



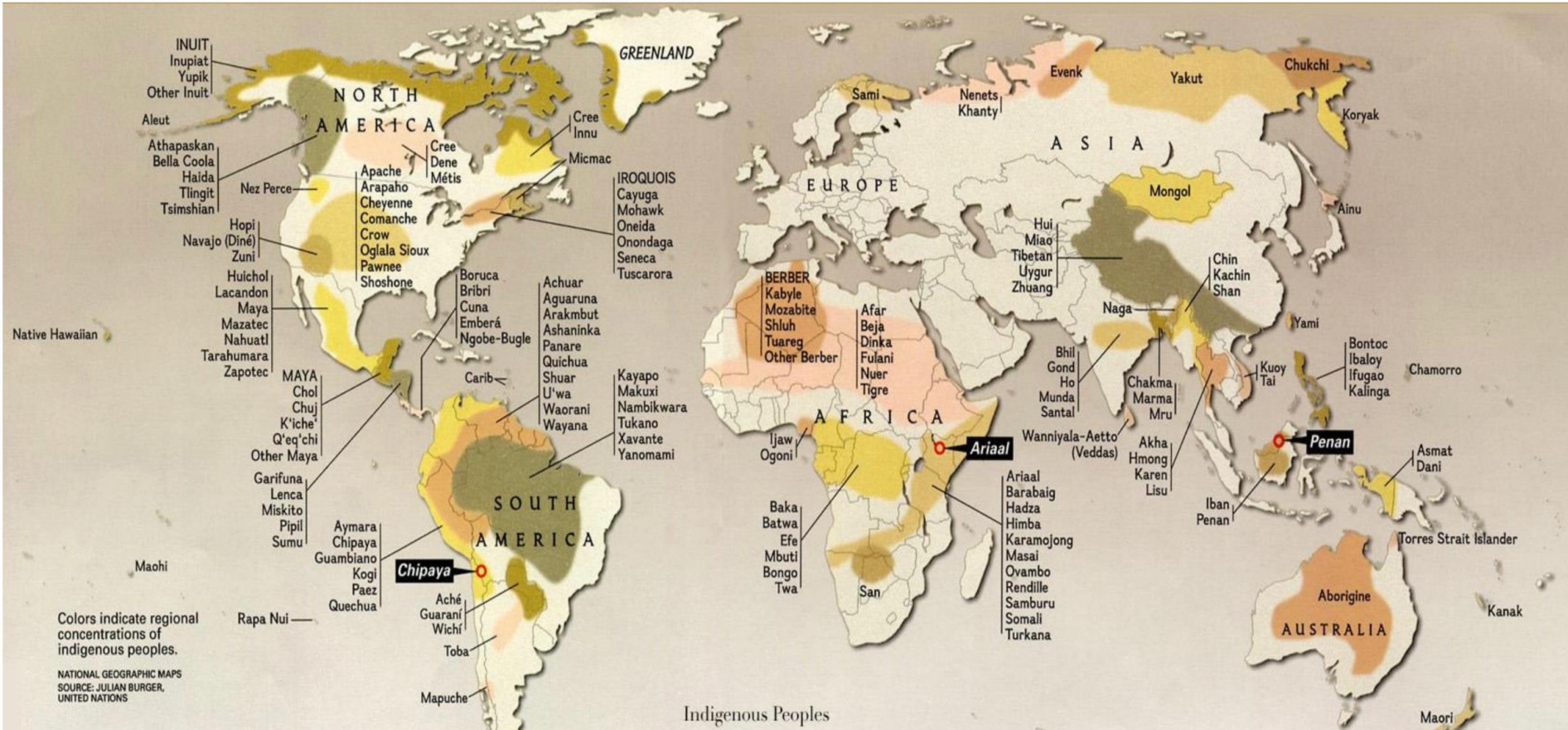
Rights of Indigenous Peoples (RIPs) to Land and the Caribbean Constitution Order: Intersectionality

*CAJO Presentation by
Winston Anderson
Judge, CCJ*

1. Indigenous peoples



A global map of indigenous peoples



NATIONAL GEOGRAPHIC MAPS
SOURCE: JULIAN BURGER,
UNITED NATIONS

2. Hypothesis



- **Indigenous peoples**

UN Working Definition (2004):

- “Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, ...”

- **Critical issue**

- How is this claim to pre-colonial title to be reconciled with the fact of arrival of European sovereignty which, either by conquest or settlement, displaced the previous sovereignty under which native title would have subsisted?



Do indigenous rights survive European sovereignty?

- *Cal v Attorney General of Belize* (2007) per CJ Conteh
found that Mayas has rights to land/customary land rights before British
- *Campbell v Hall* (1774) per Lord Mansfield
 - Conquered or ceded country becomes dominion of the Crown and subject to British legislation
 - The conquered inhabitants become subjects of the Crown
 - The legislation of each dominion equally affects all persons and property within that dominion
 - Laws of the conquered territory continue until altered by the Crown
- *Re Southern Rhodesia* (1919) per Lord Sumner

“Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them...Whoever now owns the unalienated lands, the natives do not.”

Do Indigenous rights survive European sovereignty?



- *Amodu Tijani v Southern Nigeria* (1921) Privy Council

“No doubt there was cession to the British, along with the sovereignty, of radical or ultimate title to the land in the new colony; that this cession appears to have been made on the footing that the rights of property were to be fully respected...”

- *Mabo v Queensland (No. 2)* High Court of Australia

“But if the lands were occupied by indigenous inhabitants and their right and interest are recognized by the common law, the radical title which is acquired with the acquisition of sovereignty cannot be taken to confer an absolute beneficial title to the occupied land.”

- *Delgamuukw v British Columbia* (1997) Supreme Court of Canada

(i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

Transmutation of indigenous rights by common law?



- ***Cal v Attorney General of Belize*** per Conteh, CJ:
 - “The whole of Belize, including the Toledo District, was of course acquired by the British Crown *not* by conquest but by *settlement*... It is ... logical, rationale and fair to conclude that if the inhabitants of a conquered colony did not ipso facto lose their pre-conquest interests and rights in land, a fortiori therefore, the indigenous inhabitants of a settled colony could not have lost theirs without more, by the mere act of settlement or even by session of their land to another or new sovereign.”
- *Maya Leaders Alliance v Attorney-General of Belize*, per Byron P and Anderson, JCCJ for the CCJ:
 - The concession recognized and gave “legal and constitutional effect to the umbilical relationship between the Maya people of southern Belize and the land and its resources that have long provided physical and spiritual sustenance to them and their forebears.” This was a kind of reparation for “centuries of oppression endured by the Maya people since the arrival of the European colonisers.”
- *Thomas & Arau Village Council v Attorney General of Guyana (2007)* per Chief Justice Chang (ag):
 - “In the context of British Guiana as a ceded territory, to which the common law of England did not become applicable with the advent of British sovereignty in 1803, it does appear that the Crown could have extinguished the de facto occupational right of the indigenous communities. However, on the introduction and application of the common law of England in 1917, in so far as indigenous communities were still then in occupation of lands occupied from time immemorial, the Crown no longer had the prerogative authority to extinguish those rights since those rights became the de jure rights of British subjects in lands i.e., private rights of British subjects... Thereafter, such rights could have been extinguished only under statutory authority.”

3. Defining the rights in Native Title / Customary interest in land



- Dr Arif Bulkan: “situating indigenous rights within a Western legal framework”
- **Australia**
 - Constitution Section 51 (xxvi); *Kartinyeri v The Commonwealth* (1998)
 - *Mabo v Queensland (No.2)* (1992)
 - Native Title Act 1993
- **Canada**
 - Constitution Act 1982, s. 35 (1) “...are hereby recognized and affirmed.”
 - *Delgamuukw v British Columbia* (1997)
 - *Tsilgot’in Nation v British Columbia* (2014)
- **Guyana**
 - Constitution: Preamble, Sects. 142 (2) 149 G.
 - *Thomas and Arau Village Council v Attorney General of Guyana et al* (2007) per Chief Justice Chang (ag)
 - Amerindian Act 2006

The Case of Belize



- Constitution: Preamble
 - Affirms the need for state policies that “protect the identity, dignity and social and cultural values of Belizeans, including Belize’s indigenous peoples”;
 - And policies “which preserve the right of the individual to the ownership of private property”.
- *Maya Leaders Alliance v Attorney General* (2015) (CCJ)
 - Government conceded there was customary land tenure
 - Government agreed to develop legislative and administrative arrangements
 - CCJ undertook to monitor compliance.
 - Policies
 - Mapping exercise: An auto delimitation methodology (ADM);
 - Maya Customary Land Tenure Policy
 - Free Prior and Informed Consent
 - Rights of Third parties
 - Dispute resolution framework (‘the Authority’)
- Statutory framework



4. New and emerging challenges

- What exactly is the nature of the interaction with private property rights?
- Do the constitutional rules of compulsory acquisition apply?
- What of enjoyment of indigenous land rights and the exploitation of mineral resources?
- Autonomy & collective rights (question of ‘sovereignty’)
- What of gender and minority rights within the collective?

- International law to the rescue?
 - Byron P and Anderson JCCJ:
 - Rule of law requires adherence to international law obligations **VERSUS**
 - “We are aware of and accord great significance to relevant international law jurisprudence, ... However, the international jurisprudence does not and cannot alleviate the duty of this Court to have regard to the actual wording and context of the constitutional provisions in question and to give such interpretations to those provisions as are consistent with the jurisprudence evolving in Belize and other countries with similar constitutional provisions. In short, international jurisprudential prescriptions must be mediated through the peculiar legal traditions and constitutional arrangements which this Court is sworn to uphold.” At [8].



Title of Session: Right of Indigenous Persons

Session Chair:

The Hon. Mme Justice Sandra Kurtzious - Judge of the Supreme Court of Judicature of Guyana

Session Panelists:

The Hon. Mme Justice Antoinette Moore - Judge of the Supreme Court of Belize

The Hon. Mr Justice Winston Anderson- Judge of Caribbean Court of Justice

Objectives of Session:

- a. Identify critical issues faced by the indigenous population within the judicial system
- b. Identify developments in the law in relation to the rights of indigenous persons.

Key points from presentations:

The meeting commenced with the session Chair highlighting the overarching objective of the meeting, which was **to gain a comprehensive understanding of the issues which indigenous persons face in the judicial system.**

The Hon Mme Justice Antoinette Moore:

1. Mme Justice Moore stated that there were key issues in languages and identities, including the difficulties experienced in translating cultural concepts through languages, and translating indigenous language into the official language of the country of a language which most of the population understands. An example she used was the word “alcalde” which is a Spanish word that historically meant magistrate but in later times has come to mean mayor. In the Maya communities the word has a cultural connotation that is not easily translated. This was a point of contention in the Maya Land Rights cases. Within the Maya villages, the magistrate systems are different than in the larger society and run in accordance with the indigenous culture and practices. The Alcalde serves as magistrate in the Maya Communities and those communities have been relatively peaceful in

comparison to the overall country. The example of “kawanatanga” from the Maori of New Zealand was also given where the Maori and the British entered into a treaty which was written in both languages. Problems were encountered when it was realized that the word did not translate to mean “sovereignty” as was thought by the British. Justice Moore emphasized the need to understand that differences in language and culture were important to grasp what litigants were claiming and how to fairly dispense justice.

2. The issue of identity of IPs was also discussed. The United Nation Declaration on the Rights of Indigenous Peoples (UNDRIP) was raised in relation to identity. It states that “Indigenous people have the right to determine their own identity or membership in accordance with their customs and traditions.”
3. 143 nations including Belize voted in favour of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Belize voted for the adoption of the Declaration at the very same time it was fighting the Maya in the Supreme Court in Belize. The country’s affirmative vote on the adoption of UNDRIP was submitted to the Court as further proof that Belize accepted there were IPs within its territories and that they were entitled to a specific set of rights.
4. In Article 3 of the UNDRIP, the right to self-determination for IPs is set out. The concept of self-determination of indigenous peoples is internal not a matter of secession or external self-determination. The State Parties to UNDRIP ensured this by inclusion of an article that says nothing in the Declaration would interfere with territorial integrity or the principles of the UN Charter.
5. Reference was made to the Maya identifying themselves as descendants of the Manche Ch’ol and how this issue related to both identity and language. A lack of understanding had been shown by the government representative when
6. The UN Special Rapporteur in 1986 gave a helpful definition of who constitutes IPs. He said, “Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are

determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.”

7. Mme Justice Antoinette Moore emphasized that it is essential to educate the people of rights of the indigenous people. She also mentioned that “self-identification is very important and special and spiritual connection to ancestral land is vital to indigenous people”.

The Hon. Mr Justice Winston Anderson:

1. Justice Anderson reiterated the UN working definition of indigenous people and communities as discussed by Mme Justice Antoinette Moore. This definition from 2004 is as follows: “*Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, ...*”
2. He indicated that the critical issue is how can this claim to pre-colonial title to be reconciled with the fact of arrival of European sovereignty which, either by conquest or settlement, displaced the previous sovereignty under which native title would have subsisted?
3. Mr Justice Anderson made compelling statements about the issues which indigenous people face in the judicial system. One of the questions surrounding his arguments was, ‘Do indigenous rights survive European sovereignty?’
4. He made reference to several judgements including:
 - a. ***Cal v Attorney General of Belize (2007)*** per CJ Conteh
found that Mayans have rights to land/customary land rights before British.
 - b. ***Re Southern Rhodesia (1919)*** per Lord Sumner. Lord Sumner pronounced: “Some tribes are so low in the scale of social organization that their

usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society...”

c. ***Campbell v Hall (1774)*** per **Lord Mansfield**

- Conquered or ceded country becomes dominion of the Crown and subject to British legislation
- The conquered inhabitants become subjects of the Crown
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d. ***Amodu Tijani v Southern Nigeria (1921)*** Privy Council

“No doubt there was cession to the British, along with the sovereignty, of radical or ultimate title to the land in the new colony; that this cession appears to have been made on the footing that the rights of property were to be fully respected...”

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“But if the lands were occupied by indigenous inhabitants and their rights and interest are recognized by the common law, the radical title which is acquired with the acquisition of sovereignty cannot be taken to confer an absolute beneficially title to the occupied land.”

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(i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

5. When referring to the case of Belize, Justice Anderson considers:

- the preamble of the Constitution which affirms the need for state policies that “protect the identity, dignity and social and cultural values of Belizeans, including Belize’s indigenous peoples” and policies “which preserve the right of the individual to the ownership of private property
 - He also made reference to the **Maya Leaders Alliance v. The Attorney General of Belize (2015)**. In this case, the Government of Belize conceded that there was customary land tenure. The Government agreed to develop a mechanism to recognize and protect Maya land rights in consultation with the Maya people. The Caribbean Court of Justice continues to monitor such compliance. As a consequence, policies of Mapping Auto Delimitation, Maya Customary Land Tenure Policy, Rights to a third party and Dispute resolution framework are being developed.
6. However, there are ongoing challenges with respect to the nature of the interaction with private property rights, the tradeoff between indigenous land rights and exploitation of mineral resources, autonomy and collective rights (question of Sovereignty), and [tender] and minority rights.

Questions and Responses:

- A participant queried the impact of the Mapping Auto Delimitation.

Response: The Mapping Auto Delimitation started many years ago by the Mayas. There is a collaboration of the Maya and Government of Belize. However, a principal concern by the Government relates to the cost of the technology needed to conduct such surveys.

- Another member questioned as to whether the Maya people would need to pay land taxes like any other landowner?

Response: Nothing as yet has been finalized by the Government about these concerns.