority of the Crown are concerned: see *Common Law Aboriginal Title*, *supra* note 6 at 108-10.

<sup>43</sup> There would, however, be nothing to prevent British subjects from acquiring lands by purchase from the "natives" in other jurisdictions, such as France, where territorial sovereignty was not an issue. In other words, it was the *colonial context* of New Zealand and the fact that there was more at stake than private property that placed restrictions on the capacity of the settlers to acquire lands. Moreover, contrary to what Chapman J. said, it appears that British subjects could acquire lands for themselves in regions colonized by Britain as long as they did so *before* the Crown asserted sovereignty: see discussion of British Honduras and Pitcairn Island, *ibid.* at 141-57.

controlled and guided by the Supreme Power of the nation."<sup>44</sup> While acknowledging the feudal origins of the rule that the Crown is the source of all titles to land within its common law dominions,<sup>45</sup> he pointed out that it is now understood that Crown lands are to be administered for the national benefit. So when the Native inhabitants of New Zealand ceded land to British subjects, "the right which succeeds thereto is not the right of any individual subject of the Crown, not even of the person by whom the cession was procured, but the right of the Crown on behalf of the whole nation, on behalf of the whole body of subjects of the Crown".<sup>46</sup> Linking this to territorial sovereignty in much the same way as Chapman J. had done, he said this:

If a subject of the Crown could by his own act, unauthorized by the Crown, acquire against the Crown a right to any portion of the lands of a new country, it is plain that he might, acting upon that right, proceed to form a colony there. Now, the law of England denies to any subject the right of forming a Colony without the license of the Crown. And when we consider the complicated responsibilities which flow out of the existence of a colony, and which may seriously affect the power to which *the settlers owe allegiance*, and from which they expect to receive protection, and when we also estimate the means and appliances needed for successful colonization, that denial can scarcely fail to appear reasonable and necessary.<sup>47</sup>

So for Chief Justice Martin, like Chapman J., the incapacity of settlers to acquire Maori lands for themselves was based on the common law rule that British subjects who owe

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<sup>44</sup> *Symonds, supra* note 3 at 395.

<sup>45</sup> As we have seen, it is not entirely accurate to say that the Crown is the source of all titles: see *supra* notes 36-39 and accompanying text. Even in England, the dogma that all private titles to land originated from Crown grants is generally acknowledged to be a legal fiction: see Blackstone, *supra* note 16, vol. II, 51; Joseph Chitty, *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), 211; *Common Law Aboriginal Title, supra* note 6 at 82-84.

<sup>46</sup> *Symonds, supra* note 3 at 396.

<sup>47</sup> *Ibid.* at 395 [emphasis added].

allegiance to the Crown cannot acquire territory for themselves.<sup>48</sup> This rule is grounded in part on the British nation's public interest in controlling and benefiting from the acquisition of lands in colonial contexts. As was already apparent from our analysis of Chapman J.'s judgment, there is clearly more at stake here than private property.

We have seen that Chapman J. and Martin C.J. both approached the issue of the inalienability of Maori lands from the vantage point of the common law status and capacity of settlers. Neither of them said much about the nature of Maori title to land, as that issue was not before them.<sup>49</sup> However, I think the connection they made between the settlers' incapacity to acquire Maori lands and their incapacity to engage in colonization has important implications for Maori title. When Britain acquired territory from a European sovereign such as France, there does not seem to have been any restriction on the ability of British subjects to acquire lands in that territory that were already owned by French individuals. Those lands were regarded as private

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<sup>48</sup> This rule is well established: see *Re Southern Rhodesia*, [1919] A.C. 211, at 221; Chitty, *supra* note 45 at 30; Charles James Tarring, *Chapters on the Law Relating to the Colonies*, 4th ed'n (London: Stevens and Haynes, 1913), 23; Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens and Sons, 1966), 100. Sarawak, which although ceded to a British subject in 1841-42 was not acquired by the Crown until 1946, is regarded by the last two authors as an anomaly: see also Tan Sri Datuk Lee Hun Hoe, "Legal History of Sarawak", [1977] 2 *Malayan L.J.* ms lviii.

<sup>49</sup> Chapman J. did say that "[t]he legal doctrine as to the exclusive right of the Queen to extinguish the Native title ... is no doubt incompatible with that full and absolute dominion over the lands which they occupy, which we call an estate in fee": *Symonds*, *supra* note 3 at 391. He evidently assumed that alienability is a fundamental attribute of a fee simple estate. This does not appear to be correct. Apparently the Crown can grant an inalienable fee simple: see Chitty, *supra* note 45 at 386 n.(h). Moreover, in *Pierce Bell Ltd. v. Frazer* (1972-73), 130 C.L.R. 575 (H.C. Aust.), at 584, Barwick C.J. said that a statutory restraint on alienation of land granted by the Crown would not reduce, or make conditional, the fee simple estate obtained by the grantee.

property, and so were alienable as such.<sup>50</sup> But when Britain acquired sovereignty over a territory like New Zealand that was occupied by Indigenous peoples, British subjects could not acquire lands directly from them because acquisition of Indigenous lands, according to Martin C.J., was part of the colonizing enterprise. It therefore seems that the lands of Indigenous peoples cannot be equated with private property. They have a public aspect and so have to be acquired by the Crown before they can be transformed into private property by Crown grant.

Since the *Symonds* case was decided in 1847, the law of Native or Aboriginal title has undergone extensive development, especially in Canada and Australia.<sup>51</sup> An important element of that development has been confirmation of the communal nature of that title. In *Mabo*, the High Court of Australia held that the Meriam People have communal Native title to lands on the Murray Islands, even though their traditional laws and customs contain no concept of community title, as in their legal system all the land belongs to individuals and groups.<sup>52</sup> Although Brennan J. (as he then was) said that "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of

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<sup>50</sup> See *supra* note 39 and accompanying text.

<sup>51</sup> In the United States, the Marshall Court had already laid down the parameters for Indian title and tribal sovereignty in *Johnson v. M'Intosh*, *supra* note 4, and *Worcester v. Georgia*, 6 Pet. 515 (1832), to be discussed further in text accompanying notes 108-42, *infra*. These decisions influenced Chapman J. and Martin C.J. in the *Symonds* case.

<sup>52</sup> *Mabo*, *supra* note 2 at 22 (Brennan J.). For detailed discussion of the implications of this, see "The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law" [hereinafter "Traditional Laws and Customs"], in *Emerging Justice?*, *supra* note 27, 416, esp. at 418-23.

a territory",<sup>53</sup> the Court went on to declare that "the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands".<sup>54</sup> Brennan J. said that this kind of "proprietary community title" could co-exist with "individual non-proprietary [or proprietary] rights that are derived from the community's laws and customs and are dependent on the community title."<sup>55</sup> Moreover, an Indigenous people's laws and customs, and so the nature of their intra-community land rights, could be modified after British colonization.<sup>56</sup> This presupposes the existence of community authority that must be governmental in nature.<sup>57</sup> It appears, therefore, that Native title involves a *relationship* between the Crown and an Indigenous people that is not merely proprietary.<sup>58</sup> While their communal title obviously has a proprietary aspect, it also has social, cultural and political dimensions that are beyond the scope of standard conceptions of private property.

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<sup>53</sup> *Mabo, supra* note 2 at 58.

<sup>54</sup> *Ibid.* at 217.

<sup>55</sup> *Ibid.* at 52.

<sup>56</sup> *Ibid.* at 61, 70 (Brennan J.), 110 (Deane and Gaudron JJ.), 192 (Toohey J.).

<sup>57</sup> It might be argued that the modifications to Indigenous laws and customs that the High Court envisaged could occur without conscious decision-making on the part of Indigenous communities. This argument is reminiscent McEachern C.J.'s discredited trial judgment in *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.), esp. at 441, where he said he did not accept that the ancestors of the Gitksan and Wet'suwet'en "behaved as they did because of `institutions"; instead, he found that "they more likely acted as they did because of *survival instincts* which varied from village to village" [emphasis added]. For critical commentary, see Michael Asch, "Errors in *Delgamuukw*: An Anthropological Perspective", in Frank Cassidy, ed. *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992), 221; Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby, B.C.: Talon Books Ltd., 1998).

<sup>58</sup> See Jeremy Webber, "Beyond Regret: Mabo's Implications for Australian Constitutionalism", in Duncan Ivison, Paul Patton, and Will Sanders, eds., *Political*

Likewise in Canada, the decision of the Supreme Court in the *Delgamuukw* case contains a concept of Aboriginal title that has a governmental quality.<sup>59</sup> In his discussion of the unique elements of Aboriginal title, Chief Justice Lamer said this:

A further dimension of aboriginal title is the fact that it is held *communally*. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.<sup>60</sup>

Commenting on this aspect of the *Delgamuukw* decision in *Campbell v. British Columbia*, Williamson J. concluded that the right of a community to make decisions regarding the use of its land includes "the right to have a political structure for making those decisions".<sup>61</sup> Moreover, the fact that Aboriginal title is "a collective right held by all members of an aboriginal nation" suggests that Aboriginal nations as such have the capacity to own land and therefore have legal personality.<sup>62</sup> As Aboriginal nations have decision-making authority over their lands that is governmental, they cannot be

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*Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000), 60.

<sup>59</sup> For further discussion, see Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5 *Tulsa J. Comp. & Int'l L.* 253, esp. at 285-91, reprinted in *Emerging Justice?*, *supra* note 27, 58, esp. at 89-95; "The Post-*Delgamuukw* Nature and Content of Aboriginal Title", in *Emerging Justice?*, 102 [hereinafter "Post-*Delgamuukw* Nature and Content"].

<sup>60</sup> *Delgamuukw*, *supra* note 1 at 1082-83 [emphasis in original]. See also *R. v. Marshall [No. 2]*, [1999] 3 S.C.R. 533, at 547, where the Supreme Court said that treaty rights to hunt and fish "do not belong to the individual, but are exercised by authority of the local [Aboriginal] community to which the accused belongs".

<sup>61</sup> *Campbell v. British Columbia*, [2000] 4 C.N.L.R. 1 (B.C.S.C.), at 30. See also *Mitchell v. M.N.R.*, 2001 S.C.C. 33, where Binnie J. (for himself and Major J.) envisaged the possibility of Aboriginal self-government to the extent that it is compatible with Canadian sovereignty.

<sup>62</sup> For further discussion, see "Post-*Delgamuukw* Nature and Content", *supra* note 59 at 122-25.

equated with natural persons or private corporations. Nor are they like municipal corporations which are created by statute. Their legal personality, like that of the Crown itself, is both inherent and public - it arises from their existence as nations and includes political authority.<sup>63</sup> At common law, an Aboriginal nation can therefore be conceptualized as the aggregate of its members,<sup>64</sup> a legal and political body which holds Aboriginal title in a way that is both proprietary and governmental.<sup>65</sup>

These more recent judicial pronouncements on the nature of Native or Aboriginal title in *Mabo* and *Delgamuukw* make the connection that the Supreme Court found in *Symonds* between acquisition of territorial sovereignty and acquisition of land more

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<sup>63</sup> The Crown is a corporation sole that owes its legal personality to its status as the titular head of state: see Frederick Pollock, *A First Book of Jurisprudence* (London: Macmillan and Co., 1896), 113. Maitland, in his incisive essay "The Crown of Corporation", in H.D. Hazeltine, G. Lapsley, and P.H. Winfield, eds., *Frederic William Maitland: Selected Essays* (Freeport, N.Y.: Books for Libraries Press, 1936), 104 at 106, observed:

[M]edieval thought conceived the nation as a community and pictured it as a body of which the king was the head. It resembled those smaller bodies which it comprised and of which it was in some sort composed. What we would regard as the contrast between State and Corporation was hardly visible. The "commune of the realm" differed rather in size and power than in essence from the commune of a county or the commune of a borough.

See also Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Philosophy* (Princeton: Princeton University Press, 1957); Geoffrey Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971), 17-24.

<sup>64</sup> In at least some Aboriginal nations, members would probably include past and future as well as present generations: see Little Bear, *supra* note 31 at 245.

<sup>65</sup> In the *Delgamuukw* case, the Gitksan and Wet'suwet'en who brought the action appear to have conceived of their claim in a way that included proprietary rights (ownership) and governmental authority (jurisdiction): see *The Address of the Gitksan and Wet'suwet'en Hereditary Chiefs to Chief Justice McEachern of the Supreme Court of British Columbia*, [1988] 1 C.N.L.R. 17. By the time the case reached the Supreme Court of Canada, the claim had been recharacterized and argued primarily as a claim to Aboriginal title: see *Delgamuukw*, *supra* note 1 at 1029 (Lamer C.J.). In its decision, the Court declined to deal with the jurisdiction or self-government claim directly, leaving that to be dealt with at a new trial: *ibid.* at 1114-15 (Lamer C.J.), 1134 (La Forest J.).

understandable. It is clear from both these cases that Aboriginal title is not a mere private property right. It is communal and has a governmental dimension that cannot be acquired by private persons. So the incapacity of the settlers stems not so much from the doctrine of tenures and the fiction that the real property rights of British subjects must originate from Crown grant, as from the fact that as private individuals who owe allegiance to the Crown they cannot acquire a title that is public in the sense that it is communal and entails governmental authority. Given these attributes of Aboriginal title, it is not surprising that it can only be transferred to an entity, like the Crown, that has governmental capacity itself.

### ***(b) Constitutional History and Political Theory***

Additional support for an explanation of the inalienability of Aboriginal title that is based on the communal and political attributes of the title itself can be found in English constitutional history. The concept of the Crown as a legal entity apart from the natural person of the king began to develop in the medieval period, and found judicial expression in the sixteenth century.<sup>66</sup> Around the same time as this concept was developing, a notion took root that the king was not a personal ruler, but held an office that included certain responsibilities. Among these was an obligation not to alienate elements of the Crown's property and sovereignty, which included lands (the royal demesne), territory and jurisdiction.<sup>67</sup> The main reasons given for this were that the

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<sup>66</sup> See *Willion v. Berkley* (1559), 1 Plow. 223 (C.P.); *Case of the Duchy of Lancaster* (1561), 1 Plow. 212 (Q.B); and discussion in Kantorowicz, *supra* note 63, esp. at 7-23.

<sup>67</sup> See Peter N. Riesenber, *Inalienability of Sovereignty in Medieval Political Thought* (New York: Columbia University Press, 1956), discussing the

king's property and powers were administered by him on behalf of his subjects as a whole,<sup>68</sup> and that he should maintain the realm and its appurtenances intact for his successor.<sup>69</sup> Where alienations of territory were concerned, the shifting of homage and allegiance of the king's subjects to a new ruler without their consent also involved a breach of feudal obligations.<sup>70</sup> In England, this restriction on the authority of the king to alienate the Crown's property and powers was incorporated into the coronation oath, at least as sworn by Edward II in 1308, if not before.<sup>71</sup>

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development and application of this theory in continental Europe as well as in England. At 99 Riesenbergs stated: "the inalienable aspects of the Crown included not only landed property and feudal rights over the royal demesne, but also a freedom of action and prerogative which pertained to the ruler as king and which were qualitatively different from those of a feudal lord." At 15 he explained that the theory of inalienability was designed to preserve "the regalian and feudal rights which ... formed a necessary foundation to the state," as well as "the less tangible but ultimately more powerful assets of the monarchy: its very regality, dignity, freedom and scope of action". See also Kantorowicz, *supra* note 63, esp. at 347-58.

<sup>68</sup> Note the similarity to the explanation Martin C.J. gave in *Symonds*, *supra* note 3, for the rule that settlers could not acquire lands for themselves in British colonies: see text accompanying notes 44-46, *supra*.

<sup>69</sup> Riesenbergs, *supra* note 67, esp. at 20, 109.

<sup>70</sup> *Ibid.* at 129-44. On the meaning and importance of allegiance and its relation to the feudal concept of fealty, see Blackstone, *supra* note 16, vol. I, 366-71. Regarding the impact on allegiance of the 1783 Treaty of Versailles, whereby the British Crown recognized the independence of the United States, see *Doe d. Thomas v. Acklam* (1824), 2 B. & C. 779 (K.B.); *Inglis v. Trustees of the Sailor's Snug Harbor*, 3 Pet. 99 (1830); Herbert Broom, *Constitutional Law Viewed in Relation to the Common Law*, 2nd ed'n by George L. Denman (London: W. Maxwell and Son, 1885), 34-36, 52-53.

<sup>71</sup> See B. Wilkinson, "The Coronation Oath of Edward II and the Statute of York" (1944) 19 *Speculum* 445; H.G. Richardson, "The English Coronation Oath" (1949) 24 *Speculum* 44; Ernst H. Kantorowicz, "Inalienability: A Note on Canonical Practice and the English Coronation Oath in the Thirteenth Century" (1954) 29 *Speculum* 488.

However, this theory of the inalienability of sovereignty was never rigidly applied.<sup>72</sup> In so far as lands were concerned, the English kings continued to alienate the Crown's demesne by grant, as this was a means of obtaining necessary feudal services and revenues.<sup>73</sup> We nonetheless have to pay close attention to the way in which Crown lands were (and still are) alienated. As every first year law student learns, the statute *Quia Emptores*,<sup>74</sup> enacted in 1290, prohibited the creation by subinfeudation of new feudal lordships. Henceforth, alienation of a fee simple by one private landholder to another has had to take place by substitution.<sup>75</sup> This statute, however,

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<sup>72</sup> Riesenbergs, *supra* note 67, made this point repeatedly. In his Conclusion at 178, he wrote that basic to the theory's ... fundamental importance as an element of public law, were its flexibility and its harmony with contemporary ideas. Since the theory of inalienability of sovereignty developed against the background of an essentially feudal society, it had to come to terms with that surrounding reality. This it did by moderating the tone with which it proclaimed its prohibitions. Not all alienations or delegations of ruling authority were forbidden to the rulers of a state split into local units; only those which would substantially block the progress of the new social and political order. By accommodating their theory to the status quo, the legists and theorists were able to give it real force.

<sup>73</sup> See generally Robert S. Hoyt, *The Royal Demesne in English Colonial History: 1066-1272* (New York: Greenwood Press, 1968). Some statutory restraints on alienation of Crown lands were enacted in the 18th century (see Chitty, *supra* note 45 at 203-5), but according to Blackstone, *supra* note 16, vol. I, at 287, this was done "too late, after almost every valuable possession of the crown had been granted away forever, or else upon very long leases". Chitty nonetheless stated at 205 that, "[e]ven at common law, the leaning and endeavour seems always to have been to preserve entire and to keep in the possession of the Crown its demesne lands and possessions, as materially conducive to its dignity and honour."

<sup>74</sup> 18 Edw. I, cc. 1-3.

<sup>75</sup> That is, the alienee replaces the alienor as tenant in fee of the feudal lord: see Joshua Williams, *Principles of the Law of Real Property*, 17th ed'n by T. Cyprian Williams (London: Sweet and Maxwell, Ltd., 1894), 45-46; Charles Sweet, *Challis's Law of Real Property*, 3rd ed'n (London: Butterworth and Co., 1911), 18-20.

has never applied to the Crown.<sup>76</sup> So when the Crown grants land in fee simple - and this is as true today as it was in 1290 - the grantee holds the land in tenure from the Crown. In other words, the alienation takes place as an infeudation rather than as a substitution. Thus, "[i]f the king grants land to J.S. in fee, to hold as freely as the king is in his crown, yet he shall hold of the king."<sup>77</sup> The significance of this is that it reveals that the Crown is incapable of giving up the feudal aspect of its sovereignty (otherwise known as its paramount lordship).<sup>78</sup> So the theory of the inalienability of sovereignty does apply in England to prevent the Crown from creating real property interests that are inconsistent with its sovereign rights over all the lands in the realm.<sup>79</sup>

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<sup>76</sup> See E.H. Burn, *Cheshire and Burn's Modern Law of Real Property*, 15th ed'n (London: Butterworths, 1994), 15; Robert Megarry and William Wade, *The Law of Real Property*, 6th ed'n by Charles Harpum (London: Sweet and Maxwell Ltd., 2000), 29.

<sup>77</sup> Charles Viner, *A General Abridgement of Law and Equity*, 2nd ed'n (London: Robinson, Payne, Whieldon, and Butterworth, 1791-94), "Tenure", B.a.15: see Y.B. 14 Hen. 6, 43, 11b at 12b. See also John Comyns, *A Digest of the Laws of England*, 5th ed'n by Anthony Hammond (London: A. Straham, 1822), "Tenure", A: "though the king releases to his tenant all services, yet he holds of him". Comyns relied, first, on Y.B. 8 Hen. 7, 12b, where it was said that "it is an incident to the king that all lands are held of him, and there cannot be any lands that are not held of him, mediately or immediately" [my translation]; and second, on *Anthony Lowe's Case* (1603), 9 Co. R. 122b (Ct. of Wards), where it was held (at 123a) that the king cannot by grant extinguish the tenure because that would be an alteration of the law.

<sup>78</sup> As Maitland wrote in reference to the medieval period, "[a]ll land in England must be held of the king of England, otherwise he would not be king of all England": Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2nd ed'n (1898), reissued (Cambridge: Cambridge University Press, 1968), vol. II, at 3. See also *Common Law Aboriginal Title*, *supra* note 6 at 82-83 n.19.

<sup>79</sup> Also, the Crown cannot make grants that infringe public rights to navigate and fish in tidal waters. It appears that the former cannot be derogated from by Crown grant due to the common law, whereas the latter has been protected since 1215 by *Magna Carta*: see *Malcomson v. O'Dea* (1863), 10 H.L.C. 593; *Gann v. Free Fishers of Whitstable* (1865), 11 H.L.C. 192; *Attorney-General for British Columbia v. Attorney-General for Canada*, [1914] A.C. 153 (P.C.); *Harper v. Minister for Sea Fisheries*

Where alienation of territory is concerned, one has to consider international law as well as the common law. Cession of territory from one sovereign to another has long been accepted by European jurists in their expositions of the law of nations. Early jurists, however, thought there were restrictions on the authority of rulers to alienate territory and jurisdiction.<sup>80</sup> Alberico Gentili, for example, in his 1598 work *De Iure Belli Libri Tres*, wrote that rulers may not make their subjects change rulers without their consent, as rulers and subjects "are bound by mutual obligations."<sup>81</sup> Similarly, Hugo Grotius expressed the view in his 1625 classic *De Jure Belli ac Pacis Libri Tres* that, although a king can alienate the sovereignty he holds by inheritance, he cannot alienate part of a people without their consent because to do so would violate the original "voluntary compact."<sup>82</sup> Nonetheless, Grotius saw "nothing to hinder a people,

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(1989), 168 C.L.R. 314 (H.C. Aust.); *Commonwealth v. Yarmirr* 168 A.L.R. 426 (Full F.C. Aust.), at 471-77 (Beaumont and von Doussa JJ.), 539-60 (Merkel J., dissenting in part); *Halsbury's Laws of England*, 4th ed'n (London: Butterworths), vol. VIII (1974), para. 1419. In *Gann v. Free Fishers of Whitstable*, *supra*, Lord Westbury said at 207 that the Crown's ownership of the bed of tidal waters "is for the benefit of the subject", thus acknowledging the public nature of the Crown's sovereign rights in that context.

<sup>80</sup> For a very useful discussion, see Theodor Meron, "The Authority to Make Treaties in the Late Middle Ages" (1995) 89 *Am. J. Int'l L.* 1.

<sup>81</sup> Alberico Gentili, *De Iure Belli Libri Tres*, trans. of ed'n of 1612 by John C. Rolfe (Oxford: Clarendon Press, 1933), vol. II, 608. To the argument that the people may have granted the ruler "full dominion and power over themselves", he responded forcefully: "It is true that the people conferred all sovereignty and power, but they did so in order that they might be governed like men, not sold like cattle" (*ibid.*, 609).

<sup>82</sup> Hugo Grotius, *On the Law of War and Peace*, trans. by Francis W. Kelsey (Oxford: Clarendon Press, 1925), bk. II, ch. VI, pts. III-IV. Grotius, at bk. I, ch. III, pt. XII, and bk. I, ch. IV, pt. X, distinguished between territories where the king's rights were proprietary or patrimonial, and territories where his rights were usufructuary because the kingship was conferred by succession or election. This distinction is even more prominent in Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1749), trans. by Joseph H. Drake (Oxford: Clarendon Press, 1934), § 1007, where the author states that the people's consent is required only in the latter case. See also *infra* note 96.

or even a king with the consent of the people, from alienating sovereignty over a place, that is, a part of its territory, for example, a part that is uninhabited or deserted."<sup>83</sup>

Vattel, in his influential work *Le Droit des Gens*,<sup>84</sup> first published in 1758, took a more categorical position:

Every true sovereignty is essentially inalienable. We shall easily be convinced of this if we consider the origin and aim of political society and of the sovereign authority. A Nation constitutes itself a social body to work for the common good as it shall think fit, and to live according to its own laws. With this object in view it establishes a public authority. If it confides this authority to a prince, even with the power to transfer his authority to other hands, that can never imply, unless the express and unanimous consent of the citizens be given, the right to really alienate it, or to subject the State to another political body; for the individuals who formed that society entered into it for the purpose of living in an independent State and by no means with the intention of submitting to a foreign yoke.<sup>85</sup>

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<sup>83</sup> Grotius, *supra* note 82, bk. II, ch. VI, pt. VII. On the necessity for the people's consent, he said that "both the whole territory and its parts are the undivided common property of the people, and therefore subject to the will of the people": *ibid.*

<sup>84</sup> M. de Vattel, *Le Droit des Gens ou les Principes de la Loi Naturelle Appliqués à la Conduite et aux Affaires des Nations et des Souverains*, reproduction of the ed'n of 1758 (Washington: Carnegie Institution, 1916). In *Worcester v. Georgia*, *supra* note 51 at 561, Marshall C.J. used Vattel to support his position that the Indian nations did not surrender their right of self-government when they signed treaties of association and protection with Britain and the United States. Vattel was also mentioned in the judgments of Chapman J. and Martin C.J. in *Symonds*, *supra* note 3 at 392, 395. Martin C.J. quoted a passage from *Attorney-General v. Brown* (1847), 1 Legge 312 (N.S.W.S.C.), at 318, where Stephen C.J. relied on Vattel as authority that the sovereign, as "the representative and the executive authority of the nation", is the "moral personality" that holds public lands as the "patrimony of the nation".

<sup>85</sup> E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, trans. of the ed'n of 1758 by Charles G. Fenwick (Washington: Carnegie Institution, 1916), bk. 1, ch. 5, § 69; see also bk. 1, ch. 21, § 260. At § 69, Vattel answered the contrary argument from state practice in this way: "I know that several authors, Grotius among them, give us many instances of alienations of sovereignty. But the examples frequently prove only the abuse of power and not the right; and besides, the people consented to the alienation, either willingly or by force." [footnote omitted.]

A common theme in the writings of each of these jurists is therefore a requirement of consent by the people affected by the transfer of territory, stemming from the social contract between rulers and their subjects.<sup>86</sup>

More recent international law experts, however, have been less willing to question the authority of sovereigns to alienate territory.<sup>87</sup> Oppenheim, for example, wrote in 1905:

Cession of State territory is the transfer of sovereignty over State territory by the owner State to another State. There is no doubt whatever that such cession is possible according to the Law of Nations, and history presents innumerable examples of such transfer of sovereignty. The Constitutional Law of the different States may or may not lay down special rules for the transfer or acquisition of territory. Such rules can have no direct influence upon the rules of the Law of Nations concerning cession, since Municipal Law can neither abolish existing nor create new rules of International Law. But if such municipal rules contain constitutional

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<sup>86</sup> The concept of a social contract as the basis of civil society was, of course, developed more fully in England by Thomas Hobbes, *Leviathan* (originally published in 1651), edited by Richard Tuck (Cambridge: Cambridge University Press, 1996), and John Locke, *Second Treatise of Government* (originally published in 1690), in *Two Treatises of Government*, edited by Peter Laslett (Cambridge: Cambridge University Press, 1988), esp. at 44-74 **ck pp**. For further discussion, see J.W. Gough, *The Social Contract*, 2nd ed'n (Oxford: Clarendon Press, 1957). For Locke, however, the contract was between all members of a society, rather than between ruler and subjects, though eighteenth century English Whigs and American revolutionaries relied on Locke to support the latter sort of social contract theory (which is what the international jurists seem to have had in mind as well): see Jerrilyn Greene Marston, *King and Congress: The Transfer of Political Legitimacy, 1774-1776* (Princeton: Princeton University Press, 1987), 17-20. See also Blackstone, *supra* note 16, vol. I, 233, referring to the "reciprocal duties" of "protection and subjection" arising from "the *original contract* between king and people" [emphasis in original].

<sup>87</sup> This may be due in part to a shift from the natural law approach of earlier jurists to a more positivist, state-practice orientation: see generally S.A. Williams and A.L.C. de Mestral, *An Introduction to International Law, Chiefly as Interpreted and Applied in Canada*, 2nd ed'n (Toronto: Butterworths, 1987), 5. Phillimore, for example, relied mainly on state practice to reject the contention of Grotius that usufructuary kingdoms, and of Vattel that public property or domain, cannot be alienated without the consent of the people: Robert Phillimore, *Commentaries upon International Law* (Philadelphia: T. & J.W. Johnson, 1854), vol. I, 222-30.

restrictions of the Government with regard to cession of territory, these restrictions are so far important that such treaties of cession concluded by heads of State or Governments as violate these restrictions are not binding.<sup>88</sup>

He acknowledged, however, the view of some writers that the inhabitants of a territory should not be forced to change their citizenship without their consent, expressed in a plebiscite.<sup>89</sup> This view is supported by the modern principle of self-determination.<sup>90</sup>

Professor Brownlie, however, in the 1998 edition of his textbook, *Principles of Public International Law*, states that "at present there is insufficient practice to warrant the view that a transfer is invalid simply because there is no sufficient provision for expression of opinion by the inhabitants."<sup>91</sup> But even if this is correct internationally, as

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<sup>88</sup> L. Oppenheim, *International Law: A Treatise* (London: Longmans, Green, and Co., 1905), vol. I, § 213 [footnotes omitted]. This passage was retained substantially unchanged in the 8th ed'n, edited by H. Lauterpacht (London: Longmans, Green and Co., 1955), vol. I, § 213. See also R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), 16-19.

<sup>89</sup> Oppenheim, *supra* note 88 at § 219: see authorities cited in the 8th ed'n at § 219 n.5. However, Oppenheim suggested that this problem could be dealt with by a stipulation in the treaty of cession that the inhabitants have the option of retaining their old citizenship or emigrating: *ibid.* at § 219. See also T.J. Lawrence, *The Principles of International Law*, 4th ed'n (London: Macmillan and Co., 1911), 95. Compare William Edward Hall, *A Treatise on International Law*, 8th ed'n edited by A. Pearce Higgins (Oxford: Clarendon Press, 1924), at 54: "The principle that the wishes of a population are to be consulted when the territory which they inhabit is ceded has not been adopted into international law, and cannot be adopted into it until title by conquest has disappeared."

<sup>90</sup> See Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (Boston: Little, Brown, and Company, 1922), vol. I, §§ 108-9. On the use of plebiscites to determine the will of the people of a territory in this regard, see Marjorie M. Whiteman, *Digest of International Law* (Washington: U.S. Department of State, 1963), vol. II, 1168-72.

<sup>91</sup> Ian Brownlie, *Principles of Public International Law*, 5th ed'n (Oxford: Clarendon Press, 1998), 167.

Oppenheim noted there may still be a domestic law requirement of popular assent that may have an impact on the validity of a cession of territory.<sup>92</sup>

We therefore need to ask whether the Crown, in English constitutional law, has the authority to transfer territorial sovereignty to another ruler. Historically, it seems very doubtful that the king could do this without the assent of the people, expressed through Parliament. We have already seen that at his coronation Edward II swore to maintain the rights of the Crown.<sup>93</sup> After 1308 this undertaking was dropped from the coronation oath, perhaps because the principle it expressed had become too entrenched to be seriously questioned.<sup>94</sup> In any case, Sir Matthew Hale, in *The Prerogatives of the King*, which was probably written during the period of the Interregnum in the 1650s,<sup>95</sup> said of the king that "[n]either could nor can he part with

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<sup>92</sup> However, Jennings, *supra* note 88 at 17-18, suggested that the validity of a treaty of cession in the constitutional law of the ceding state is not relevant to its validity in international law, at least "where there has been actual tradition [handing over] of the territory." He relied on *Union of India v. Manmull Jain* (1954), A.I.R. 615. In that case, however, the argument that was unsuccessfully made was that a cession of territory from France to India was invalid because it had not been assented to by the Parliament of India.

<sup>93</sup> See *supra* note 71 and accompanying text.

<sup>94</sup> See Riesenbergs, *supra* note 67 at 126. Referring to the king, barons and commons at that time, Riesenbergs wrote that "[a]ll were alive to the fact that England was a kingdom whose destiny was, so to speak, immortal and independent of that of the king": *ibid.* at 126-27.

<sup>95</sup> See D.E.C. Yale, ed., *Sir Matthew Hale's The Prerogatives of the King* (London: Selden Society, 1976) [hereinafter *Hale's Prerogatives*], "Introduction", ix. Hale is generally recognized as one England's great legists and judges. Baker wrote that he was "[f]ar superior to Coke" and was regarded as "an oracle in his own time": J.H. Baker, *An Introduction to English Legal History*, 2nd ed'n (London: Butterworths, 1979), 165. Potter praised him by saying that, "[b]esides being a learned lawyer and an historian, he possessed great grace of character, and it is his honesty of soul and purpose in a partisan age which gives to his work some of its peculiar value": A.K.R. Kiralfy, *Potter's Historical Introduction to English Law and Its Institutions*, 4th ed'n (London: Sweet and Maxwell Ltd., 1958), 289.

that right [the *jus summi imperii*] in all or any part of his dominions, but by consent of the people [and] states of the kingdom in parliament, for the relation and bond is reciprocal."<sup>96</sup> Hale gave several examples from English constitutional history to demonstrate the application of this principle, among which was a declaration by Parliament in 1366 that King John's cession in 1213 of England and Ireland to Pope Innocent III as feudal lord was null and void because "neither the said King John nor any other could bring himself or his realm or his people into such subjection without their assent".<sup>97</sup> Nonetheless, in practice the Crown has in the past relinquished its sovereignty over some of its colonial possessions without the direct concurrence of Parliament, as when it recognized the independence of the United States by the Treaty of Versailles in 1783.<sup>98</sup> Perhaps the explanation for this is that, in colonial contexts, the

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<sup>96</sup> *Hale's Prerogatives*, *supra* note 95 at 15. In this passage, Hale was repeating the view of medieval theorists that reciprocal feudal obligations prevented kings from unilaterally transferring their subjects' allegiance to other kings: see *supra* note 70 and accompanying text. At 16, Hale also rejected the argument that England was the property of the king and thus transferable by him: "[t]hough it be *regnum hereditarium*, yet it is not *regnum patrimoniale*, so as to be transferred by the absolute power of the king to any other without the consent of the kingdom and that in a regular and parliamentary way." On the distinction between usufructuary and patrimonial kingships, which Hale obviously had in mind, see *supra* note 82.

<sup>97</sup> *Ibid.* at 17. The quotation is from the declaration itself, *Rotuli Parliamentorum*, 40 Edw. 3, vol. II, p. 290, no. 7, as translated in Charles Howard McIlwain, *The Growth of Political Thought in the West from the Greeks to the End of the Middle Ages* (New York: The Macmillan Company, 1932), 380. See also Merton, *supra* note 80 at 6. Hale also observed (at p. 18) that Henry VIII had been unable to change the succession to the throne by letters patent or will without an enabling Act of Parliament: see 28 Hen. 8, c.7; 35 Hen. 8, c.1.

<sup>98</sup> See Roberts-Wray, *supra* note 48 at 118: "Negotiation was authorized by Act of Parliament [22 Geo. 3, c.46; see also 18 Geo. 3, c.13] but not the surrender of sovereignty." See also William R. Anson, *The Law and Custom of the Constitution*, 4th ed'n by A. Berriedale Keith (Oxford: Clarendon Press, 1935), vol. II, pt. II, 138; Stanley A. de Smith and Rodney Brazier, *Constitutional and Administrative Law*, 6th ed'n (London: Penguin Books, 1989), 141. Compare *Doe d. Thomas v. Acklam*, *supra* note

consent of the local inhabitants rather than the consent of Parliament is what matters.<sup>99</sup> According to Stanley de Smith and Rodney Brazier, however, "in the modern practice the transfer of British territory and the implementation of a peace treaty are always effected by statute."<sup>100</sup> Moreover, they said "[i]t is very doubtful whether the Crown has a prerogative to cede any part of the United Kingdom."<sup>101</sup> So even in modern British constitutional law, the authority of the Crown to cede territory without the assent of either the local inhabitants or Parliament appears somewhat doubtful.<sup>102</sup>

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70, where Abbott C.J. said at 795-96: "if the sanction of the British Legislature could be thought necessary to give validity to this treaty [the Treaty of Versailles], such sanction has been abundantly given." For other examples of cessions without the express concurrence of Parliament, see Roberts-Wray at 119-26; Anson at 138-40. Apparently the only other case on point is *Damodhar Gordhan v. Deoram Kanji* (1876), 1 App. Cas. 332 (P.C.), where Lord Selborne said (at 373-74) that their Lordships entertain "grave doubts (to say no more) of the soundness" of the opinion of the High Court at Bombay that the Crown could not make a cession of territory without the concurrence of Parliament (the Privy Council did not have to decide this issue because, unlike the High Court, it found that a cession had not taken place). See discussion in Roberts-Wray at 120-22; D.L. Keir and F.H. Lawson, *Cases in Constitutional Law*, 4th ed'n revised (Oxford: Clarendon Press, 1954), 108-9.

<sup>99</sup> This explanation may, however, be more satisfying to political theorists than to constitutional lawyers. There is nonetheless some support for it in constitutional law: see Charles Howard McIlwain, *The American Revolution: A Constitutional Interpretation*, reissue of original 1923 ed'n (Ithaca: Cornell University Press, 1958), arguing that Americans like James Wilson and John Adams and were probably correct when they asserted that the British Parliament did not have jurisdiction over the American Colonies.

<sup>100</sup> de Smith and Brazier, *supra* note 98 at 141. See also O. Hood Phillips and Paul Jackson, *O. Hood Phillips's Constitutional and Administrative Law*, 7th ed'n (London: Sweet and Maxwell, 1987), 287.

<sup>101</sup> de Smith and Brazier, *supra* note 98 at 141. On the same page, they described as "a flight of fancy" Walter Bagehot's suggestion in *The English Constitution* (London: C.A. Watts and Co., 1964), Introduction to the 2nd ed'n (1872), at 287, that the Crown has a prerogative right to cede Cornwall. See also Phillips and Jackson, *supra* note 100 at 287, where it is suggested that the royal prerogative respecting cessions of territory does not apply in the United Kingdom.

<sup>102</sup> See Anson, *supra* note 98, vol. II, pt. II, 137-42; E.C.S. Wade and A.W. Bradley, *Constitutional and Administrative Law*, 11th ed'n by A.W. Bradley and K.D.

To sum up, the concept of the inalienability of sovereignty has roots deep in the political philosophy of medieval Europe. General acceptance of this concept accompanied emergence of the principle that the rights and powers of kings are held on behalf of the people and so should be exercised for their benefit. In England, the same concept and underlying principle lay behind Edward II's coronation promise to maintain the rights of the Crown. The concept of inalienability was also accepted by Hale in his mid-seventeenth century exposition of the prerogatives of the king. It found its way as well into the law of nations, where it was strongly endorsed as late as 1758 by Vattel.<sup>103</sup> By the end of the eighteenth century, however, the concept seems to have been losing force both internationally and domestically in Britain, perhaps as a result of the growth of national states and of the influence of legal positivism. It began to re-emerge internationally in the twentieth century as a corollary to the right of self-determination.

The existence of this concept of inalienability when North America was being colonized by European nations in the seventeenth and eighteenth centuries assists us in understanding the inalienability of Aboriginal title. If the Aboriginal peoples were sovereign nations at the time, the stipulation in the Royal Proclamation of 1763 that their lands could be purchased only in the name of the Crown "at some public Meeting

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Ewing (London: Longman, 1993), 265-66. Compare W.S. Holdsworth, "The Treaty Making Power of the Crown" (1942) 58 *L.Q.R.* 175, esp. at 182-83; E.W. Ridges, *Constitutional Law*, 8th ed'n by G.A. Forrest (London: Stevens and Sons, 1950), 225; S.K. Agrawala, *International Law: Indian Courts and Legislature* (New York: Oceana Publications Inc., 1965), 23-24.

<sup>103</sup> See text accompanying note 85, *supra*. As we have seen, around the same time the British Crown was implementing its policy of forbidding private

or Assembly of the Said Indians, to be held for that purpose",<sup>104</sup> is consistent with the principle that sovereigns could not alienate parts of their territory without the consent of the people. The Crown's exclusive right to purchase those lands is also consistent with the principle of British constitutional law that, unlike private property, territory can be acquired only by the Crown, not by private persons.<sup>105</sup> This principle is linked, in turn, to the doctrine of tenures, which prevents the Crown from alienating its paramount lordship because that is a feature of its sovereignty. So just as they are incapable of acquiring the Crown's lordship, private persons cannot acquire Indian lands because the Aboriginal title to those lands has attributes of sovereignty that can only be acquired by another sovereign, like the Crown. This explains why the Crown has to first acquire those lands by accepting a surrender of Aboriginal title before the lands can be converted into private property.

This explanation for the inalienability of Aboriginal title is implicitly supported by *Johnson v. M'Intosh*<sup>106</sup> and *Worcester v. Georgia*,<sup>107</sup> the two leading decisions of the United States Supreme Court on the inalienability of Indian title and the sovereignty of the Indian nations. In those cases, Chief Justice Marshall decided that the exclusive right of the British Crown, and hence of the United States, to acquire Indian title was based on what he called the "doctrine of discovery". We therefore need to analyze

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purchases of Indian lands in North America which found general expression in the Royal Proclamation of 1763: see *supra* notes 8-9 and accompanying text.

<sup>104</sup> R.S.C. 1985, App. II, No. 1, at 6.

<sup>105</sup> See notes 40-48 and accompanying text.

<sup>106</sup> *Supra* note 4.

<sup>107</sup> *Supra* note 51.

those decisions to understand how the doctrine of discovery is related to Indian sovereignty and the concept of inalienability.

**(c) Chief Justice Marshall and the Doctrine of Discovery**

*Johnson v. M'Intosh* involved lands north of the Ohio River that had been sold to private purchasers in 1773 and 1775 by chiefs of the Illinois and Piankeshaw Nations. As the stated facts showed the right of those nations to the lands and the authority of the chiefs to deal with them, the sole issue before the Supreme Court was whether private purchasers could acquire a valid title from Indian nations. Marshall C.J., for the Court, gave three reasons for holding they could not. Taking them in reverse order, his third reason was that the Royal Proclamation of 1763 applied in the region at the time, making these purchases unlawful. His second reason, which we will return to later, was that the purchased lands would still be part of the territory of the Illinois and Piankeshaw Nations, and so would be subject to their laws. If they chose to resume those lands and include them in treaties of cession to the United States (as in fact happened), the purchasers could have no recourse to the courts of the United States. But these two reasons appear to have been secondary, as Marshall devoted most of his judgment to his first reason.

This reason was that, after the "discovery" of North America, to avoid conflict among themselves the colonizing European nations adopted the principle "that discovery gave title to the government by whose subjects, or by whose authority, it was

made, against all other European governments, which title might be consummated by possession."<sup>108</sup> He continued:

The exclusion of all other Europeans, necessarily gave the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere.<sup>109</sup>

If one accepts Marshall's premise that discovery gave what has sometimes been called an inchoate title to the discovering sovereign,<sup>110</sup> his conclusion that other European sovereigns could not interfere by acquiring lands from the Indian nations within the discovered territory makes sense, as otherwise a conflict between two European sovereigns could arise. However, it is not evident why *subjects* of the discovering sovereign would also be prevented from acquiring Indian lands. It appears from Marshall's judgment, however, that the reason for this is that the Indian title, while

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<sup>108</sup> *Johnson v. McIntosh*, *supra* note 4 at 573. In actual fact, however, the existence of such a principle is extremely doubtful, as there does not seem to have been much agreement among the European nations at the time over what was necessary to acquire territorial sovereignty: see John Thomas Juricek, "English Claims in North America under Elizabeth and the Early Stuarts" (1976) 7 *Terrae Incognitae* 7; Brian Slattery, "Did France Claim Canada Upon 'Discovery'?", in J.M. Bumsted, ed., *Interpreting Canada's Past*, vol. I, *Before Confederation* (Toronto: Oxford University Press, 1986), 2. See also Lindsay G. Robertson, "John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine" (1997) 13 *J.L. & Pol.* 759, revealing the historical weaknesses in this aspect of Marshall's judgment.

<sup>109</sup> *Johnson v. McIntosh*, *supra* note 4 at 573.

<sup>110</sup> This aspect of his decision has attracted a lot of criticism: e.g. see Gordon I. Bennett, "Aboriginal Title in the Common Law: A Stony Path Through Feudal Doctrine" (1978) 27 *Buffalo L. Rev.* 617, esp. at 646-49; Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (Austin: University of Texas Press, 1985), 85-111; Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990), 312-17; Steven T. Newcomb, "The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, *Johnson v. McIntosh*, and Plenary Power" (1993) 20 *Rev. L. & Soc. Change* 303; David E. Wilkins, *American Indian Sovereignty*

"entitled to the respect of all Courts until it should be legitimately extinguished",<sup>111</sup> is simply "a right of occupancy" that cannot be sold or transferred, but can only be surrendered to the discovering sovereign who holds the "absolute, ultimate title" to the soil.<sup>112</sup> In an oft-quoted passage that seems to sum up his views on the status and rights of the Indian nations after acquisition of a European title by discovery, he said this:

They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.<sup>113</sup>

By recognizing that a European title based on discovery only *diminished* the rights of the Indian nations to *complete sovereignty*, this passage acknowledged the pre-existing

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*and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997), 31-35.

<sup>111</sup> *Johnson v. M'Intosh*, *supra* note 4 at 593, citing *Fletcher v. Peck*, 6 Cranch 87 (1810) (U.S.S.C.).

<sup>112</sup> *Johnson v. M'Intosh*, *supra* note 4 at 588, 592. At 591, Marshall stated: "the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others." Compare *Mitchel v. United States*, 9 Pet. 711 (1835), a case involving acquisition of Indian lands in Florida by private persons with the authorization of the Spanish governor, where the Indian title under the Spanish and the British was described as a "right of property": Baldwin J. for the Court at 756. Note too that the Indian nations have the full beneficial use and possession of their lands, including surface and subsurface resources, in much the same way as Lamer C.J. held that the Aboriginal nations in Canada have the exclusive use and possession of their lands: see *United States v. Paine Lumber*, *supra* note 4; *United States v. Shoshone Tribe*, 304 U.S. 111 (1938), esp. at 116-17; *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119 (1938), at 122-23.

<sup>113</sup> *Johnson v. M'Intosh*, *supra* note 4 at 574. This passage was quoted and emphasized by Lamer C.J. in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*], at 541-42.

sovereignty of the Indian nations, and prepared the ground for Marshall's later acceptance of its continuation.<sup>114</sup>

*Worcester v. Georgia*,<sup>115</sup> decided nine years later, involved a prosecution of an American missionary who had been charged with violating a Georgia law requiring "all white persons, residing within the limits of the Cherokee nation", to obtain a licence from the state governor and to take an oath to support the constitution and laws of Georgia.<sup>116</sup> In overturning the conviction imposed by the Georgia Superior Court, Chief Justice Marshall dealt with some vital issues in relation to the status of the Indian nations, the effect of treaties between the Cherokees and the United States, and the authority of Congress in Indian territories. But for present purposes, we are interested in the light his decision casts on the issue of inalienability of Indian or Aboriginal title.

The Chief Justice began his analysis by affirming the pre-existing sovereignty of the Indian nations, and questioning his own conclusion in *Johnson v. M'Intosh* that discovery gave title to the discovering European nation:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or

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<sup>114</sup> See Philip P. Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law" (1993) 107 *Harvard L. Rev.* 381, at 390.

<sup>115</sup> *Supra* note 51. See also *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831) (U.S.S.C.), where Marshall C.J. initiated the exposition of the doctrine of Indian sovereignty that he developed more fully in *Worcester*. For commentary, see Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality" (1969) 21 *Stanford L. Rev.* 500; Jill Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* (New York: McGraw-Hill, Inc., 1996).

<sup>116</sup> *Worcester v. Georgia*, *supra* note 51 at 542.

over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.<sup>117</sup>

But taking a pragmatic approach, Marshall said nonetheless that "power, war, conquest, give rights, which, *after possession*, are conceded by the world".<sup>118</sup>

He then explained what he had meant in *Johnson v. M'Intosh* when he outlined the principle of discovery:

This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave the nation making the discovery, as its inevitable consequence, *the sole right of acquiring the soil* and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. *It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave an exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.*<sup>119</sup>

Here we have a clear statement of how discovery gave the discovering nation an exclusive right *vis-à-vis other European nations* to acquire territory from the Indian nations, without diminishing their sovereignty or right to their lands.<sup>120</sup> Marshall put this even more forcefully in a subsequent passage, in reference to royal charters granted by the British Crown:

The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired

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<sup>117</sup> *Ibid.* at 542-43. This passage was quoted with apparent approval by Lamer C.J. in *Van der Peet*, *supra* note 113 at 543.

<sup>118</sup> *Worcester v. Georgia*, *supra* note 51 at 543 [emphasis added].

<sup>119</sup> *Ibid.* at 544 [emphasis added].

<sup>120</sup> Though Marshall did not say so, in *Worcester v. Georgia* he evidently modified the principle of discovery he had articulated in *Johnson v. M'Intosh*. For further discussion, see Kent McNeil, "Sovereignty on the Northern Plains: Indian, European, American and Canadian Claims" (2000) 39:3 *J.O.W.* 10.

legitimate power by them [the charters] to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of the European sovereigns respecting America, they might rightfully convey, and no more. This was *the exclusive right of purchasing such lands as the natives were willing to sell*.<sup>121</sup>

He later confirmed this by stating that "these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned."<sup>122</sup>

Throughout his judgment, Marshall affirmed that the Indian nations retained jurisdiction over and title to their territories, even after they entered into treaties bringing them under the protection of the British Crown and later the United States.<sup>123</sup>

In one such passage, he said:

The Indian nations had always been considered as *distinct, independent political communities*, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from

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<sup>121</sup> *Worcester v. Georgia*, *supra* note 51 at 544-45 [emphasis added].

<sup>122</sup> *Ibid.* at 546. For a British colonial law perspective on the efficacy of royal charters, see *Staples v. R.* (1899, unreported), where the Privy Council decided that the British South Africa Company Charter could not, of itself, give the Crown territorial sovereignty over Matabeleland (Southern Rhodesia). In the course of the proceedings, the Lord Chancellor commented that the charter could not "give jurisdiction of sovereignty over a place Her Majesty has no authority in": as quoted and discussed in "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have", in *Emerging Justice?*, *supra* note 27, 1, at 11-12. The proceedings in *Staples* are printed in Stephen Allan Scott, "The Prerogative of the Crown in External Affairs and Constituent Authority in a Constitutional Monarchy", D. Phil. Thesis, Oxford University, 1968, App. I. For discussion of this issue in the context of the Hudson's Bay Company Charter, see Kent McNeil, "Sovereignty and the Aboriginal Nations of Rupert's Land" (1999) 37 (Spring/Summer) *Man. Hist.* 2.

<sup>123</sup> He said that the treaties, which extended to the Indian nations "the protection of Great Britain, and afterwards that of the United States", did not take away their right of self-government, as "a weaker power does not surrender its independence - its right to self government, by associating with a stronger, and taking its protection": *Worcester v. Georgia*, *supra* note 51 at 560-61, relying on Vattel, *supra* note 84.

intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed....<sup>124</sup>

Citing the Royal Proclamation of 1763, including its prohibition against private purchases of Indian lands, he observed:

Such was the policy of Great Britain toward the Indian nations inhabiting the territory from which she excluded all other Europeans...: she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.<sup>125</sup>

Likewise the United States, in statutes (as well as in treaties),

... manifestly consider[ed] the several Indian nations as *distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries,* which is not only acknowledged, but guaranteed by the United States.<sup>126</sup>

Given the Indian nations' status as "distinct, independent political communities", with territorial rights that included both governmental authority and title to land, British subjects and American citizens clearly would not have the capacity to acquire those rights from them. Only another sovereign could do that, and Marshall's principle of discovery led him to conclude that, in the part of North America under consideration, that sovereign was first the British Crown, and then its successor, the United States. When read together, *Johnson v. M'Intosh* and *Worcester v. Georgia* therefore show that the inalienability of Aboriginal title arises first from the exclusive right of the Crown

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<sup>124</sup> *Ibid.* at 559 [emphasis added]. This passage was quoted and emphasized by Lamer C.J. in *Van der Peet*, *supra* note 113 at 544. See also *Cherokee Nation v. Georgia*, *supra* note 115 at 16-17 (Marshall C.J.).

<sup>125</sup> *Worcester v. Georgia*, *supra* note 51 at 548. This passage was quoted with approval by Lamer J. (as he then was) in *R. v. Sioui*, [1990] 1 S.C.R. 1025, at 1054.

<sup>126</sup> *Worcester v. Georgia*, *supra* note 51 at 557 [emphasis added].

as the colonizing sovereign to acquire it, and secondly from the inability of private persons to receive a title that is cloaked with attributes of sovereignty.

This explanation of inalienability also provides a solution to another unresolved issue, namely whether Aboriginal title can be transferred from one Aboriginal nation to another after Crown acquisition of sovereignty. As the Aboriginal nations were not parties to the alleged agreement among European powers that discovery gave the exclusive right of acquiring Aboriginal title to the discovering sovereign, they would not be bound by it.<sup>127</sup> Moreover, as they would all have sovereign status as distinct, independent political communities, they would not be handicapped by the incapacity suffered by private persons. As the inalienability aspect of Aboriginal title appears to be a result of inter-European diplomacy and settler incapacity, rather than an inherent feature of the title itself, then, absent restrictions in the law of the Aboriginal nations in question,<sup>128</sup> it should be transferable among them.<sup>129</sup> This is supported by *La Forest*

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<sup>127</sup> See *ibid.* at 544, quoted in text accompanying note 119, *supra*. This rule of privity, expressed by the Latin maxim *pacta tertiis nec nocent nec prosunt*, is also part of the modern law of treaties: see Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), 309-10; Christine Chinkin, *Third Parties in International Law* (Oxford: Clarendon Press, 1993), esp. at 26-27, 33; Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998), 628; Vienna Convention on the Law of Treaties (1969), Art. 34, in Ian Brownlie, ed., *Basic Documents in International Law*, 2nd ed'n (Oxford: Clarendon Press, 1972), 233.

<sup>128</sup> See *Little Bear*, *supra* note 31 at 247, where, in the context of treaty-making, the author stated:

In summary, the standard or norm of the aboriginal peoples' law is that the land is not transferable and therefore is inalienable. Land and benefits therefrom may be shared with others, and when Indian nations entered into treaties with European nations, the subject of the treaty, from the Indians' viewpoint, was not the alienation of the land but the sharing of the land.

<sup>129</sup> See Slattery, "Understanding Aboriginal Rights" (1987) 66 *Can. Bar Rev.* 727, at 742-43.

J.'s judgment in *Delgamuukw*, where he said that continuity of occupation by an Aboriginal group need not date from the time of Crown sovereignty, as

... one aboriginal group may have ceded its possession to subsequent occupants or merged its territory with that of another aboriginal society. As well, the occupancy of one aboriginal society may be connected to the occupancy of another society by conquest or exchange.<sup>130</sup>

The inalienability of Aboriginal title could nonetheless be a serious impediment to economic development of Aboriginal title lands, as it prevents them from being sold to non-Aboriginal third parties without the intervention of the Crown. This could mean, for example, that an Aboriginal nation that wanted to receive the benefit of minerals under its lands by leasing them to a mining company would first have to surrender them to the Crown for that purpose.<sup>131</sup> However, there is another way of approaching this that is more respectful of the decision-making authority of Aboriginal peoples regarding their lands,<sup>132</sup> but is nonetheless in keeping with the inalienability of their title. We shall now discuss this approach, support for which can be found in Chief Justice Marshall's second reason for denying the validity of private purchases of Indian lands in *Johnson v. M'Intosh*.

### **(c) Inalienability and Economic Development**

We have seen that Marshall C.J.'s main reason for invalidating private purchases of Indian lands in *Johnson v. M'Intosh* was that the doctrine of discovery

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<sup>130</sup> *Supra* note 1 at 1130.

<sup>131</sup> Though the *Indian Act*, R.S.C. 1985, c. I-5, does not apply to Aboriginal title lands that are not within reserves, it is worth noting that under the statute a surrender is required for reserve lands to be leased for such a purpose: e.g. see *Blueberry River Indian Band*, *supra* note 21 (dealing with surrender of mineral rights under an earlier version of the *Indian Act*).

gave the discovering nation the exclusive right, *as against other European nations*, to acquire those lands. To a lesser extent, Marshall also relied on the Royal Proclamation of 1763. But he gave another reason as well which, though seldom commented on, has the potential to augment Indigenous peoples' control over their lands through the exercise of the inherent right of self-government that Marshall so strongly endorsed in his later decision in *Worcester v. Georgia*.

After presenting his lengthy exposition of the doctrine of discovery and its effects, the Chief Justice said that "[a]nother view has been taken of this question, which deserves to be considered."<sup>133</sup> The Crown's title, he said, could only be acquired from the Crown. All that a private purchaser could acquire from the Indians was the Indian title. However,

[t]he person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws.<sup>134</sup>

He then equated this situation with a grant made by an Aboriginal nation to one of its members, "authorizing him to hold a particular tract of land in severalty."<sup>135</sup> Marshall continued:

As such a grant could not separate the Indian from his nation, nor give a title which our Courts could distinguish from the title of his tribe, as it might still be conquered from, or ceded by his tribe, we can perceive no legal principle which will authorize a Court to say, that different consequences are attached to this purchase, because it was made by a stranger.<sup>136</sup>

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132 See *supra* nn. 98-99, 114-21 *????*, and accompanying text.

133 *Johnson v. M'Intosh*, *supra* note 4 at 592-93.

134 *Ibid.* at 593.

135 *Ibid.*

136 *Ibid.*

This part of his judgment is significant in part because it acknowledges that Aboriginal law continued to apply within the Indian nations after European colonization. Moreover, as Marshall also admitted the power of the Indian nations "to change their laws or usages",<sup>137</sup> it supports the concept of Indian self-government that he was to develop in *Worcester v. Georgia*. As Professor Brian Slattery has pointed out, this explanation for inalienability was not necessarily offered as an *alternative* to the doctrine of discovery. Instead, the two appear to *complement* one another. Slattery's analysis is worth quoting at length:

The court in effect recognizes that the situation under consideration is governed simultaneously by two distinct legal regimes, Anglo-American and Indian. The first argument approaches the question from within the context of Anglo-American law.... [T]he second argument ... looks to the Indian side of the matter. It holds that the rules in force in settler communities do not directly apply to Indian peoples living independent lives in their own territories under their own laws. Just as an Indian nation may presumably confer exclusive land rights on particular members of the group (if the laws of the nation allow this), so also it is conceivable that an Indian nation might grant land to individual outsiders. In such a case, maintains the court, the outsider assimilates himself with the Indians, and holds his lands subject to their authority and under their laws. If the Indians subsequently surrender their lands to the government so as to extinguish not only the collective title of the group itself, but also any particular rights held by group members, then the rights of the outsider are nullified as well, for he stands in no higher a position than any other member of the group.<sup>138</sup>

By considering both the Anglo-American and Indian sides of the matter, Marshall's judgment provides us, in this context of inalienability, with a way to follow Chief Justice Lamer's direction in *Delgamuukw* that both the common law and

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<sup>137</sup> *Ibid.*

<sup>138</sup> Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983), 29.

Aboriginal perspectives have to be taken into account.<sup>139</sup> The result, as Slattery has explained, is that two separate legal regimes have to be considered. The common law of Aboriginal title operates at the level of inter-governmental relations between the Indian or Aboriginal nations and the American and Canadian governments. At that level, Aboriginal title is inalienable other than by surrender to the United States or the Crown, for the reasons we have discussed. But within Indian or Aboriginal nations, those reasons should not apply because no alienation of Aboriginal title is involved. If their own laws so permit, they could create interests in land within their own territories, while retaining their communal title to the whole of their territories. This, in fact, would be an important aspect of the decision-making authority that Chief Justice Lamer said Aboriginal nations have with respect to their lands.<sup>140</sup> And as Chief Justice Marshall pointed out, if the laws of an Indian or Aboriginal nation can permit the creation of interests in favour of members of the nation, as must be the case, there appears to be no valid reason why they cannot also permit the creation of interests in favour of non-

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<sup>139</sup> See *Delgamuukw*, *supra* note 1 at 1066, 1081, 1099-1100.

<sup>140</sup> See *supra* notes 60-61 and accompanying text. It is worth noting that Indian bands do have limited authority of this kind with respect to their reserve lands under s.20 of the *Indian Act*, R.S.C. 1985, c. I-5,, which permits band councils to allot possession of reserve lands to Indians. However, exercise of this authority is subject to approval by the Minister of Indian Affairs. Also, s.58(3) authorizes the Minister to lease reserve land that is in lawful possession of an Indian for his or her benefit. A lease can be made under this subsection to a non-Indian without a surrender of the land, so that it remains within the reserve and is therefore subject to the by-law making authority of the band council, e.g. respecting zoning: see *R. v. Devereux*, [1965] S.C.R. 567; *Boyer v. Canada* (1986), 65 N.R. 305 (F.C.A.), leave to appeal refused (1986), 72 N.R. 365n. (S.C.C.); *Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1999] 1 C.N.L.R. 258 (F.C.T.D.). See also s.28(2), empowering the Minister to "authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve."

members. As the non-member's interest would be held under the nation's Aboriginal title and subject to their laws, the nation would retain control over the land.<sup>141</sup> As Marshall C.J. pointed out, the land would still be part of their territory and so could be resumed by them through the exercise of their continuing authority to change and apply their own laws.<sup>142</sup>

Support for limiting the application of the inalienability rule to transfers of Aboriginal title itself, so that the capacity of Aboriginal nations to create interests in land under that title is acknowledged, can also be found in Australia in the decision of the High Court in *Mabo*.<sup>143</sup> In that case, which involved a Native title claim to islands in the Torres Strait at the northern tip of Queensland, we have seen that the Court declared that "the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the Murray Islands".<sup>144</sup> Writing the principal judgment, Brennan J. (as he then was) had this to say about the inalienability of Native title:

*... unless there are pre-existing laws of a territory over which the Crown acquires sovereignty which provide for alienation of interests in land to strangers, the rights and interests which constitute a native title can be possessed only by the indigenous inhabitants and their descendants. Native title, though recognized by the common law, is not an institution of*

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<sup>141</sup> This control should alleviate any lingering concerns over the need to protect Indigenous nations from exploitation: see *supra* notes 16-34 and accompanying text.

<sup>142</sup> *Johnson v. M'Intosh*, *supra* note 4 at 593.

<sup>143</sup> *Supra* note 2.

<sup>144</sup> *Ibid.* at 217 [italics removed]: see text accompanying notes 52-58, *supra*. Note that concept of Native title in Australia is more inclusive than the concept of Aboriginal title in Canada, as it can include rights that would be classified in Canada as free-standing Aboriginal rights not amounting to title: see Kent McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 36 *Alta. L. Rev.* 117, esp. at 138-44; "Traditional Laws and Customs", *supra* note 52.

the common law and is *not alienable by the common law. Its alienability is dependent on the laws from which it is derived.*<sup>145</sup>

Elaborating on this, he said:

It follows that a right or interest possessed as a native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, *does not acknowledge their laws and observe their customs*; nor can such a right or interest be acquired by a clan, group or member of the indigenous people unless the acquisition is consistent with the laws and customs of that people. Such a right or interest can be acquired *outside those laws and customs* only by the Crown.<sup>146</sup>

From this, it is apparent that Brennan J. thought there are two kinds of alienation of Native title land. The first involves creation of a right or interest that is still subject to the laws and customs of the Indigenous people in question, and apparently depends on and is contained within their communal Native title.<sup>147</sup> The second involves loss of the Native title itself by surrender of it to the Crown and removal of the land from the community, thereby placing the land beyond the reach of their laws and customs. Or to put it another way, when an alienation of the first kind takes place the Native title and

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<sup>145</sup> *Mabo, supra* note 2 at 59 [emphasis added].

<sup>146</sup> *Ibid.* at 60 [footnote omitted, emphasis added].

<sup>147</sup> Brennan J. said, *ibid.* at 61-62, that where an Indigenous people, ... as a community, are in possession or are entitled to possession of land under a proprietary native title, their possession may be protected or their entitlement to possession may be enforced by a representative action brought on behalf of the people or *by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title. Those rights and interests are, so to speak, carved out of the communal native title.* A sub-group or individual asserting a native title dependent on a communal native title has a sufficient interest to sue to enforce or protect the communal title. A communal native title enures for the benefit of the community as a whole and for *the sub-groups and individuals within it who have particular rights and interests in the community's lands.* [footnote omitted, emphasis added.]

jurisdiction over it is retained by the community, whereas an alienation of the second kind involves giving up both title and jurisdiction.

Deane and Gaudron JJ., concurring in result in *Mabo [No. 2]*, dealt with inalienability more briefly, but appear to have arrived at the same conclusions as Brennan J. Referring to limitations on Native title, they said this:

The first limitation relates to alienation. It is commonly expressed as a right of pre-emption in the Sovereign, sometimes said to flow from "discovery" (i.e. in the European sense of "discovery" by a European State). The effect of such a right of pre-emption in the Crown is *not to preclude changes to entitlement and enjoyment within the local native system*. It is to preclude alienation *outside the native system otherwise than by surrender to the Crown*.<sup>148</sup>

Toohey J., also concurring in result, only touched on inalienability in the context of extinguishment of Native title, without mentioning whether rights or interests could be created subject to that title in accordance with Indigenous laws or customs.<sup>149</sup>

It therefore appears that the concept of Indian or Native title that emerges from both *Johnson v. M'Intosh* and *Mabo* is a communal right over land that has jurisdictional as well as proprietary attributes. One way that jurisdiction can be exercised is through Indigenous laws and customs that provide for the creation and enjoyment of land rights that depend on and are included within the communal title of the Indigenous people in question. Moreover, both the Supreme Court of the United States and the High Court of Australia envisaged that land rights created by

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<sup>148</sup> *Ibid.* at 88 [footnote omitted, emphasis added]. See also at 110: "The enjoyment of the rights [under Native title] can be varied and dealt with under the traditional law or custom. The rights are not, however, assignable outside the overall native system. They can be voluntarily extinguished by surrender to the Crown."

Indigenous laws and customs could be acquired by persons who are not members of the community if the laws and customs make provision for that. As the Indian or Native title would be retained by the community in that situation, there would be no alienation of that title and so no violation of the rule that Indian or Native title is inalienable. We have seen that in Canada as well the Supreme Court has held that Aboriginal title is a communal right that entails decision-making authority that appears to be jurisdictional in nature.<sup>150</sup> So as in the United States and Australia, Aboriginal nations in Canada should be able to make laws that provide for non-members to hold interests in land within the territory covered by their Aboriginal title.<sup>151</sup> As this would not involve alienation of their communal title, it should be permissible under Canadian law.

Acknowledgment of the capacity of Indigenous nations to create rights or interests in their Aboriginal, Indian or Native title lands in accordance with their own

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<sup>149</sup> *Ibid.* at 194. He did say, however, that "inalienability of the title says nothing of the Crown's power or the nature of the title. Rather, it describes rights, or restrictions on rights, of settlers and other potential purchasers." [footnote omitted.]

<sup>150</sup> See *supra* notes 59-65 and accompanying text.

<sup>151</sup> This is possible under the Nisga'a Final Agreement. Para. 44.c of ch. 11, which deals with Nisga'a Government, provides that the Nisga'a Lisims Government may make laws in respect of "the disposition of an estate or interest ... in any parcel of Nisga'a Lands". When the Agreement came into force on 11 May 2000, Nisga'a Lands became owned by the Nisga'a Nation in fee simple (ch. 3, para. 3), and from that time on the Nisga'a Nation has had the authority to dispose of the whole of its estate in fee simple or of any lesser estate or interest "to any person" (ch. 3, para. 4). Significantly, however, "[a] parcel of Nisga'a Lands does not cease to be Nisga'a Lands as a result of any change in ownership of an estate or interest in that parcel" (ch. 3, para. 5). So apparently a parcel of land will remain Nisga'a land and hence subject to Nisga'a jurisdiction even after the Nisga'a Nation has disposed of its fee simple interest (a nice question arises, however, as to the nature of the interest the Nisga'a Nation retains in that land after disposal of its fee simple). For general discussion, see *The Nisga'a Treaty* (Winter 1998/99) No. 120 *B.C. Studies*; Tom Molloy, *The World Is Our Witness: The Historic Journey of the Nisga'a into Canada* (Calgary: Fifth House Ltd., 2000). I am

laws and customs raises an important question of enforceability. Would those rights or interests be enforceable only by whatever mechanisms are available within the Indigenous legal systems themselves, or would they be enforceable by Canadian, American or Australian courts? In *Johnson v. M'Intosh*, Marshall C.J. appears to have taken the position that interests created by an Indian nation under its own laws would not be enforceable in the courts of the United States. An Indian grant of land, he said,

... derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title.<sup>152</sup>

This approach is consistent with Marshall's subsequent ruling on the sovereign status of the Indian nations in *Worcester v. Georgia*.<sup>153</sup> In *Mabo*, however, without concerning himself with the internal sovereignty of the Indigenous peoples of Australia,<sup>154</sup> Brennan J. adopted a somewhat different position on this question of enforceability. He said:

If alienation of a right or interest in land is a mere matter of the custom observed by the indigenous inhabitants, not provided for by law enforced by a sovereign power, there is no machinery which can enforce the rights of the alienee. The common law cannot enforce as a proprietary interest the rights of a putative alienee whose title is not created either under a law which was enforceable against the putative alienor at the time of the alienation and thereafter until the change of sovereignty or under the common law.<sup>155</sup>

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grateful to Tom Molloy for his assistance in locating and understanding the relevant sections of the Agreement.

<sup>152</sup> *Johnson v. M'Intosh*, *supra* note 4 at 593.

<sup>153</sup> See *supra* notes 115-26 and accompanying text.

<sup>154</sup> Brennan J. nonetheless held that acquisition of Crown sovereignty over Australia was an act of state that could not be questioned by the courts: *Mabo*, *supra* note 2 at 31-32. Deane and Gaudron JJ. said the same thing at 78-79, 95. See also *Coe v. The Commonwealth* (1979), 53 A.L.J.R. 403. For related discussion, see David Ritter, "The `Rejection of Terra Nullius' in *Mabo*: A Critical Analysis" (1996) 18 *Sydney L. Rev.* 5.

<sup>155</sup> *Mabo*, *supra* note 2 at 59.

From this, it appears that a right or interest created, even before Crown sovereignty, under Indigenous *law* as opposed to "mere" *custom*, might be enforceable after sovereignty in a common law court. However, the reference to a pre-sovereignty origin of the right or interest in this passage makes it somewhat uncertain whether a non-Indigenous alienee would be in the same position.<sup>156</sup>

Case law from the United States and Australia is therefore somewhat inconclusive on this question of enforceability. At the heart of the matter is the issue of self-government. Respect for Aboriginal decision-making and autonomy may make it inappropriate for non-Indigenous courts to intervene in this situation, whether to protect the interests of community members, or of non-members who have voluntarily acquired rights under the laws of the nation in question. On the other hand, investors may be reluctant to engage in development on Indigenous lands if the rights they obtain are not enforceable in non-Indigenous courts. There are thus complex policy issues that need to be considered before coming to definite conclusions on this question of jurisdiction. While the matter cannot be pursued here, examination of modern American law on the jurisdiction of tribal, federal and state courts in relation to Indian reservation lands might provide useful insights.<sup>157</sup>

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<sup>156</sup> See also the quotation in note 147, *supra*, from which it appears that sub-groups or individuals who hold rights or interests dependent on a communal Native title could bring an action in an Australian court to protect those rights or interests *against outsiders*. Whether they could also bring an action to enforce the rights or interests *against their own community* is not so clear.

<sup>157</sup> In another context, namely the application of the *Indian Civil Rights Act*, 1968, 25 U.S.C. §§ 1301-03, the United States Supreme Court decided in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), that, except where imprisonment is involved, enforcement of the Act is up to tribal courts, not the courts of the United States. Marshall J., in his majority judgment, said this at 65: "Tribal courts have repeatedly

### 3. Conclusions

In Canada in particular, the inalienability of Aboriginal title has been justified in part by a recognized need to protect Aboriginal peoples from European settlers as a matter of policy. While this policy of protection undoubtedly served an important purpose historically, the paternalism inherent in it has undermined its value as a justification for the inalienability of Aboriginal title today. There is nonetheless a continuing need at least to preserve the land bases that Aboriginal peoples have been able to retain in the face of European colonization. I am therefore not arguing that Aboriginal title lands should be freely alienable. On the other hand, inalienability should not act as a fetter that prevents Aboriginal nations from developing their lands economically without surrendering them to the Crown. So I think what is needed is a principled explanation for inalienability that avoids the paternalism of the protection rationale, and yet acknowledges that the Aboriginal peoples have the authority to engage in economic development of their lands through the exercise of their inherent right of self-government.

The incapacity of settlers rationale for the inalienability of Aboriginal title seems to serve this dual purpose. Political theories and international legal ideas that were current when the eastern portion of North America was being colonized conceived of

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been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." He supported his conclusion by adding at 72 that "efforts by the federal judiciary to apply the statutory prohibitions of [the *Indian Civil Rights Act*] in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."

sovereignty as inalienable, at least without the consent of the people concerned. The judgments of Chief Justice Marshall in the 1820s and '30s revealed that the Aboriginal nations were sovereign prior to the "discovery" of America by the Europeans, and that they retained a degree of sovereignty after colonization. More recent judicial decisions in Canada and Australia have affirmed that Aboriginal title is a communal right, and that decision-making authority over Aboriginal or Native title lands rests with the community involved. Aboriginal title therefore has governmental attributes that make it much more than a property right. It follows from this that private persons who have no authority to govern cannot acquire it for themselves. Aboriginal title is only alienable to an entity that does have governmental capacity - in Canada, another Aboriginal nation or the Crown.

An important practical consequence arises from attributing the inalienability of Aboriginal title to its governmental aspects. Because Aboriginal title is both proprietary and jurisdictional, the two should be severable in much the same way as the proprietary element of the Crown's title to public lands can be separated from the Crown's sovereignty over those lands. When the Crown grants an interest in land, it always retains its paramount lordship and its jurisdiction because these cannot be acquired by the grantee. Similarly, an alienation of land by an Aboriginal nation that does not terminate the communal and jurisdictional aspect of that nation's title should be permissible. In that situation, the alienee could obtain a property interest in the land, but would hold that interest subject to the jurisdiction and laws of the Aboriginal nation. As the nation would retain the governmental aspects of its title, there would be no violation of the rule against alienation of that title. Moreover, we have seen that both

the Supreme Court of the United States and the High Court of Australia have in fact accepted this, as they have held that Indigenous peoples can create interests in land within their territories without alienating their Indian or Native title.<sup>158</sup>

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<sup>158</sup> It would, of course, be up to each Aboriginal nation to decide whether to allow such purchases, and if allowed to define the nature of the rights and interests that could be acquired, through exercise of their decision-making authority over their lands, which we have seen is an aspect of self-government: see *supra* nn. 114-21 and accompanying

Acknowledgment of the authority of Aboriginal nations to alienate interests in land that are subject to their Aboriginal title would facilitate economic development that is subject to Aboriginal control. It would avoid the dilemma of Aboriginal nations having to surrender their lands to the Crown in order to create third party interests for the purpose of development. This approach also affirms the decision-making authority of Aboriginal nations regarding use of their lands, and acknowledges their responsibility for preserving their lands for future generations. In short, it is a practical and effective way to move from paternalism to self-determination.