Traditional Law in a Modern World

Researching Indigenous Peoples’ Law
OUR VALUE PROPOSITION

AALL is dedicated to supporting the career development needs of law librarians through quality educational programming and events designed specifically for legal information professionals.

AALL embraces law librarians in all stages of their careers to provide exceptional experiences, tools for success and premier services to support professional growth.
SPEAKERS

Christopher Dykes
Victoria Szymczak
Dr. Jolande Goldberg
Kurt Meyer
Indigenous Peoples
International Law-An Overview

Chris Dykes
There is no single way to define “Indigenous Peoples.” The term used will vary depending on locality or region. There has been a trend toward a broader definition that is more inclusive and considers the heritage and identity of ethnic groups.

- United Nations Working Group on Indigenous Populations (WGIP) “descendants of the original inhabitants of conquered territories possessing a minority culture and recognizing themselves as such.”
“Definition of “Indigenous Peoples”


“broadly to the living descendants of pre-invasion inhabitants of lands now dominated by others.”

World Bank’s Operational Directive 4.10 (2005) recognizes the difficulty in defining “indigenous peoples,” contains a broad definition, and allows for situations where an ethnic population does not specifically meet the definition.

Convention on Indigenous and Tribal Peoples, Convention No. 169 (1989) and other treaties focus on defining who the directive protects rather than focusing on defining “indigenous peoples.”
History

- During the 16th-17th centuries European nations settled in North and South America
- During the 18th-19th centuries, European nations arrived in Australia and South Africa
- The residents who originally inhabited these regions would be subjected to atrocities such as slaughter, enslavement, and diseases
- Survivors and their descendants would face discrimination
- Case law and statutes would grant rights to protect indigenous peoples and eventually there would be a similar movement at the international level
History

- 1919, the International Labor Organization (ILO) was created.
- 1957, ILO Convention No. 107, provided protection of individual rights.
- 1966, United Nations issued two proclamations to advance the rights of “Indigenous Peoples,” most importantly the right to “self-determination.”
History

• 1989, The Indigenous and Tribal Peoples Convention, 1989 (No. 169), was passed with the intent to improve living conditions, protect the identity and culture of the indigenous groups.

• 2007, The United Nations Declaration on the Rights of Indigenous Peoples was passed by the U.N. General Assembly with the goals of providing significant safeguards and protections.
Indigenous Populations

- Aboriginal and Strait Islander ........................................ Australia
- Aleut ................................................................. Arctic
- Amazigh (Berbers) ..................................................... Africa
- Indians ................................................................. America
- Inuit ................................................................. Arctic
- Hill Tribes or highlanders ........................................... Asia (Cambodia)
- Maori ................................................................. New Zealand
- Sami (Lapp) ............................................................. Europe
- San ................................................................. Africa
Important Issues

• Right to Self-Determination
• Sovereignty (Autonomy or Self-Government)
• Cultural Rights and Identity
• Land Rights
• Education and Media
• Social and Economic Improvement
• Discrimination
• Reparations, Redress, and Remedies
• Environmental Issues
International Organizations

• United Nations
  – Committee on the Elimination of Racial Discrimination
  – International Labor Organization
  – Office of the High Commissioner for Human Rights
  – Human Rights Council
  – Working Group on Indigenous Populations
  – Committee on the Rights of a Child
Regional and National Organizations

• African Union
• American Indian Law Alliance
• Asian Indigenous and Tribal Peoples Network
• National Congress of American Indians
• European Court of Human Rights
• Foundation for Aboriginal & Islander Research Action
Regional and National Organizations

- Grand Council of the Crees (Quebec)
- Inuit Circumpolar Council (Canada)
- Inter-American Commission on Human Rights (IACHR)
- Inter-American Court of Human Rights
- Organization of American States (OAS)
- Russian Association of Indigenous Peoples of the North, Siberia, and Far East (RAIPON)
International Documents


International Documents


International Documents


International Documents


International Documents


Resources


Resources


TRADITIONAL LAW IN A MODERN WORLD: RESEARCHING INDIGENOUS PEOPLES’ LAW

Kanak/a ~ Pacific Islander

Vicki Szymczak, University of Hawaii School of Law Library
October 29, 2020
COMMON THEMES
Features of Custom Legal Systems

Commonalities of Pacific Islanders

- Organized into clans/tribes with complex social hierarchies tied to land ownership and village affiliation
- Led by a chief or council of chiefs/king
- Adverse to the win-lose solution to a conflict
- Historically practiced oral cultures
- Social obligations of gift-giving, mutual assistance, and care for the young and old

Clashes with Western Culture

- Gender/Race equalities
- Criminal violations and punishments
- Property distribution/control
  - Inheritance
  - Land Courts
  - Commercialization (Environmental law/sustainability)
The Hawaii Example: the Constitution

- Art. XII, § 7: The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupuaʻa tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

- Article XI, § 1: For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
The Hawaii Example: Legislation

- Haw. Rev. Stat. 1-1: “The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.”

- Haw. Rev. Stat. 7-1: “Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way.”
1. the identity and scope of “valued cultural, historical, or natural resources” in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;

2. the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and

3. the feasible action, if any, to be taken by the government to reasonably protect native Hawaiian rights if they are found to exist.
US Affiliated Pacific Islands

- American Samoa
- Guam
- Federated States of Micronesia
- Marshall Islands
- Northern Mariana Islands
- Palau
Art. I, This Constitution is the supreme law of the State. An act of government in conflict with this Constitution is invalid to the extent of conflict.

Art. III, § 2. There shall be a Council of Pilung and Council of Tamol which shall perform functions which concern tradition and custom.

Art. III, § 3. Due recognition shall be given to traditions and customs in providing a system of law, and nothing in this Constitution shall be construed to limit or invalidate any recognized tradition or custom.

Art. XIII, § 2 Title to land may be acquired only in a manner consistent with traditions and customs.

Art. XIII, § 5 The State recognizes traditional rights and ownership of natural resources and areas within the marine space of the State from the high water mark up to and beyond 12 miles from island baselines. No action may be taken to impair these traditional rights and ownership, except the State Government may provide for the conservation and sustainable development of natural resources.
<table>
<thead>
<tr>
<th>Location</th>
<th>Relevance of Custom Law Over Written Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Samoa</td>
<td>Custom</td>
</tr>
<tr>
<td>Fedearl States of Micronesia</td>
<td>Unclear</td>
</tr>
<tr>
<td>- Pohnpei</td>
<td>Not likely</td>
</tr>
<tr>
<td>- Kosrae</td>
<td>No</td>
</tr>
<tr>
<td>- Yap</td>
<td>Custom</td>
</tr>
<tr>
<td>- Chuk</td>
<td>Custom</td>
</tr>
<tr>
<td>Guam</td>
<td>No</td>
</tr>
<tr>
<td>Marshall Islands</td>
<td>Custom</td>
</tr>
<tr>
<td>Northern Mariana Islands</td>
<td>Not likely</td>
</tr>
<tr>
<td>Palau</td>
<td>Custom</td>
</tr>
</tbody>
</table>
Constitutional / Written Law Examples

Solomon Islands > Schedule 3

2.- (1) Subject to this paragraph, the principles and rules of the common law and equity shall have effect as part of the law of Solomon Islands, save in so far as:

(a) they are inconsistent with this Constitution or any Act of Parliament;

(b) they are inapplicable to or inappropriate in the circumstances of Solomon Islands from time to time; or

(c) in their application to any particular matter, they are inconsistent with customary law applying in respect of that matter.

Papua New Guinea > Underlying Law Act 2000

Section 6: Courts shall apply the laws in the following order:

(a) written law;

(b) the underlying law (defined as the English common law and equity) in force immediately before 16 September 1975;

(c) the customary law;

(d) the common law.
Kiribati, Laws of Kiribati 1989

(2) In addition to the Constitution, the Laws of Kiribati comprise-
   (a) every Ordinance and every Act and every subsidiary legislation made thereunder;
   (b) customary law;
   (c) the common law of Kiribati;
   (d) every applied law.

5.- (1) Customary law comprises the customs and usages, existing from time to time, of the natives of Kiribati. (2) Subject to section 4(1), customary law shall have effect as part of the law of Kiribati, except to the extent that it is inconsistent with an enactment an applied law published under section 11.

6.- (1) Subject to this section, the common law of Kiribati comprises the rules comprised in the common law, including the doctrines of equity, of England (in this section referred to as "the inherited rules"), as applied in the circumstances pertaining, from time to time in Kiribati.
<table>
<thead>
<tr>
<th>Country</th>
<th>Legal System</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cook Islands</td>
<td>Unclear</td>
</tr>
<tr>
<td>Fiji</td>
<td>Common Law</td>
</tr>
<tr>
<td>Kiribati</td>
<td>Unclear</td>
</tr>
<tr>
<td>Nauru</td>
<td>Custom</td>
</tr>
<tr>
<td>Papua New Guinea</td>
<td>Common</td>
</tr>
<tr>
<td>Samoa</td>
<td>Unclear</td>
</tr>
<tr>
<td>Solomon Islands</td>
<td>Custom</td>
</tr>
<tr>
<td>Tokelau</td>
<td>Unclear</td>
</tr>
<tr>
<td>Tonga</td>
<td>Common Law</td>
</tr>
<tr>
<td>Tuvalu</td>
<td>Mixed</td>
</tr>
<tr>
<td>Vanuatu</td>
<td>Unclear</td>
</tr>
</tbody>
</table>
Resources

- PACLII, http://www.paclii.org
- Individual country websites
- Hein Online, Illustrated Constitutions of the World
Considering Class K Principles

**Jurisdictionality:** The term jurisdiction as we understand it, signals independence/autonomy of a corporate body. Only if this character is determined for a corporate body, a classification for its law can be considered—since law, by its very nature, is tied to a jurisdiction.

**Regionalism:** The regionalism principle acknowledges a region as a geographically defined area in which historical, ethnic, and socio-economic similarities are reflected in a wide range of customs and laws found in the area, and where cultural, political, and economic interests of the individual groups have led to formation of inter-governmental organizations.
Geopolitical Hierarchies of Jurisdiction

– Regional
  • National
    – Local
    » Subjects
But are Tribes **Jurisdictions**?

YES!
Tribes are Modern Sovereign Jurisdictions!

- U.S. recognizes over 560 tribal entities within the continental US as sovereign political entities with immunities and privileges by virtue of their government-to-government relationship with the U.S.
- Library of Congress moved the MARC 21 field for names of tribes from 110 (corporate name) field to 151 (geographic name), in keeping with rule 21.35 of the AACR 2 (treat tribal entities as sovereign governments).
- Library of Congress maintains Name Authority Records for tribal entities based on lists of tribes maintained by the U.S. Dept. of Interior/Bureau of Indian Affairs and the Canadian Ministry Crown-Indigenous Relations and Northern Affairs Canada.
Indigenous Peoples’ Rights and Law: Duality of Legal Systems

**Federal** Indian law or Indian law
- KF8220+ (United States)
- KE7701+ (Canada)

**Indigenous, Aboriginal, or Tribal law**
- KIA-KIX

*Policy decision: Retain the Duality defined by different Classes*
Region North America

Geo-political Outline:
Sub-regions I
Region United States
Geo-political Outline:
Sub-regions II
Region North America

Classification Outline:

Sub-Regions III

KIA-KIL  North America
KIA  Arctic and sub-Arctic (Comparative)
     Greenland, see KI
     Northern Canada
     Alaska
KIB  Canada (Comparative)
KIC  Eastern Canada
KID  Western Canada
KIE  United States (Comparative)
KIF  Northeast Atlantic
KIG  South
KIH  North Central
KIJ  Pacific Northwest
KIK  New Southwest
KIL  Mexico (Comparative)
     West and Central Region
KIQ-KIX  South America (Comparative)
KIQ  Bolivia
KIR  Brazil
KIV  Peru
What we strive for:

- Preserving uniform conceptual class structures
- Pattern uniformity for entire class

How we get there:

- Model Schedules
- Uniform Subject Tables
Model Schedules & Derived Subject Tables

1. Model Schedules
2. Refined Uniform Tables

KF

KIE

KIB

KIM

Subject Table KIA-KIX 1 (20 no.)

Subject Table KIA -KIX 2 (50no.)
Uniform Classification Structure I - Regions

Regional General & Comparative Classes
- KI (Indigenous General)
- KIA (North America: Arctic & sub-Arctic: General)
- KIB (Canada: General)
- KIE (US: General)
- KIM (Central & South America: General)
- KIQ (South America: General)

Symmetry: By structure/organization & number
Uniformity: By uniform tables for subject/terminology
Uniform Classification Structure II - Hierarchy

Subclass KIA-KIL North America
Subclass KIE-KIK United States
Subclass KIG United States: South (Region)
  Tribal Jurisdiction: Choctaw
Subjects/Relationship by Indention

↓

Application of Uniform Subject Table
KIA-KIX 1 (20 no.)
Uniform Classification Structure III - Subjects

KIA-Hierarchy

- Arctic & sub-Arctic Regions
  - Alaska
  - Political Organizations
    - Alaska Intertribal Council

KIH-Hierarchy

- United States Regions
  - Pacific Northwest
  - Political Organizations
    - Montana-Wyoming Tribal Leaders Council
Uniform Classification Structure IV – Class Numbers

Uniform Subject Table KIA-KIX 2 (50 no.)

- KIF 950-52.2
  Oneida of New York
  Traditional knowledge based ecology

- KIJ2 250-52.2
  Ft. McDowell (Ariz.)
  Traditional knowledge based ecology

- KIG15 50-52.2
  Winnebago (Nebr.)
  Traditional knowledge based ecology
Language, Terms, and Definitions I: Same Traditions - Different Terms

KIF-Topics
Terms
US
United States - South
Cherokee Nation (Oklahoma)
Indian land law. Indian title
Reservation resources
Water rights. Fishing rights

KIC-Topics
Terms
CA
Canada - Western
Alexander First Nation (Alberta)
Aboriginal land law. Native title
Reserve resources
Water rights. Fishing rights
Language, Terms, and Definitions II: Human Rights vs. Copyright

Indigenous Cultural Heritage: Catalogue in the UN Declaration 2007

Language. Linguistic rights

Material (tangible) cultural property (defined by UNESCO conventions)

Intellectual (intangible) cultural property
  - Indigenous knowledge (systems) held and used by the Indigenous, e.g.,
    - Traditional cultural expressions (TCE)
    - Medicines and (spiritual) healing practices
    - Ecological, and
    - Biodiversity-related knowledge

Decolonization of Copyright: The Indigenous are not the Copyright Holders

Copyright was held by researchers, missionaries, and/or government

In the Digital Culture, does Open Access perpetuate “Colonial Taking?”
Region Latin America. Classification Outline: Sub-Regions IV

- KIA-KIX: Law of Indigenous Peoples in the Americas
- KIM: Latin America. Central & South America (General)
- KIM-KIP: Central America (Selective)
  - KIM: Belize
  - KIM: El Salvador
  - KIN: Guatemala
  - KIN: Honduras
  - KIP: Nicaragua
  - KIP: Panama
- KIQ-KIX: South America (Selective)
  - KIQ: Bolivia
  - KIR: Brazil
  - KIS: Colombia
  - KIT: Ecuador
  - KIV: Paraguay
  - KIV: Peru

Andean surviving traditions and terminology
Bolivia sets comparative patterns
The 4 Subregions. Suyus

- **Chinchasuyu.** Northwest region (covering most of Ecuador & part of Colombia)
- **Antisuyu.** Northeast region (mostly Peru)
- **Kuntinsuyu.** Southwest region (along the southern coast of Peru, extending into the highlands)
- **Qullasuyu.** Southeast region
Shared Andean Legal Traditions II

Tawantin Suyu. Inca Empire

Subregions. Suyus:

Qullasuyu. Southeastern Region

Overlays Bolivia/Altiplano, North Argentina & Chile, part of Peru and Paraguay

(Anthropological map)
LLMC’s Indigenous Law Portal

Domestic, International, and Foreign Resources
Why LLMC?

• Relationship between LLMC and LC
• Longstanding commitment to Indigenous Law
• Preservation
LLMC Digital thanks its 513+ Participating Members and Sponsors for assisting with our expanding content collection.
How is it organized?
Navigation

Pull-down menus

Maps

General resources will always be on the first page of a particular region or country (e.g. Canadian Indigenous Law).
Updating

- Continually updated
- Crowdsourced by experts
- LLMC created a new backend tool to accommodate this process
- Resources can be updated instantaneously
Upcoming Additions

- We plan to expand the foreign coverage of this resource
- Next, we plan on adding a new circumpolar map
- Alaska, Arctic regions of Canada and Russia, Iceland, Greenland, Denmark, and others would be included
Questions and Answers
Thank You