IV. CONSTITUTIONALISM AND INDIGENOUS PEOPLES

Indigenous peoples could be understood as having distinct relationships to national constitutional systems and to the international legal system. In some countries, constitutional documents expressly address the status of indigenous peoples and recognize them as retaining some attributes of sovereignty; in others, documents ignore or make ambiguous references to indigenous peoples.

With or without text, many puzzles exist about the sources, nature, and parameters of such group-based identitarian claims, some of which entail the sharing or layering of territorial sovereignty. Further, law is just beginning to sort out the implications of what it means for individuals to be, simultaneously, members of an indigenous community, of a state within a federation, and of a federation itself. In this session, we shall discuss the kinds of accommodations made in the face of claims by indigenous peoples.

A wealth of materials (in terms of documents, case law and commentary) is available from which we have culled a small subset to explore a series of questions, including:

- What are the sources of indigenous peoples' "sovereignty" or distinctive communal rights, and how are both defined or extinguished?

- To the extent that courts have played roles in recognizing, creating, or limiting such rights, what methods of constitutional adjudication have been applied? Are the approaches distinct or akin to interpretative work applied to other forms of constitutional claims?

- Do indigenous peoples have, by dint of constitutional theory, special or distinct claims on or relationships to courts as contrasted with either legislatures or the executive branch? What role does the history of conquest play in generating such relationships?

- How do national constitutional courts differ in their doctrinal approaches to indigenous rights and to the treaties made in earlier centuries with indigenous peoples? Do or should comparative constitutional law and international legal precepts have a special place when analyses are made of indigenous claims?

- What commonalities exist across national courts in their rulings on indigenous rights to land, water, and other natural resources?

- Should the remedies provided for indigenous claims be understood in terms that are used in response to other forms of group-based discrimination, like affirmative action or positive discrimination? Or should both the concept of "indigenous" group rights and the remedies provided be seen as distinct from the responses made by polities to claims by ethnic, other national, or religious minorities?

- How is "membership" or "citizenship" or other forms of group affiliation defined for an indigenous group? What institutions control those definitions? What approach have national courts taken when conflicts emerge within indigenous groups about membership? What kinds of issues are seen by either nation-states or the international community as "internal" to the "domestic" order of indigenous groups?

- What roles do constitutional courts play when conflicts (civil and criminal) emerge between in-group members and other citizens of nation-states? Between indigenous groups?

- How have judgments by courts been used in political processes that readjust rights of indigenous peoples?

- What role ought national courts accord to transnational calls for the protection of indigenous peoples?

These questions open up consideration of whether aboriginal rights are *sui generis*. Ought the claim of distinctiveness be embraced or should the emphasis be placed on the similarities between indigenous rights and the group-based rights of other ethnic, national, linguistic, religious or race-based minorities? That question in turn invites another, more general one, which is how claims of group-based rights relate to the project of judicial protection of individual liberty and dignity.

A. Questioning the Coherence of Terms

Will Kymlicka
The Internationalization of Minority Rights[*]

The UN is a key actor in [the debate about indigenous rights], not only because it claims to represent and speak for all the peoples of the world but also because it has addressed the question of integration and accommodation explicitly and has developed formal statements of its position. Moreover, its official position is surprisingly simple; namely, that "indigenous peoples" have a right to accommodation, whereas "minorities" have a right to integration.

This basic distinction between indigenous peoples and minorities is reiterated throughout the UN's activities, be it in the field of environmental protection, economic development, or human rights. However, it is articulated most clearly in two key texts—the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the Draft Declaration on the Rights of Indigenous Peoples. . . .

The UN endorses integration and non-discrimination for national, ethnic, religious, and linguistic minorities, even as it endorses accommodation and autonomy for indigenous peoples. We can see echoes of this approach in other major intergovernmental organizations, such as the World Bank or International Labour Organization, which have adopted similar formal policies espousing autonomy for indigenous peoples while endorsing nondiscrimination and integration for minorities. . . .

There are several difficulties confronting the UN approach to minorities; the central problem, however, is the underlying assumption that "ethnic, national, racial, religious or linguistic" minorities can all be lumped together, and that they all seek integration rather than accommodation. This is, at best, a drastic overgeneralization, and at worst a serious misinterpretation of the issues. As others discuss in depth, there are many cases worldwide where minorities seek accommodation rather than integration. Some of the most well-known and protracted struggles for autonomy around the world involve groups that are considered minorities rather than indigenous peoples by the UN—groups such as the Scots, Catalans, Chechens, Kosovar Albanians, Kurds, Kashmiris, and Tamils. Indeed, in the early 1990s, it was precisely the upsurge of ethnic conflicts involving autonomy-seeking substate nationalist minorities that led the UN to take an active interest in formulating standards regarding minorities. And

[*] *Excerpted from* 6 INT'L J. CONST. L. 1 (2008).

yet, remarkably, the text that resulted—the 1992 Declaration on Minority Rights—far from providing guidance for dealing with such minority claims for autonomy, actually renders them invisible by presupposing that minorities, by definition, are only interested in integration.

The problem is not simply that a model based on a stark dichotomy between autonomy-seeking indigenous peoples and integration-seeking minorities is inadequate to deal with a number of important real-world cases. The deeper problem is that this very way of dividing up the ethnocultural landscape may obscure the actual issues involved in the choice between accommodation and integration.

In order to understand the problem, we need to step back and examine the broader patterns of ethnic politics in contemporary democracies. Relations between the state and minorities in the Western democracies are highly differentiated by group. Certain generic civil and cultural rights are guaranteed to the members of all ethnocultural groups; however, there are also a number of "targeted" rights that apply only to particular categories of groups. The precise categories vary from country to country, but they typically fall into the same basic pattern. The most common distinction is between "old" minorities, which were settled on their territory prior to its becoming part of a larger, independent country, and "new" minorities, which were admitted to a country as immigrants after it achieved legal independence. The old minorities are often called "homeland" minorities, since they have been historically settled within a particular part of a country for a long period of time and, as a result of that historic settlement, have come to see that part of the country as their historic homeland. The minority's homeland is incorporated within a larger state or, perhaps, divided between two or more countries; nonetheless, the minority still has a strong sense of attachment to this homeland and often nurtures memories of an earlier time, prior to the origin of the modern state, when it had self-government over this territory.

There is a nearly universal tendency within the Western democracies to distinguish the rights of old homeland minorities from those of new immigrant minorities. As Perry Keller notes, this distinction is "found in the laws and policies of almost every European State." The same is true in North America. . . .

We now see how the UN approach to the accommodation/integration issue differs from the established practice of Western democracies. In two key contexts, UN norms and Western practices converge: both endorse a norm of accommodation for indigenous peoples, and both endorse a norm of integration for new minorities. They diverge, however, with regard to the central case of national minorities or, more generally, on the case of homeland minorities that do not qualify as

indigenous peoples, whether it is the Scots in Britain, the Kurds in Turkey, or the Tibetans in China. In the practice of Western democracies, such national minorities are typically accorded accommodation, while, under the UN norms, they would be presumed to come under the integration approach. In the practice of Western democracies, national minorities belong with indigenous peoples on the accommodation side of the ledger; according to UN norms, they would belong, with the new minorities, on the integration side.

Why have UN norms diverged from Western practices in this way? . . . [P]art of the answer lies in the special vulnerability of indigenous peoples and, hence, in their more urgent need for accommodation. . . . [T]he subjugation of indigenous peoples by European colonizers was typically a more brutal and disruptive process than the subjugation of national minorities by neighboring European societies, and this has left indigenous peoples more vulnerable and, hence, in greater need of international protection. As a result, there was a plausible moral argument for giving priority to indigenous peoples over national minorities in the development of rights to self-government in international law.

However, what began as a difference in the relative priority and urgency of the claims of indigenous peoples and national minorities has paved the way for an almost total rupture between the two at the level of international law. If we take the stance of international organizations as our reference point—rather than the practice of Western democracies—it would appear that rights of self-government are claimed legitimately only by indigenous peoples, rather than by homeland minorities more generally. Across a wide range of international documents and declarations, indigenous peoples have been distinguished from other homeland minorities, and claims to territory and self-government have been restricted to the former. Under the current UN framework, national minorities are lumped in the same category as new minorities, ignoring their distinctive needs and aspirations in relation to historic settlements and territorial concentration. As a result, the distinction between indigenous peoples and other homeland minorities has acquired a significance and a rigidity in the international community that is entirely missing in the theory and practice of Western liberal democracy.

The attempt to draw a sharp distinction between indigenous peoples and national minorities, and to put national minorities in the same legal category as new minorities, raises a number of difficult questions. It creates (a) moral inconsistencies, (b) conceptual confusion, and (c) unstable political dynamics.

The sharp distinction in rights between the two types of groups is morally inconsistent, because whatever arguments exist for recognizing the

rights of indigenous peoples to self-government also apply to the claims for self-government by other vulnerable and historically disadvantaged homeland groups. . . . [B]ecause virtually all of the moral principles and arguments invoked at the UN to defend indigenous rights also apply to national minorities, an attempt to draw a sharp distinction in legal status between national minorities and indigenous peoples is morally problematic. It is also conceptually unstable. The problem is not merely how to justify the sharp difference in their legal rights but how to identify the two types of groups in the first place. The very distinction between indigenous peoples and other homeland minorities is difficult to draw outside the original core cases of Europe and European settler states.

In the West, there is a relatively clear distinction to be drawn between European "national minorities" and New World "indigenous peoples." Both are homeland groups, although the former have been incorporated into a larger state dominated by a neighboring people, whereas the latter have been colonized by a remote colonial power. It is far less clear how we can draw this distinction in Africa, Asia, or the Middle East, or whether the categories even make sense there. Depending on how we define the terms, we could say that none of the homeland groups in these regions are "indigenous," or that all of them are.

In one familiar sense, no groups in Africa, Asia, or the Middle East fit the traditional profile of indigenous peoples. All the homeland minorities in these regions were incorporated into larger states dominated by neighboring groups rather than into settler states dominated by European settlers. In that sense, they are all closer to the profile of European national minorities than to New World indigenous peoples. For this reason, several Asian and African countries insist that none of their minorities should be designated as indigenous peoples. In another sense, however, we could say that, in these regions, all homeland groups (including the dominant majority group) are "indigenous." And, indeed, the governments of several Asian and African countries declare that *all* their historic groups, majority and minority, should be considered indigenous. . . .

[The UN] has made the assumption that some homeland minorities in Africa and Asia are as deserving of—and as much in need of—autonomy and accommodation as indigenous peoples in the Americas. In order to protect such groups, therefore, the UN has attempted to reconceptualize the category of indigenous peoples so that it covers at least some homeland minorities in postcolonial states. From this perspective, we should not focus on whether homeland minorities are dominated by settlers from a distant colonial power or by neighboring peoples. What matters, simply, is the fact of their domination by others and their vulnerability. . . .

The difficult question this raises, however, is how to identify which homeland groups in Africa or Asia should be designated as indigenous peoples for the purposes of international law and practice, and on what basis? Once we start down the road of extending the category of indigenous peoples beyond the core case of New World settler states, there is no obvious stopping point. . . .

These narrow definitions of indigenous people are clearly inconsistent with the way the term is used in the New World. In Latin America, for example, the term applies not only to isolated forest peoples in the Amazon, such as the Yanomami, but also to peasants in the highlands who have been in intensive contact and trade with the larger settler society for five hundred years, such as the Maya, Aymaras, or Quechuas. Similarly, many indigenous peoples in North America, such as the Mohawks, have been involved in either settled agriculture and/or the labor market for generations. To limit the category to groups that are geographically isolated or not involved in trade or the labor market would be to exclude some of the largest and most politically influential indigenous groups in the New World. . . .

From my perspective, however, the fact that different definitions are being used by different intergovernmental organizations is not the only, or even the primary, problem. The more serious problem is that all of these proposed approaches, whether narrow or broad, invoke criteria that are clearly a matter of degree. Homeland minorities in postcolonial states form a continuum in terms of their cultural vulnerability, geographical isolation, level of integration into the market, and political exclusion. We can, if we like, set a threshold somewhere along this continuum in order to determine which of these groups are called "indigenous peoples" and which are "national minorities"; however, any such threshold is likely to appear arbitrary and incapable of bearing the weight that international law currently places upon it. International law treats the distinction between indigenous peoples and national minorities as a categorical one, with enormous implications for the legal rights each type of group may claim. In the postcolonial world, however, any attempt to distinguish indigenous peoples from national minorities on the basis of their relative levels of vulnerability or exclusion can only track differences of degree, not the difference in kind implied by international law.

The attempt to preserve such a sharp distinction is not only morally dubious and conceptually unstable, it is also, I suspect, politically unsustainable. The problem here is not simply that the category of indigenous peoples has gray areas and vague boundaries, with the potential for being over- or under-inclusive. That is true of all targeted categories, and there are well-established techniques of democratic deliberation and legal interpretation for dealing with such boundary disputes. The problem,

rather, is that too much depends on which side of the line the various groups fall, and, as a result, there is intense political pressure to change where the line is drawn. . . .

As should be clear by now, the current UN framework provides no incentive for any homeland minority to identify itself as a national minority, since this category provides no rights that are not available to any other ethnocultural group, including new minorities. Instead, all homeland minorities have an overwhelming incentive to define, or redefine, themselves as indigenous peoples. If they present themselves to the international community as a national minority, they get nothing other than generic minority rights premised on the integration model; if they come, instead, as an indigenous people, they have the promise of rights to land, control over natural resources, political self-government, language rights, and legal pluralism.

The increasing tendency for homeland groups in Africa, Asia, and the Middle East to adopt the label of indigenous peoples is thus not surprising. An interesting case is the Arab-speaking minority in the Ahwaz region of Iran, whose homeland has been subjected repeatedly to state policies of Persianization, including the suppression of Arab language rights, the renaming of towns and villages to erase evidence of their Arab history, and settlement policies that attempt to swamp the Ahwaz with Persian settlers. In the past, Ahwaz leaders have complained to the UN Working Group on Minorities that their rights as a national minority were not respected. But since the UN does not recognize national minorities as having distinctive rights, the Ahwaz have run into a dead end. Thus, they have relabeled themselves as an indigenous people and begun participating in the work of the Working Group on Indigenous Populations. Similarly, various homeland minorities in Africa, which once sent representatives to the Working Group on Minorities, have now started rebranding themselves as indigenous peoples and participating in that working group, primarily in order to gain protection for their land rights.

This is just the tip of the iceberg. Any number of minorities are now debating whether to adopt the label of indigenous peoples, including the Crimean Tatars, the Roma, or Afro-Latin Americans. Even the Kurds—the textbook example of a stateless national minority—are debating whether to redefine themselves as an indigenous people, so as to gain international protection. So, too, with the Palestinians in Israel, the Abkhaz in Georgia or Chechens in Russia, and the Tibetans in China. . . .

If the analysis in this paper is correct, the international community's approach to minority rights is at an impasse. Intergovernmental organizations are operating with a legal framework that draws a sharp dichotomy between an accommodationist approach to indigenous peoples

and an integrationist approach to minorities. This legal framework is wholly inadequate to deal with the actual patterns of ethnic relations around the world and, in particular, is unable to deal with the aspirations to autonomy by homeland national minorities. Yet these aspirations lie at the root of many of the most pressing ethnic conflicts in the world today. In order to manage these real-world conflicts, intergovernmental organizations supplement their legal norms with case-specific interventions that are more accommodationist. However, these case-specific interventions in support of autonomy are often arbitrary and ad hoc.

This combination of unrealistic legal norms and arbitrary case-specific interventions has a number of perverse results, including encouraging and rewarding the resort to violence. Yet it is difficult to see what would be a feasible alternative. Ideally, we might hope to develop a more adequate legal framework, one that moves beyond the simplistic indigenous–minorities distinction, in order to address the distinctive needs and claims of various groups, such as homeland national minorities, which do not fit into the current dichotomy. Such a new framework would recognize that, just as indigenous peoples have legitimate claims relating to history and territory that are not addressed by generic integrationist minority rights provisions, so, too, do other homeland minorities. Indeed, we might imagine this as the first step toward a new multitargeted system of international minority rights, with separate legal provisions not only for indigenous peoples and national minorities but also for other distinctive types of minorities, such as the Roma in Eastern Europe or Afro-Latin Americans. These groups also have needs and interests that are not sufficiently protected by the current framework based on the indigenous–minority dichotomy. Various proposals for such a multitargeted system of minority rights have been made.

Unfortunately, the prospects for reform of the framework of international norms are poor. There is no support at the UN for revisiting the issue of the rights of minorities. Furthermore, the one serious attempt that has been made at a regional level to address the distinctive issues raised by national minorities—namely, the European norms developed by the OSCE and Council of Europe—has retreated to a more cautious defense of generic integrationist minority rights. Some commentators have expressed the hope that other regional intergovernmental organizations—such as the African Union, ASEAN, or the League of Arab States—might take up the task of formulating their own regional standards of minority rights. It is unlikely this will happen, but, if it did, it is almost certain that they, too, would shy away from endorsing any right to autonomy for national minorities. They might be willing to endorse a norm of autonomy for small and isolated indigenous peoples but not for powerful substate national minorities.

Nor is this simply a matter of a lack of good faith or political will. The reality is that the conditions that have enabled a consensus to emerge within various Western democracies in support of autonomy for national minorities simply do not exist in many parts of the world. Indeed, all of the obstacles that have prevented European organizations from codifying a right to autonomy for national minorities apply just as powerfully in other regions of the world. The problems we have seen in postcommunist Europe—such as the securitization of state–minority relations; the fear of human rights violations; and the nature of historic hierarchies—are pervasive in Africa, Asia and the Middle East, as well. If anything, the willingness to consider autonomy for national minorities is even weaker in these postcolonial states than in the postcommunist countries of Eastern Europe.

Under these circumstances, the prospects for gaining an international consensus on a new and more accommodationist framework for addressing the claims of national minorities is virtually nil. For the foreseeable future, we are left with the status quo. . . . [A]s I hope I have shown, the commitment of the international community to an integrationist approach is neither uniform nor stable; there are multiple, if unpredictable, avenues open by which accommodationist approaches may find international support. As international organizations become increasingly influential in shaping domestic choices concerning the rights of minorities, there are deep and unresolved questions about how this influence should be exercised.

B. Rights of Recognition

Constitution Act, 1982[*]
(Canada)

§ 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because

[*] Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, (as amended by the Constitution Amendment Proclamation, 1983).

of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. . . .

§ 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

> a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

§ 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

§ 35.1. The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "Constitution Act, 1867," to section 25 of this Act or to this Part,

> (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and
>
> (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

Constitution Act, 1867[*]
(formerly called the British North America Act, 1867)
(Canada)

§ 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say. . . .

24. Indians, and Lands reserved for the Indians. . . .

§109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

R. v. Sparrow
Supreme Court of Canada
[1990] 1 S.C.R. 1075

The judgment of the Court was delivered by

The CHIEF JUSTICE and LA FOREST J. — This appeal requires this Court to explore for the first time the scope of § 35(1) of the *Constitution Act, 1982*, and to indicate its strength as a promise to the aboriginal peoples of Canada. . . . The context of this appeal is the alleged violation of the terms of the Musqueam food fishing licence which are dictated by the *Fisheries Act*. . . . The appellant, a member of the Musqueam Indian Band, was charged under § 61(1) of the *Fisheries Act* of the offence of fishing with a drift net [of 45 fathoms in length and therefore] longer than [the 25 fathoms] permitted by the terms of the Band's Indian food fishing licence. . . . The appellant . . . admitted the facts alleged to constitute the offence, but has defended the

[*] 30 & 31 Vict. Ch. 3 (U.K.), *as reprinted in* R.S.C., No. 5 (Appendix 1985).

charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction . . . is inconsistent with § 35(1) of the *Constitution Act, 1982*. . . .

The *Fisheries Act*, § 34, confers on the Governor in Council broad powers to make regulations respecting the fisheries, the most relevant for our purposes being those set forth in the following paragraphs of that section. . . :

> (a) for the proper management and control of the seacoast and inland fisheries;
>
> (b) respecting the conservation and protection of fish;
>
> (c) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish; . . .
>
> (e) respecting the use of fishing gear and equipment. . . .

Under these Regulations (§ 4), everyone is, *inter alia*, prohibited from fishing without a licence, and then only in areas and at the times and in the manner authorized by the Act or regulations. . . . The Regulations make provision for issuing licences to Indians or a band "for the sole purpose of obtaining food for that Indian and his family and for the band," and no one other than an Indian is permitted to be in possession of fish caught pursuant to such a licence. . . .

Pursuant to these powers, the Musqueam Indian Band, on March 31, 1984, was issued an Indian food fishing licence as it had since 1978 "to fish for salmon for food for themselves and their family" . . . The licence contained time restrictions as well as the type of gear to be used, notably "One Drift net twenty-five (25) fathoms in length."

[W]e will address first the meaning of "existing" aboriginal rights and the content and scope of the Musqueam right to fish. We will then turn to the meaning of "recognized and affirmed," and the impact of § 35(1) on the regulatory power of Parliament. . . .

The word "existing" makes it clear that the rights to which § 35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982*. . . . Further, an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations. . . .

[Such an] approach reads into the Constitution the myriad of regulation affecting the exercise of aboriginal rights, regulations that differed considerably from place to place across the country. It does not permit differentiation between regulations of long-term significance and those enacted to deal with temporary conditions, or between reasonable and unreasonable restrictions. Moreover, it might require that a constitutional amendment be enacted to implement regulations more stringent than those in existence on 17 April 1982. This solution seems unsatisfactory. . . .

The arbitrariness of such an approach can be seen if one considers the recent history of the federal regulation in the context of the present case and the fishing industry. If the *Constitution Act, 1982* had been enacted a few years earlier, any right held by the Musqueam Band, on this approach, would have been constitutionally subjected to the restrictive regime of personal licences that had existed since 1917. . . . [T]he Musqueam catch had by 1969 become minor or non-existent. In 1978 a system of band licences was introduced on an experimental basis which permitted the Musqueam to fish with a 75 fathom net for a greater number of days than other people. . . . [F]rom 1977 to 1984, the number of Band members who fished for food increased from 19 persons using 15 boats, to 64 persons using 38 boats . . . . Since the regime introduced in 1978 was in force in 1982, then, under this approach, the scope and content of an aboriginal right to fish would be determined by the details of the Band's 1978 licence.

The unsuitability of the approach can also be seen from another perspective. Ninety-one other tribes of Indians, comprising over 20,000 people (compared with 540 Musqueam on the reserve and 100 others off the reserve) obtain their food fish from the Fraser River. Some or all of these bands may have an aboriginal right to fish there. . . . [T]he phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. . . .

We turn now to the aboriginal right at stake in this appeal. The Musqueam Indian Reserve is located on the north shore of the Fraser River close to the mouth of that river and within the limits of the City of Vancouver. . . . The evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day. . . .

Before the province's entry into Confederation in 1871, the fisheries were not regulated in any significant way, whether in respect of Indians or other people. . . . The 1878 regulations were the first to mention Indians. They simply provided that the Indians were at all times at liberty, by any means other than drift nets or spearing, to fish for food for themselves, but not for sale

or barter. The Indian right or liberty to fish was thereby restricted, and more stringent restrictions were added over the years. . . .

It is this progressive restriction and detailed regulation of the fisheries which, respondent's counsel maintained, have had the effect of extinguishing any aboriginal right to fish. . . . At bottom, the respondent's argument confuses regulation with extinguishment. . . . There is nothing in the *Fisheries Act* or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. . . . We would conclude then that the Crown has failed to discharge its burden of proving extinguishment. . . .

The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture . . . not only [for] consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions.

The British Columbia Court of Appeal in this case held that the aboriginal right was to fish for food purposes, but that purpose was not to be confined to mere subsistence. . . .

While no commercial fishery existed prior to the arrival of European settlers, it is contended that the Musqueam practice of bartering in early society may be revived as a modern right to fish for commercial purposes. The presence of numerous interveners representing commercial fishing interests . . . indicate the possibility of conflict between aboriginal fishing and the competitive commercial fishery with respect to economically valuable fish such as salmon. . . .

Government regulations governing the exercise of the Musqueam right to fish, as described above, have only recognized the right to fish *for food* for over a hundred years. . . . However, historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but is also incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy *can* however regulate the exercise of that right, but such regulation must be in keeping with § 35(1). . . . [We] confine our reasons to the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes. . . .

The approach to be taken with respect to interpreting the meaning of § 35(1) is derived from general principles of constitutional interpretation,

principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. . . .

The nature of § 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. . . .

In *Guerin* (1984), the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting. This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. . . . The relationship between the Government and aboriginals is trust-like, rather than adversarial. . . . Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under § 35(1). . . . [F]ederal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. . . .

By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. . . .

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under § 35(1). . . . Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case. . . .

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of § 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the

right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. . . . [T]he test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish, then the first branch of the § 35(1) analysis would be met.

If a *prima facie* interference is found, the analysis moves to the issue of justification. . . . First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. . . . An objective aimed at preserving § 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of § 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

The Court of Appeal below held . . . that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource *or in the public interest*." (Emphasis added). We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.

The justification of conservation and resource management, on the other hand, is surely uncontroversial. . . . If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue [with the] guiding interpretive principle . . . [that] the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modern fishery inevitably blurs with the efficient allocation and management of this scarce and valued resource. The nature of the constitutional protection afforded by § 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. . . . [Elsewhere, we have concluded that] "the burden of conservation measures should not fall primarily upon the Indian fishery."

[T]he constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. . . . If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing. . . .

We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. . . . The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries. . . . [The Court then ordered a retrial] in which the "appellant would bear the burden of showing that the net length restriction constituted a *prima facie* infringement of the collective aboriginal right to fish for food. If an infringement were found, the onus would shift to the Crown which would have to demonstrate that the regulation is justifiable. To that end, the Crown would have to show that there is no underlying unconstitutional objective such as shifting more of the resource to a user group that ranks below the Musqueam. Further, it would have to show that the regulation sought to be imposed is required to accomplish the needed limitation. In trying to show that the restriction is necessary in the circumstances of the Fraser River fishery, the Crown could use facts pertaining to fishing by other Fraser River Indians."

R. v. Van der Peet
Supreme Court of Canada
[1996] 2 S.C.R. 507

The judgment of Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ. was delivered by

The CHIEF JUSTICE —

[1] This appeal . . . raises the issue left unresolved by this Court in its judgment in *R. v. Sparrow*: . . . How are the aboriginal rights recognized and affirmed by § 35(1) of the *Constitution Act, 1982* to be defined? . . .

[5] The appellant Dorothy Van der Peet was charged under § 61(1) of the *Fisheries Act*, with the offence of selling fish caught under the authority of an Indian food fish licence, contrary to § 27(5) of the *British Columbia Fishery (General) Regulations*. At the time at which the appellant was charged § 27(5) read: . . . "(5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence."

[6] [T]he charges arose out of the sale by the appellant of 10 salmon on September 11, 1987. The salmon had been caught by Steven and Charles Jimmy under the authority of an Indian food fish licence. Charles Jimmy is the common law spouse of the appellant. The appellant, a member of the Sto:lo, has not contested these facts at any time, instead defending the charges against her on the basis that in selling the fish she was exercising an existing aboriginal right to sell fish. . . .

[18] In the liberal enlightenment view, reflected in the American Bill of Rights and, more indirectly, in the *Charter*, rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal; they are the way in which the "inherent dignity" of each individual in society is respected. . . .

[19] *Aboriginal* rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. . . .

[20] The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are *rights* but which does so without losing sight of the fact that they are rights held by aboriginal people because they are *aboriginal*. . . .

[21] [To do so we] take a purposive approach to the Constitution because constitutions are, by their very nature, documents aimed at a country's future as well as its present. . . .

[27] With regards to § 35(1), then, what the court must do is . . . identify the basis for the special status that aboriginal peoples have within Canadian society as a whole. . . .

[28] § 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law. . . .

[30] [T]he doctrine of aboriginal rights exists, and is recognized and affirmed by § 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status. . . .

[31] [Section 35] provide[s] the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. . . .

[32] [T]he French version of the text . . . reads "*[l]es droits existants—ancestraux ou issus de traités*." The term "*ancestral*," which *Le Petit Robert 1* (1990) dictionary defines as "*[q]ui a appartenu aux ancêtres, qu'on tient des ancêtres*," suggests that the rights recognized and affirmed by § 35(1) must be temporally rooted in the historical presence—the ancestry—of aboriginal peoples in North America. . . .

[36] In *Johnson v. M'Intosh* (1823), the first of the [John] Marshall decisions on aboriginal title, the Supreme Court held that Indian land could only be alienated by the U.S. government, not by the Indians themselves. . . . In his view, aboriginal title is the right of aboriginal people to land arising from the intersection of their pre-existing occupation of the land with the assertion of sovereignty over that land by various European nations. . . .

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing

> themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, 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. . . .
>
> *In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as 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 whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.* [Emphasis added]. . . .

[37] [As Chief Justice Marshall explained in *Worcester v. Georgia* (1832),]

> But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. . . .

[38] The High Court of Australia has also considered the question of the basis and nature of aboriginal rights. Like that of the United States, Australia's aboriginal law differs in significant respects from that of Canada. In particular, in Australia the courts have not as yet determined whether aboriginal fishing rights exist, although such rights are recognized by statute. . . . Despite these relevant differences, the analysis of the basis of aboriginal title in the landmark decision of the High Court in *Mabo v. Queensland (No. 2)* (1992) is persuasive in the Canadian context. . . .

[39] The *Mabo* judgment resolved the dispute between the Meriam people and the Crown regarding who had title to the Murray Islands. The islands had been annexed to Queensland in 1879 but were reserved for the

native inhabitants (the Meriam) in 1882. The Crown argued that this annexation was sufficient to vest absolute ownership of the lands in the Crown. The High Court disagreed, holding that while the annexation did vest radical title in the Crown, it was insufficient to eliminate a claim for native title; the court held that native title can exist as a burden on the radical title of the Crown: "there is no reason why land within the Crown's territory should not continue to be subject to native title. It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty."

[40] From this premise, Brennan J., writing for a majority[*] of the Court, went on: . . .

> *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 a territory.* The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. . . . [F]ictions were maintained that customary rights could not be reconciled "with the institutions or the legal ideas of civilized society," *In re Southern Rhodesia*, (1919), that there was no law before the arrival of the British colonists in a settled colony and that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown. These fictions denied the possibility of a native title recognized by our laws. But once it is acknowledged that an inhabited territory which became a settled colony was no more a legal desert than it was "desert uninhabited" in fact, it is necessary to ascertain by evidence the nature and incidents of native title. [Emphasis added].

This position is the same as that being adopted here. "Traditional laws" and "traditional customs" are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. . . . To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title in the pre-existing societies of aboriginal peoples. . . .

[43] The Canadian, American and Australian jurisprudence thus supports the basic proposition . . . [that] § 35(1) [rights] are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied

[*] Editor's Note: Though Justice Brennan's opinion is regarded as the lead judgment in *Mabo*, it was signed by only three of seven justices.

by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. . . .

[44] [T]he test for identifying the aboriginal rights recognized and affirmed by § 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans. . . .

[55] The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture, . . . that it was one of the things that truly *made the society what it was*."

[56] [Courts are not to] look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor . . . at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. . . .

[60] The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. . . .

[62] That this is the relevant time should not suggest, however, that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. . . . The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. . . .

[64] The concept of continuity is, in other words, the means by which a "frozen rights" approach to § 35(1) will be avoided. . . . The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights. . . .

[65] [T]he concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact. . . .

[71] The standard which a practice, custom or tradition must meet in order to be recognized as an aboriginal right is *not* that it be *distinct* to the aboriginal culture in question; the aboriginal claimants must simply demonstrate that the practice, custom or tradition is *distinctive*. A tradition or custom that is *distinct* is one that is unique—"different in kind or quality; unlike." A culture with a distinct tradition must claim that in having such a tradition it is different from other cultures; a claim of distinctness is, by its very nature, a claim relative to other cultures or traditions. By contrast, a culture that claims that a practice, custom or tradition is *distinctive*—"distinguishing, characteristic"—makes a claim that is not relative; the claim is rather one about the culture's own practices, customs or traditions considered apart from the practices, customs or traditions of any other culture. . . .

[75] If the practice, custom or tradition was an integral part of the aboriginal community's culture prior to contact with Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim. . . . On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right. . . .

[76] In this case the most accurate characterization of the appellant's position is that she is claiming *an aboriginal right to exchange fish for money or for other goods*. She is claiming, in other words, that the practices, customs and traditions of the Sto:lo include as an integral part the exchange of fish for money or other goods. . . .

[80] Was the practice of exchanging fish for money or other goods an integral part of the specific distinctive culture of the Sto:lo prior to contact with Europeans? . . .

[84] [The trial judge found that] . . . the Sto:lo fish for food and ceremonial purposes. Evidence presented did not establish a regularized market system in the exchange of fish. . . . A market as such for salmon was not present but created by European traders, primarily the Hudson's Bay Company. . . .

[91] The appellant has thus failed to demonstrate that the exchange of salmon for money or other goods by the Sto:lo is an aboriginal right recognized and affirmed under § 35(1) of the *Constitution Act, 1982* . . . [making it] unnecessary to consider the tests for extinguishment, infringement and justification. . . .

[97] L'Heureux-Dubé J. (dissenting). — [Not] only do I disagree with the result, . . . but I also diverge from [the] . . . approach to defining aboriginal rights and [the] delineation of the aboriginal right claimed by the appellant. . . .

[108] Traditionally, there are four principles upon which states have relied to justify the assertion of sovereignty over new territories . . . (1) conquest, (2) cession, (3) annexation, and (4) settlement, i.e., acquisition of territory that was previously unoccupied or is not recognized as belonging to another political entity. . . .

[109] In the eyes of international law, the settlement thesis is the one rationale which can most plausibly justify European sovereignty over Canadian territory and the native people living on it . . . although there is still debate as to whether the land was indeed free for occupation. . . .

[110] In spite of the sovereignty proclamation, however, the early practices of the British recognized aboriginal title or rights and required their extinguishment by cession, conquest or legislation. . . .

[112] [I]t has become accepted in Canadian law that aboriginal title, and aboriginal rights in general, derive from *historic occupation and use of ancestral lands by the natives* and do not depend on any treaty, executive order or legislative enactment. . . .

[116] The concept of aboriginal title, however, does not capture the entirety of the doctrine of aboriginal rights. Rather, . . . the doctrine refers to a broader notion of aboriginal rights arising out of the historic occupation and use of native ancestral lands, which relate not only to aboriginal title, but also to the component elements of this larger right—such as aboriginal rights to hunt, fish or trap, and their accompanying practices, traditions and customs—as well as to other matters, not related to land, that form part of a distinctive aboriginal culture. . . .

[117] [T]he Canadian Parliament and, to a certain extent, provincial legislatures have a general legislative authority over the activities of aboriginal people, which is the result of the British assertion of sovereignty over Canadian territory. . . .

[119] Aboriginal title lands are lands which the natives possess for occupation and use at their own discretion, subject to the Crown's ultimate title. . . .

[120] Aboriginal title can also be founded on treaties concluded between the natives and the competent government. . . . A treaty, however, does not exhaust aboriginal rights; such rights continue to exist apart from

the treaty, provided that they are not substantially connected to the rights crystallized in the treaty or extinguished by its terms. . . .

[121] Finally, aboriginal right lands are those lands on which only specific aboriginal rights exist (e.g., the right to hunt for food, social and ceremonial purposes) because the occupation and use by the particular group of aboriginal people is too limited and, as a result, does not meet the criteria for the recognition, at common law, of aboriginal title. . . .

[124] The contention of the appellant is simply that the Sto:lo, of which she is one, possess an aboriginal right to fish—arising out of the historic occupation and use of their lands—which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes.

[130] [*Sparrow*] . . . stressed the importance of taking a case-by-case approach to the interpretation of the rights involved in § 35(1). . . . [I disagree with the Chief Justice on the fundamental interpretative canons relating to aboriginal law].

[141] First, as with all constitutional provisions, § 35(1) must be given a generous, large and liberal interpretation in order to give full effect to its purposes. . . .

[144] Second, aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown *vis-à-vis* aboriginal people. . . .

[145] Finally, but most importantly, aboriginal rights protected under § 35(1) have to be interpreted in the context of the history and culture of the specific aboriginal society and in a manner that gives the rights meaning to the natives. . . .

[153] [H]olding that what is common to both aboriginal and non-aboriginal cultures must necessarily be non-aboriginal and thus *not* aboriginal for the purpose of § 35(1) is, to say the least, an overly majoritarian approach. . . .

[154] Finally, an approach based on a dichotomy between aboriginal and non-aboriginal practices, traditions and customs literally amounts to defining aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away. Such a strict construction of constitutionally protected aboriginal rights flies in the face of the generous, large and liberal interpretation of § 35(1) of the *Constitution Act, 1982* advocated in *Sparrow*. . . .

[155] A better approach, in my view, is to examine the question of the nature and extent of aboriginal rights from a certain level of abstraction and generality.

[156] [S]imilar to the values enshrined in the *Canadian Charter of Rights and Freedoms*, aboriginal rights protected under § 35(1) should be contemplated on a multi-layered or multi-faceted basis. . . .

[157] Accordingly, § 35(1) should be viewed as protecting, not a catalogue of individualized practices, traditions or customs, as the Chief Justice does, but the "distinctive culture" of which aboriginal activities are manifestations. Simply put, the emphasis would be on the *significance* of these activities to natives rather than on the activities themselves.

[158] Although, I do not claim to examine the question in terms of liberal enlightenment, an analogy with freedom of expression guaranteed in § 2(*b*) of the *Charter* will illustrate this position. Section 2(*b*) of the *Charter* does not refer to an explicit catalogue of protected expressive activities, such as political speech, commercial expression or picketing, but involves rather the protection of the ability to express. . . . In other words, the constitutional guarantee of freedom of expression is conceptualized, not as protecting the possible manifestations of expression, but as preserving the fundamental purposes for which one may express oneself, i.e., the rationales supporting freedom of expression.

[159] [The] practices, traditions and customs protected under § 35(1) should be those that are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people. . . .

[162] [A]ll practices, traditions and customs which are connected enough to the self-identity and self-preservation of organized aboriginal societies should be viewed as deserving the protection of § 35(1). . . .

[165] [As for the time period, I do not believe rights should be defined] by referring to pre-contact or pre-sovereignty practices, traditions and customs . . . prior to the arrival of Europeans. . . .

[166] [R]elying on the proclamation of sovereignty by the British imperial power as the "cut-off" for the development of aboriginal practices, traditions and customs overstates the impact of European influence on aboriginal communities [which was one of many factors in an evolution]. . . .

[167] [C]rystallizing aboriginal practices, traditions and customs at the time of British sovereignty creates an arbitrary date for assessing

existing aboriginal rights. . . . [H]ow would one determine the crucial date of sovereignty for the purpose of § 35(1)? Is it the very first European contacts with native societies, at the time of the Cabot, Verrazzano and Cartier voyages? Is it at a later date, when permanent European settlements were founded in the early seventeenth century? . . .

[168] [Further] the "frozen right" approach imposes a heavy and unfair burden on the natives. . . .

[170] [T]he "frozen right" approach is inconsistent with the position taken by this Court in *Sparrow*, which refused to define existing aboriginal rights so as to incorporate the manner in which they were regulated in 1982. . . .

[172] The [better] "dynamic right" approach to interpreting the nature and extent of aboriginal rights starts from the proposition that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time." According to this view, aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live. This generous, large and liberal interpretation of aboriginal rights protected under § 35(1) would ensure their continued vitality. . . .

[178] In short, the substantial continuous period of time necessary to the recognition of aboriginal rights should be assessed based on (1) the type of aboriginal practices, traditions and customs, (2) the particular aboriginal culture and society, and (3) the reference period of 20 to 50 years. . . .

[179] It recognizes that distinctive aboriginal culture is not a reality of the past, preserved and exhibited in a museum, but a characteristic that has evolved with the natives as they have changed, modernized and flourished over time, along with the rest of Canadian society. . . .

[202] At the British Columbia Supreme Court, Selbie J. was of the view that the trial judge committed . . . error and, as a consequence, substituted his own findings of fact:

> In my view, the evidence in this case, oral, historical and opinion, looked at in the light of the principles of interpreting aboriginal rights referred to earlier, is more consistent with the aboriginal right to fish including the right to sell, barter or exchange than otherwise and must be found so. . . . Archaeological evidence demonstrates that the Sto:lo have relied on the fishery for centuries. Located near the mouth of the Fraser River, the Sto:lo fishery consists of five

> species of salmon—sockeye, chinook, coho, chum and pink—as well as sturgeon, eulachons and trout. . . . The oral histories, corroborated by expert evidence, show a long tradition of trading relationships among the Sto:lo and with their neighbours, both before the arrival of Europeans and to the present day. . . .
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> [216] The . . . review of the historical evidence on the record reveals that . . . the fishery has always provided a focus for life and livelihood for the Sto:lo and [that] they have always traded salmon for the sustenance and support of themselves and their families. Accordingly, to use the terminology of the test propounded above, the sale, trade and barter of fish for livelihood, support and sustenance purposes was sufficiently significant and fundamental to the culture and social organization of the Sto:lo. . . .
>
> [221] As a consequence, I conclude that the Sto:lo Band, of which the appellant is a member, possess an aboriginal right to sell, trade and barter fish for livelihood, support and sustenance purposes. Under § 35(1) of the *Constitution Act, 1982* this right is protected. . . .
>
> [227] McLachlin J. (dissenting). —[My] conclusions on this appeal may be summarized as follows. The issue of what constitutes an aboriginal right must, in my view, be answered by looking at what the law has historically accepted as fundamental aboriginal rights. These encompass the right to be sustained from the land or waters upon which an aboriginal people have traditionally relied for sustenance. Trade in the resource to the extent necessary to maintain traditional levels of sustenance is a permitted exercise of this right. The right endures until extinguished by treaty or otherwise. The right is limited to the extent of the aboriginal people's historic reliance on the resource, as well as the power of the Crown to limit or prohibit exploitation of the resource incompatible with its responsible use. Applying these principles, I conclude that the Sto:lo possess an aboriginal right to fish commercially for purposes of basic sustenance, that this right has not been extinguished, that the regulation prohibiting the sale of any fish constitutes a *prima facie* infringement of it, and that this infringement is not justified. Accordingly, I conclude that the appellant's conviction must be set aside. . . .
>
> [240] This is how we reconcile the principle that aboriginal rights must be ancestral rights with the uncompromising insistence of this Court that aboriginal rights not be frozen. The rights are ancestral; they are the old rights that have been passed down from previous generations. The *exercise* of those rights, however, takes modern forms. To fail to recognize the distinction between rights and the contemporary form in which the rights are exercised is to freeze aboriginal societies in their ancient modes and deny to

them the right to adapt, as all peoples must, to the changes in the society in which they live. . . .

[241] I share the concern of L'Heureux-Dubé J. that the Chief Justice defines the rights at issue with too much particularity. . . . [H]e effectively condemns the Sto:lo to exercise their right precisely as they exercised it hundreds of years ago and precludes a finding that the sale constitutes the exercise of an aboriginal right. . . .

[244] The Chief Justice and L'Heureux-Dubé J. differ on the time periods one looks to in identifying aboriginal rights. . . .

[246] [My] own view falls between these extremes. I agree with the Chief Justice that history is important. A recently adopted practice would generally not qualify as being aboriginal. Those things which have in the past been recognized as aboriginal rights have been related to the traditional practices of aboriginal peoples. . . .

[247] I cannot agree with the Chief Justice, however, that it is essential that a practice be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question. . . .

[248] My concern is that we not substitute an inquiry into the precise moment of first European contact—an inquiry which may prove difficult—for what is really at issue, namely the ancestral customs and laws observed by the indigenous peoples of the territory. For example, there are those who assert that Europeans settled the eastern maritime regions of Canada in the 7th and 8th centuries A.D. To argue that aboriginal rights crystallized then would make little sense; the better question is what laws and customs held sway before superimposition of European laws and customs. . . .

[256] My first concern is that the proposed test is too broad to serve as a legal distinguisher between constitutional and non-constitutional rights. While the Chief Justice in the latter part of his reasons seems to equate "integral" with "not incidental," the fact remains that "integral" is a wide concept, capable of embracing virtually everything that an aboriginal people customarily did. . . . This would confer constitutional protection on a multitude of activities, ranging from the trivial to the vital. . . . Minor practices, falling far short of the importance which we normally attach to constitutional rights, may qualify as distinct or specific to a group. . . .

[257] The problem of overbreadth thus brings me to my second concern, the problem of indeterminacy. To the extent that one attempts to

narrow the test proposed by the Chief Justice by the addition of concepts of distinctiveness, specificity and centrality, one encounters the problem that different people may entertain different ideas of what is distinctive, specific or central. To use such concepts as the markers of legal rights is to permit the determination of rights to be coloured by the subjective views of the decision-maker rather than objective norms, and to invite uncertainty and dispute as to whether a particular practice constitutes a legal right.

[258] Finally, the proposed test is, in my respectful opinion, too categorical. Whether something is integral or not is an all or nothing test. Once it is concluded that a practice is integral to the people's culture, the right to pursue it obtains unlimited protection, subject only to the Crown's right to impose limits on the ground of justification. In this appeal, the Chief Justice's exclusion of "commercial fishing" from the right asserted masks the lack of internal limits in the integral test. But the logic of the test remains ineluctable, for all that: assuming that another people in another case establishes that commercial fishing was integral to its ancestral culture, that people will, on the integral test, logically have an absolute priority over non-aboriginal and other less fortunate aboriginal fishers, subject only to justification. All others, including other native fishers unable to establish commercial fishing as integral to their particular cultures, may have no right to fish at all. . . .

[261] In my view, the better approach to defining aboriginal rights is an empirical approach. Rather than attempting to describe *a priori* what an aboriginal right is, we should look to history to see what sort of practices have been identified as aboriginal rights in the past. . . . Confronted by a particular claim, we should ask, "Is this <u>like</u> the sort of thing which the law has recognized in the past?" This is the time-honoured methodology of the common law. Faced with a new legal problem, the court looks to the past to see how the law has dealt with similar situations in the past. The court evaluates the new situation by reference to what has been held in the past and decides how it should be characterized. In this way, legal principles evolve on an incremental, pragmatic basis. . . .

[276] Against this background, I come to the issue at the heart of this case. Do aboriginal people enjoy a constitutional right to fish for commercial purposes under § 35(1) of the *Constitution Act, 1982*? The answer is yes, to the extent that the people in question can show that it traditionally used the fishery to provide needs which are being met through the trade. . . .

[282] [T]he evidence conclusively establishes that over many centuries, the Sto:lo have used the fishery not only for food and ceremonial purposes, but also to satisfy a variety of other needs. Unless that right has been extinguished, and subject always to conservation requirements, they

are entitled to continue to use the river for these purposes. To the extent that trade is required to achieve this end, it falls within that right. . . .

[283] I agree with L'Heureux-Dubé J. that the scale of fishing evidenced by the case at bar falls well within the limit of the traditional fishery and the moderate livelihood it provided to the Sto:lo.

[284] For these reasons I conclude that Mrs. Van der Peet's sale of the fish can be defended as an exercise of her aboriginal right, unless that right has been extinguished. . . .

[286] For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain." The Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in *United States v. Dion*, (1986): "[w]hat is essential [to satisfy the 'clear and plain' test] is clear evidence that [the government] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" or right. . . .

[294] It . . . emerges that the regulatory scheme in place since 1908, far from extinguishing the aboriginal right to fish for sale, confirms that right and even suggests recognition of a limited priority in its exercise. . . .

[314] I have argued that the broad approach to justification proposed by the Chief Justice does not conform to the authorities, is indeterminate, and is, in the final analysis unnecessary. Instead, I have proposed that justifiable limitation of aboriginal rights should be confined to regulation to ensure their exercise conserves the resource and ensures responsible use. There remains a final reason why the broader view of justification should not be accepted. It is, in my respectful opinion, unconstitutional.

[315] [The] Chief Justice's proposal comes down to this. In certain circumstances, aboriginals may be required to share their fishing rights with non-aboriginals in order to effect a reconciliation of aboriginal and non-aboriginal interests. In other words, the Crown may convey a portion of an aboriginal fishing right to others, not by treaty or with the consent of the aboriginal people, but by its own unilateral act. I earlier suggested that this has the potential to violate the Crown's fiduciary duty to safeguard aboriginal rights and property. But my concern is more fundamental. How, without amending the Constitution, can the Crown cut down the aboriginal right? The exercise of the rights guaranteed by § 35(1) is subject to reasonable limitation to ensure that they are used responsibly. But the rights themselves can be diminished only through treaty and constitutional amendment. To reallocate the benefit of the right from aboriginals to non-aboriginals, would be to diminish the substance of the right that § 35(1) of

the *Constitution Act, 1982* guarantees to the aboriginal people. This no court can do.

> [318] [In sum:]
>
> 1 . The state may limit the exercise of the right of the aboriginal people, for purposes associated with the responsible use of the right, including conservation and prevention of harm to others;
>
> 2. Subject to these limitations, the aboriginal people have a priority to fish for food, ceremony, as well as supplementary sustenance defined in terms of the basic needs that fishery provided to the people in ancestral times. . . .
>
> 3. Subject to (1) and (2) non-aboriginal peoples may use the resource.

[319] In times of plentitude, all interests may be satisfied. In times of limited stocks, aboriginal food fishing will have priority, followed by additional aboriginal commercial fishing to satisfy the sustenance the fishery afforded the particular people in ancestral times. . . . In this sense, the right to fish for commerce is a "limited" priority. If there is insufficient stock to satisfy the entitlement of all aboriginal peoples after required conservation measures, allocations must be made between them.

Patrick Macklem

INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA[*]

[Canadian] constitutional traditions, generally speaking, are cool to constitutional rights that attach to persons or groups on the basis of difference. A familiar version of this perspective is the often-heard refrain that Aboriginal people are equal to other Canadians and therefore should not enjoy "special rights" under the constitution. But a more sophisticated version argues that constitutional rights ought to reflect fundamental aspects of citizenship shared by all Canadians. Unless they can be shown to possess constitutional significance, these four social facts simply describe factual differences among citizens, and their elevation to the status of constitutional right clashes with the fundamental ideal of equal citizenship.

[*] *Excerpted from* PATRICK MACKLEM, INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA (2001).

[I] argue that equality—the very ideal thought by many to be threatened by the constitutionalization of differences among citizens—is promoted by the existence of a unique constitutional relationship between Aboriginal people and the Canadian state. Specifically, constitutional protection of interests associated with indigenous difference promotes equal and therefore just distributions of constitutional power. Aboriginal cultural interests warrant constitutional protection because Aboriginal people face unequal challenges in their ability to reproduce their cultures over time. Aboriginal territorial interests warrant constitutional protection because Aboriginal people are entitled to at least the same level of protection that Canadian law provides to non-Aboriginal proprietary entitlements and because they lived on and occupied their territories before the establishment of the Canadian state. Interests associated with Aboriginal sovereignty merit constitutional protection because a just distribution of sovereignty requires a constitutional recognition of the fact that Aboriginal and European nations were formal equals at the time of contact and because the vesting of greater lawmaking authority in Aboriginal nations will assist in ameliorating contemporary substantive inequalities confronting Aboriginal people. Finally, Aboriginal interests associated with the treaty process warrant constitutional protection because treaties establish basic terms and conditions of Aboriginal and non-Aboriginal co-existence. Although the reasons why interests associated with indigenous difference merit constitutional protection are relatively distinct, they share a common feature: each appeals to a principle of equality.

[Four] relatively distinct sets of constitutional rights work to protect and promote interests associated with indigenous difference. The first set of rights, relating to Aboriginal cultural interests, includes rights to engage in practices, customs, and traditions integral to the distinctive culture of the Aboriginal community claiming the right. The second set of rights, relating to Aboriginal territorial interests, includes rights associated with what is often referred to as Aboriginal title. The third set of rights, which relate to interests associated with Aboriginal sovereignty, includes Aboriginal rights of self-government. Treaty rights, which comprise the fourth set of rights, typically protect interests associated with cultural, territorial, and self-government rights, but they are predicated on successful negotiations with the Crown. . . .

The last decade has seen a dramatic resurgence of indigenous nationalism in many countries originally forged through colonial expansion. Whether it is the Miskito in Central America, the Meriam in Australia, or the Sami in Sweden, indigenous peoples are advancing claims of cultural autonomy, territory, and self-determination in terms that share important features with what I refer to in this book as indigenous difference. International law, long the exclusive refuge of sovereign states, is beginning to acknowledge that it originated in part through and by a systematic denial

of the rightful place of indigenous peoples in the community of nations. . . . Determining the conditions of a just constitutional order demands a methodology that is attentive to history and context [rather than one transglobal solution].

[From] a positivist perspective, whether Aboriginal people enjoy a unique constitutional relationship with the Canadian state depends solely on whether the text and structure of the constitution as interpreted by the judiciary support such a claim. I outline a number of positivism's deficiencies, not the least of which is its insistence on a radical separation between law and justice. . . .

Given the text and structure of the [Canadian] constitution, why is there a need to demonstrate the constitutional significance of indigenous difference? This need arises in part because reliance on text and structure that intimate that Aboriginal people enjoy a unique constitutional status in Canada raises more questions than it answers. . . . For example, what types of activities do Aboriginal and treaty rights authorize? Are Aboriginal and treaty rights individual or collective rights? Do Aboriginal and treaty rights constrain the exercise of legislative power? What is the precise relation between Aboriginal and treaty rights and rights guaranteed by the Charter of Rights? What is the nature and scope of federal legislative authority with respect to Aboriginal people? . . . Whether the judiciary has provided a legitimate account of the constitutional relationship between Canada and Aboriginal people or convincingly explained the justice of constitutionally recognizing this relationship are questions that cannot be answered by precedent alone. . . .

By engaging these normative questions directly, this book strays from the well-travelled path of . . . legal positivism. . . . The drawbacks of positivism in this context are fivefold. First, by assuming that the constitution is comprised solely of formal rules generated by positive legislative or judicial action, positivism at best dimly comprehends a perspective alluded to earlier, namely, that at least some Aboriginal rights are inherent rights and not contingent on Canadian law. This perspective suggests that although the constitution recognizes and affirms Aboriginal rights, at least some Aboriginal rights owe their origins to the presence of Aboriginal law, not Canadian law, and that, as a result, the Canadian constitutional order houses a plurality of legal systems. Positivism does not dismiss the possibilities of describing Aboriginal rights in this manner, in so far as Aboriginal rights can be defined by reference to legal rights and relationships recognized by Aboriginal legal regimes, but its emphasis on legislative and judicial rule-making is not immediately receptive to legal pluralism in general and an inherent understanding of Aboriginal rights in particular.

Second, positivist accounts of law typically obscure but do not eliminate normative concerns about the legitimacy of particular judicial decisions and reasons offered in support of such decisions. Specifically, in positivist descriptions of Aboriginal rights (for example, "precedent holds that Aboriginal rights are practices integral to Aboriginal identity that existed pre-contact") normative concerns invariably re-emerge (for example, "is it just or appropriate to restrict Aboriginal rights to practices that existed pre-contact?"). Such concerns are often addressed by reasons judges offer in support of their rulings, but reasons for decision tend to play a secondary role in positivist accounts. Because they are rendered by the judiciary, reasons for decision no doubt form part of a positivist account of the nature of law, but they tend not to enjoy the same ascribed status as judicial rules or holdings. . . . Positivist accounts of the legitimacy of constitutional law—wherein decisions are legitimate if they are authorized by the constitution—do not help matters much. Such accounts too often appear to be question-begging; constitutional law is justified simply because it is law.

Third, positivist accounts of law tend to assume a degree of determinacy in law that on many occasions does not exist. . . . Fourth, positivist modes of reasoning can lead to the trap of thinking that constitutional rights do not exist if precedent is silent on the matter. But judicial silence should not be automatically equated with constitutional silence. . . . I argue that Aboriginal and treaty rights do more than restrict governmental action; properly understood, they impose certain positive social, fiscal, and institutional obligations on federal, provincial, and territorial governments. . . .

The concept of indigenous difference includes many of the factors that lead scholars to conclude that Aboriginal people comprise peoples, including aspects of Aboriginal ancestry and continuity of identity, but the term "people," like the terms "minority" and "nation," serves little purpose in my inquiry, other than providing a shorthand for the proposition that Aboriginal people constitute a class or classes of people who occupy a unique position in the Canadian constitutional order. . . .

Although equality is the primary focus of this book, the constitutional relevance of indigenous difference can be articulated by reference to other fundamental values, such as respect for life, liberty, freedom of association, or self-determination. Of these other values, self-determination is perhaps the most significant, given its place as a core legal principle of international law. International law is often invoked in support of the normative proposition that all peoples, or nations, should be entitled to determine their own political future or destiny free of external interference. . . .

International legal sources supporting a right of self-determination include article 1(2) of the United Nations Charter, which lists the principle of self-determination as one of the purposes of the United Nations.[74] Article 55 of the Charter calls for the promotion of a number of social and economic goals "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." Similarly, the International Covenant on Civil and Political Rights provides that "[a]ll peoples have the right of self-determination . . . [and to] freely determine their political status and freely pursue their economic, social and cultural development." Self-determination has also been described as a right by the International Court of Justice.

At its inception in the early twentieth century, the principle of self-determination was primarily invoked in the international sphere as a political justification for the liberation of Eastern European nations under the yoke of foreign domination. It later served increasingly as a clarion call for colonies seeking to shed imperial shackles and assume independent statehood. In the 1950s, Belgium attempted to extend the principle of self-determination not only to colonies that wished to rid themselves of their imperial masters, but also to populations within independent states, so that indigenous populations and cultural minorities could assert a right of self-determination under international law.

The Belgian initiative was unsuccessful; in passing the Declaration on the Granting of Independence to Colonial Territories, the General Assembly of the United Nations implemented what is known as the "salt water thesis," which restricts the right of self-determination to overseas colonies. The Declaration stated that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations." In the words of Patrick Thornberry, "[t]he effect is that colonial boundaries function as the boundaries of the emerging States. Minorities, therefore, may not secede from States, at least, international law gives them no right to do so. The logic of the resolution is relatively simple: peoples hold the right of self-determination; a people is the whole people of a territory; a people exercises its right through the achievement of independence."

As with constitutional law, international law is not a static body of manifest legal *rules* but an active, evolving, and interpretive inquiry into both what the law is and what it ought to become. And international law

[74] U.N. Charter, ('[t]he purposes of the United Nations are . . . [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples').

increasingly is acknowledging the arbitrariness of restricting the right of self-determination to overseas colonies. Positivistic limitations on the principle of self-determination under international law, such as the salt water thesis, should not obscure its normative dimensions or the emergence of a more flexible formulation of the principle of self-determination based in part on the relevance of indigenous difference. Indigenous organizations themselves certainly describe their objectives in terms of self-determination. The World Council of Indigenous Peoples, at its second general assembly, described self-determination as one of the "irrevocable and inborn rights which are due to us in our capacity as Aboriginals." The International Indian Treaty Council described indigenous populations as "composed of nations and peoples, which are collective entities entitled to and requiring self-determination," which in turn is described as including external and internal features. External self-determination encompasses all the features of independent statehood, whereas internal self-determination includes rights to maintain and promote interests associated with indigenous difference through parallel political institutions.

The emergence of a more flexible formulation of the principle of self-determination is also reflected in the Draft Declaration on the Rights of Indigenous Peoples, prepared by a sub-commission of the United Nations Commission on Human Rights. The Draft Declaration proposes to recognize that "Indigenous peoples have the right to self-determination" and [b]y virtue of that right they freely determine their political status and freely determine their economic, social and cultural development. Accordingly, the Draft Declaration proposes to recognize indigenous rights of autonomy and self-government, the right to manifest, practice and teach spiritual and religious traditions, rights to territory, education, language, and cultural property, and the right to maintain and develop indigenous economic and social systems.

An explanatory note accompanying an earlier version of the Draft Declaration draws the aforementioned distinction between "external" and "internal" self-determination. It defines internal self-determination as "entitling a people to choose its political allegiance, to influence the political order in which it lives and to preserve its cultural, ethnic, historical or territorial identity." An indigenous right of external self-determination is contingent upon the failure of the state in which indigenous peoples live to accommodate indigenous aspirations for internal self-determination: "Once an independent State has been established and recognized, its constituent peoples must try to express their aspirations through the national political system, and not through the creation of new States. This requirement continues unless the national political system becomes so exclusive and non-democratic that it no longer can be said to be representing the whole people." At that point, and if all international and diplomatic measures fail to protect the peoples concerned from the State, they may perhaps be justified

in creating a new State. Acceptance by the world community of the Draft Declaration would usher in a new international legal order, one in which indigenous peoples would no longer be denied the right of self-determination simply because they live within existing state structures.

What is the relevance of these developments to the claim that Aboriginal nations ought to be treated as independent of the Canadian constitutional order? They suggest the emergence of a more flexible formulation of the principle of self-determination in international law, one that extends to Aboriginal people in Canada and that calibrates its content to the capacity and willingness of the Canadian state to protect interests associated with indigenous difference. Under this formulation, a failure by Canada to constitutionally protect interests associated with indigenous difference increases the likelihood that Aboriginal nations possess a right of external self-determination under international law. However, if Canada protects interests associated with indigenous difference in accordance with the right of internal self-determination, it is unlikely that international law, under this formulation, would treat Aboriginal nations as independent of the Canadian constitutional order. Canada's international legal obligations, in other words, require domestic constitutional arrangements that implement the right of internal self-determination that Aboriginal peoples possess under international law. . . . I argue that these domestic arrangements must be predicated on a non-absolute, pragmatic conception of sovereignty that contemplates a plurality of entities wielding sovereign authority within the Canadian constitutional order.

Notwithstanding the emerging distinction between external and internal self-determination in international law, the discourse of self-determination is difficult to adapt to the objective of allowing Aboriginal peoples to participate in Canadian, as well as their own, forms of government. The principle of self-determination supports constitutional recognition of Aboriginal governmental authority but it is not clear why, having exercised rights of self-determination, Aboriginal peoples ought also to possess the right to continue to enjoy benefits associated with Canadian citizenship. In other words, the principle of self-determination yields a group right to decide to be self-governing, but it does not appear to confer a right on the group in question to unilaterally decide the extent to which it is entitled to participate in the polity from which it seeks a measure of distance. If a group exercises its right to exclude others from its political institutions, on what basis can it demand representation in the political institutions of those whom it has excluded? Although there may be normative reasons in support of continued representation, the principle of self-determination, standing alone, does not appear to provide them.

The distinction between internal and external self-determination avoids this concern by defining internal self-determination as including

rights of political participation within the state structure in which indigenous peoples find themselves in addition to rights of self-government and political autonomy. But simply redefining the principle as including that which it appears to exclude does not eliminate the necessity of normatively justifying such a definition. The question remains: why should indigenous peoples be entitled both to rights of self-government and autonomy and the right to continue to participate in political structures from which they seek a measure of distance? In light of concerns that constitutional protection of interests associated with indigenous difference clashes with the fundamental ideal of equal citizenship, an answer to this question cannot rest solely on an assertion of a flexible international right of self-determination. As will be seen, it also rests on the constitutional significance of the four social facts that comprise indigenous difference. . . .

This book stakes out what I believe is a distinct position among current debates concerning the justice of constitutional arrangements by sidestepping an important debate concerning the nature of human rights. Some scholars believe in the existence of certain values so fundamental to humanity that they provide universal standards for determining the justice of particular constitutional arrangements. Others believe that normative standards are relative to specific cultural contexts, and that there exists no universal means of judging the merits of culturally specific ways of life. Universalists charge that relativists sanction violations of human rights in the name of cultural difference, whereas relativists argue that universalism is a cloak for the projection of culturally specific beliefs onto cultures that possess different inner logics.

Rights to be free of racial or cultural discrimination are often posited as universal human rights, inhering in all persons as a prerequisite to human dignity and freedom. The Universal Declaration of Human Rights, to take one international legal instrument, recognizes that all individuals "are equal before the law and are entitled without any discrimination to equal protection of the law," and that every individual implicate the distinction between civil and political rights and social and economic rights and concerns relating to the justiciability of social and economic rights. Nonetheless, these distinctions do not fully capture what differentiates Aboriginal and treaty rights from their civil, political, social, and economic counterparts. Aboriginal and treaty rights are neither civil and political rights nor social and economic rights. They reflect qualitatively different interests and concerns, which possess unique positive dimensions and impose unique positive obligations on the Canadian state. . . .

Hingitaq 53 v. Denmark
European Court of Human Rights
App. No. 18584/04 (2006)

The applicants are 428 individuals from the Thule District in Greenland, and Hingitaq 53, a group that represents the interests of relocated Inughuit (the Thule Tribe) and their descendants in a legal action against the Danish Government. . . .

The population of Greenland (approximately 55,000) is predominantly Inuit, a people bearing an affinity and solidarity with the Inuit populations of Canada, Alaska and Siberia.

In the north-west of Greenland the Inuit people are Inughuit (also known as the Thule Tribe), a people living from hunting and fishing, who entered Greenland from Canada in around 2000 BC. They lived completely isolated until 1818, following which they received visits by whalers and expeditions. . . .

In 1909 the Danish polar researcher Knud Rasmussen established a commercial trading station and privately initiated a colonisation of the area, which he called the Thule District. . . . In order to preserve the people's way of living, in 1927 Knud Rasmussen established a Hunters' Council (*Fangerråd*), which adopted the "Laws of the Cape York Station Thule."

[I]n 1937 Denmark took over the trading station.

During World War II, after the German occupation of Denmark in 1940, the United States of America ("the US") invoked the Monroe Doctrine in respect of Greenland and reached an agreement in 1941 with the Danish minister at Washington that permitted the establishment of US military bases and meteorological stations. Thus, in 1946, among other places in Greenland, a so-called weather station was built in the Thule District. It appears that the Hunters' Councils received a sum of approximately 200 Danish kroner (DKK) in compensation for this. . . . After the war, Denmark and the US signed a treaty on the defence of Greenland, which was approved on 18 May 1951 by the Danish Parliament (called *Rigsdagen* at the relevant time) and entered into force on 8 June 1951.

Consequently, an American air base was established at the Dundas Peninsula in the Thule District amidst the applicants' hunting areas and in the vicinity of the applicants' native village site, Uummannaq (then called Thule).

As part of the base a 3 km-long airstrip was built, together with housing and facilities intended to accommodate 4,000 people. . . .

Inughuit access to hunting and fishing was increasingly restricted and that the activities at the base eventually had a detrimental effect on the wildlife in the area.

In the spring of 1953 the US wished to establish an anti-aircraft artillery unit as well and requested permission to expand the base to cover the whole Dundas Peninsula. The request was granted, with the consequence that the Thule Tribe was evicted and had to settle outside the defence area. The tribe was informed of this on 25 May 1953 and within a few days, while they could still travel over the frozen sea ice with dog sleds, twenty-six Inuit families, consisting of 116 people, left Uummannaq, leaving behind their houses, a hospital, a school, a radio station, warehouses, a church and a graveyard (the family houses were later burned down and the church was moved to another village on the west coast). . . .

On 5 June 1953 a new Danish Constitution was passed (to replace the previous one of 1849). It extended to all parts of the Danish Kingdom, including Greenland, which thus became an integral part of Denmark.

Subsequently, by Resolution 849 (IX) of 22 November 1954 the United Nations General Assembly approved the constitutional integration of Greenland into the Danish Realm and deleted Greenland from the list of non-self-governing territories.

At the Hunters' Council's meeting in 1954 the question of compensation for the Thule Tribe's relocation arose for the first time. . . .

On 20 August 1999 the High Court of Eastern Denmark delivered its judgment, which ran to 502 pages. It found, in particular: that the Thule Air Base had been legally established under the 1951 Defence Treaty, the adoption and content of which had been in accordance with Danish law; that the population at the relevant time could be regarded as a tribal people as this concept was now defined in Article 1.1 (a) of the International Labour Organisation's Convention no. 169 of 28 June 1989 concerning Indigenous and Tribal Peoples in Independent Countries ("the ILO Convention");[*] that

[*] Editor's Note: Article 1.1 of the International Labour Organisation's Convention no. 169 provides:

> 1. This Convention applies to:
> (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.
> (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who,

the substantial restriction of access to hunting and fishing caused by the establishment of the Thule Air Base in 1951 and the eviction of the tribe from the Thule District in May 1953 had amounted to such serious interferences that they had to be regarded as expropriations; that the tribe had had too little time to prepare their departure; that expropriations could be carried out in Greenland at the relevant time without statutory authority; but that at the relevant time, pursuant to Article 73 of the UN Charter, the Danish Government had had international obligations towards Greenland, as was confirmed by section 45 of the Greenland Administration Act of 1925 (*Loven af 1925 om Grønlands styrelse*); and that the applicants' claims had not become time-barred. . . .

[T]he High Court found that the Thule Tribe should be granted DKK 500,000 (equivalent to approximately EUR 66,666) in compensation for its eviction and loss of hunting rights in the Thule District. . . .

[H]aving regard to the nature and extent of the interference imposed by the colonial power on an isolated indigenous tribe, the High Court found that the individuals affected in 1953 should be granted an award for non-pecuniary damage. . . . Accordingly, those applicants who at the relevant time had been at least 18 years of age were granted DKK 25,000 (equivalent to approximately EUR 3,333) in compensation for non-pecuniary damage and those who had been between 4 and 18 years old were granted DKK 15,000 (equivalent to approximately EUR 2,000). . . .

On 2 September 1999, in addition to signing a new agreement aimed at renewing the relationship between the Danish Government and the Home Rule Government, the Danish Prime Minister formally apologised to the applicants for the forced relocation of the Inughuit in 1953. . . .

On appeal to the Supreme Court (*Højesteret*), the applicants argued that pursuant to Article 1.1 (b) of the ILO Convention, they had to be considered a distinct indigenous people separate from the rest of the Greenlandic population, for which reason Articles 1, 12, 14 and 16 of the ILO Convention[*] should be applied in particular. They also increased their claim for compensation to DKK 235 million.

> irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

[*] Editor's Note: Article 12 of the ILO Convention provides:

> The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

Article 14 provides:

In a judgment of 28 November 2003 the Supreme Court unanimously upheld the High Court's judgment and held as follows:

> [T]he assessment of whether or not the Thule Tribe is a distinct indigenous people within the meaning of the ILO Convention should be based on current circumstances. . . . After an overall assessment of the evidence before it, the Supreme Court finds that in all essential respects the population of the Thule District [live under] the same conditions as the rest of the Greenlandic people, and that they do not differ from the latter in any other relevant way. The particulars produced on the difference between the languages spoken in Qaanaaq and in West Greenland and the Thule Tribe's perception of itself as a distinct indigenous people cannot lead to any other conclusion. The Supreme Court therefore finds that the Thule Tribe does not "retain some or all of its own social, economic, cultural and political institutions." [A]ccordingly the Thule Tribe is not a distinct

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> 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
> 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
> 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 16 provides:

> 1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
> 2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
> 3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
> 4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
> 5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

indigenous people for the purposes of Article 1.1 (b) of the ILO Convention.

[The Supreme Court upheld entirely the High Court's judgment].

COMPLAINTS

The applicants complained:

1. That they, the Inughuit, were the rightful owners of the Thule District and had, on a continuing basis, been deprived of their homeland and hunting territories and denied the opportunity to use, peacefully enjoy, develop and control their land, in breach of Article 1 of Protocol No. 1[*] to the Convention. They submitted that, although their forced relocation could retroactively be characterised as an expropriation, the interferences in 1951 and 1953 had been unlawful.

2. That their rights guaranteed under Article 8 of the Convention[**] had been breached because their family houses in Uummannaq had been burned down and the old church had been removed without prior consultation of the Hunters' Council, the parish or the parish council. The applicants maintained that they had not received any compensation on that account.

3. That in the determination of their civil rights they had not been afforded a fair hearing within the meaning of Article 6 of the Convention[***] . . . .

4. That Article 1 of the Convention had been violated in that the Government, through various acts and omissions, had failed to secure the

[*] Editor's Note: Article 1 of Protocol 1 to the European Convention of Human Rights provides, in relevant part:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

[**] Editor's Note: Article 8 of the European Convention on Human Rights provides:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[***] Editor's Note: Article 6 of the Convention provides, in relevant part:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . . .

practical enjoyment of several of their rights under the Convention. They had failed, for example, to respond to the claims submitted by the Hunters' Council in 1959 and 1960 and had allegedly obstructed and opposed the resubmission of the claim in 1985. Also, allegedly by keeping facts secret from Parliament, the applicants and the general public and withholding evidence from the review committee and the domestic courts, the Government had tried to hinder the victims from obtaining just satisfaction.

5. That as a result of the exclusion of the Inughuit from their land, their freedom of movement within the meaning of Article 2 of Protocol No. 4 to the Convention[*] had been wrongfully restricted in the following ways: (a) as regards communication and travel between the north and the south of the Thule District; (b) as regards communication and travel by air between the Thule District and the rest of Greenland and Denmark; and (c) as regards the air traffic allowed by the base, which had had a detrimental effect on local efforts to promote economic development through tourism in the Thule District.

6. That for more than a decade after the beginning of the interferences, the Inughuit had been barred from access to judicial and political means of protecting their rights under the Convention, in breach of Article 13 of the Convention.[**]

7. That compared with other Danish citizens, and in some respects also compared with persons in other areas of Greenland, the applicants as Inughuit had been discriminated against in breach of Article 14 of the Convention[***] . . . .

The Court considers that the complaints under Article 8 of the Convention fall to be examined together with the complaints under Article 1 of Protocol No. 1, which provides as follows:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be

[*] Editor's Note: Article 2 of Protocol 4 to the European Convention on Human Rights provides, in relevant part:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. . . .

[**] Editor's Note: Article 13 of the Convention provides:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

[***] Editor's Note: Article 14 of the Convention provides:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

> deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The Court reiterates that Article 1 of Protocol No. 1, which guarantees in substance the right of property, comprises three distinct rules. The first, . . . lays down the principle of peaceful enjoyment of property. The second rule . . . covers deprivation of possessions and subjects it to certain conditions. The third . . . recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule . . .

It should be reiterated in this connection that the Convention only governs, for each Contracting Party, facts subsequent to its entry into force with respect to that Party. As regards Denmark, the Convention entered into force on 3 September 1953 and Protocol No. 1 on 18 May 1954.

Accordingly, with regard to the above-mentioned interferences, the Court has no jurisdiction and the applicants' complaints relating to them are incompatible *ratione temporis* with the provisions of the Convention . . . .

The applicants' remaining complaints that do fall within the Court's competence . . . relate to the proceedings before the High Court and the Supreme Court and their outcome. . . .

[T]he Court finds that the national authorities did strike a fair balance between the proprietary interests of the persons concerned and is satisfied that the present case does not disclose any appearance of a violation of Article 1 of Protocol No. 1. [The court rejected Applicants' other claims].

Rainer Grote

On the Fringes of Europe: Europe's Largely Forgotten Indigenous Peoples[*]

[The] concept of "indigenous peoples" or "indigenous minorities" is rarely used with regard to the original inhabitants of certain territories in Europe which, at a later stage in history, were invaded, either belligerently or peacefully, by groups of different ethnic origin whose descendants today form the politically, economically and culturally dominant majority population of the respective territories. The reason for this absence of the indigenous peoples from the European discussion is not hard to detect. The plight of indigenous peoples in many parts of the world, especially in the Americas, Australia and New Zealand, is the result of the conquest and colonization of overseas territories by Europeans and their descendants from the late fifteenth century onward, a process which in some cases continued until the late nineteenth century. A similar process of internal colonization took place in Europe a long time ago. European nations emerged in a complex historical process which was characterized by the reception of important elements of Roman and Greek legal and political thinking, the adherence to Christianity and the protracted power struggles between competing feudal lords and dynastic rivals which were later replaced by the intense rivalry between sovereign nation states. . . .

It is therefore highly uncommon to speak of "indigenous peoples" when referring to certain native populations living in the center, the west and the south of Europe, even if some of them might *prima facie* fit the description of indigenous peoples in International Labor Organization Convention 169. In Germany, for example, "[t]he Sorbs have lived in Lusatia [a region which today forms part of the federal state of Saxony,] since 600 A.D., when Slavic tribes settled in the area between the Baltic Sea and the Erz Mountains, which had been largely depopulated by the out-migration of Germanic tribes." Since the Sorbs' settlement area was placed under German rule in the tenth century and the way was paved for the German colonization of the area, "the Sorbs—a West Slavic people—have been living together with the German population for about one thousand years." Although they have managed to retain some elements of distinct Sorbian culture, most importantly the Sorbian language which is written and spoken by 35,000, out of an estimated 60,000, Sorbs, it would be highly unusual to speak of these, or other, minorities living in Central Europe as "indigenous" populations or peoples. They are subsumed under the broader heading of "national minorities," which in Europe has become the central—although vaguely defined—conceptual focus for different attempts at protection.

[*] *Excerpted from* 31 AM. INDIAN L. REV. 425 (2007).

This development has also had important consequences for the concepts and procedures which are commonly used in legal debate to address the problems related to the definition of the status and rights of indigenous peoples. While the protection of ethnic, national, linguistic, and other minorities has received increasing attention from European politicians, lawyers and scholars after the end of the Cold War, and has even been made the object of a specific regional framework convention drafted under the auspices of the Council of Europe, the situation and the needs of indigenous minorities have not been identified as a separate matter for concern in this debate. . . . A genuine prospect for a change for the better seems to exist only at the regional level. . . .

When the term "indigenous peoples" is used in the current European debate, it is mainly restricted to the native populations living at the far ends of Europe: the Saami people, who live in the far north of Finland, Norway, Sweden and Russia; the Inuit living in Greenland; and the forty or so indigenous groups living in the Russian North and Siberia, which form part of the "Common List of Indigenous Small Peoples of Russia" approved by the government of the Russian Federation in March 2000. In those European countries where indigenous peoples live, national governments have sometimes found ways to side-step international obligations concerning the treatment of those groups and to escape international scrutiny. Finland, Sweden and Russia have not yet ratified ILO Convention No. 169, thus avoiding any obligations which might result from the Convention with regard to the treatment of their indigenous peoples. Denmark and Norway, on the other hand, have both ratified the Convention, but seem to have interpreted its provisions in a manner which has deprived their indigenous populations of the full enjoyment of its benefits, particularly with regard to land rights.

While Norway and Finland have acknowledged the status of the Saami people as indigenous peoples of their countries in their reports to international human rights bodies like the Committee on the Elimination of Racial Discrimination (CERD), Sweden continues to deal with these indigenous people under the heading of "national minorities." In Norway, the Saami have been granted a constitutional right to preserve their culture and special statutory property rights in the northernmost province of Finland. Similarly, "[t]he Russian Federation guarantees the rights of small indigenous peoples in accordance with the generally accepted principles and standards of international law and international treaties of the Russian Federation." The right of these peoples "to preserve and develop their native language, traditions and culture is enshrined in the Federal Laws on the Languages of the Peoples of the Russian Federation and on National and Cultural Autonomy." However, [because] each State continues to apply its own national laws to the indigenous peoples living within its boundaries, . . . [it is] difficult to find and to apply coherent solutions .for those indigenous

groups . . . in different national territories, like the Inuit, who have settled in the Arctic regions of Alaska, Canada and Greenland, or the Saami, whose places of settlement are divided among Norway, Sweden, Finland and Northern Russia.

At the level of the European Union (EU), a policy on indigenous peoples has only recently been developed. The starting point was a May 1998 working document of the European Commission on support for indigenous peoples. This was rapidly followed by the adoption of a Council Resolution calling for concern for indigenous peoples to be integrated into "all levels of development cooperation" and encouraging full participation of indigenous peoples in the democratic processes of their respective countries in accordance with an approach that recognizes their own diverse concepts of development and "the right to choose their own development paths." However, this policy aims principally at integrating indigenous concerns into EU development policies and cooperation with third countries. The policy does not, yet, have an internal dimension [nor] . . . authorize the EU to intervene in the domestic affairs of its Member States to improve or extend the protection of indigenous rights at the national level. . . .

The EU Charter of Fundamental Rights, which was adopted at the Summit of Nice in 2000, [only reaffirms] . . . the general principle of non-discrimination and . . . [recognizes] the cultural, religious and linguistic diversity of the Union. . . .

The first instrument to which one would turn for the protection of indigenous rights is the European Convention on Human Rights. . . . An indirect reference to group affiliations is found in Article 14, which prohibits discrimination of individuals in the exercise of their Convention rights on grounds of "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." [B]y no means does it protect the existence or the rights of the group itself.

[Some] individual rights may still be used to defend certain indigenous practices or institutions, like the freedom of religion, the freedom of assembly, or even the right to property. However, so far, the Convention's impact on the protection of indigenous peoples' rights has been very limited, more limited than that of Article 27 of the UN Covenant on Civil and Political Rights, which has been used, at least in some cases, by domestic courts in order to protect Saami economic and cultural rights. . . .

Although Europe has a long history in the protection of minority rights, it was not until 1995 that a Framework Convention for the Protection of National Minorities was adopted by the Council of Europe and opened for signature by member States. . . . [T]he Convention leaves the member

States a wide margin of discretion in implementing their (limited) obligations. To begin with, the Framework Convention contains no definition of the notion "national minority." It is up to the States themselves to decide which of the groups living on their territory they are prepared to recognize as "national minorities," subject to the general principle that the distinctions made should not be arbitrary or irrational. While, in general, indigenous peoples have been recognized as "national minorities" for the purposes of the Framework Convention by the relevant States (for example, Sweden, Norway, Finland, and Russia), Denmark has persistently argued that the Inuit in Greenland constitute the majority population of that territory, enjoying considerable powers of self-government under existing home rule arrangements, and can, therefore, not be considered as a minority under international law in general and the Framework Convention in particular.

The Framework Convention protects . . . the right of equality before the law; the right to maintain and develop their culture; the right to freely express themselves in their minority language; the right to learn his or her minority language and—subject to certain conditions—to be taught in this language; and the right to maintain cross-border contacts with people that share their ethnic, cultural or linguistic heritage. On the other hand, social and economic rights, which are of particular importance for the maintenance of the traditional livelihoods of indigenous peoples, are barely mentioned in the Convention. Article 15 meekly speaks of the parties' obligation to "create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them."

[T]he preamble of the Nordic Saami Convention recognizes the Saami people as the indigenous people of the three prospective member States of the Convention, of Finland, Norway and Sweden, and acknowledges the essential unity of the Saami as one people residing across national borders. The three States reaffirm that they "have a national as well as international responsibility to provide adequate conditions for the development of Saami culture and society," and explicitly recognize that "the Saami people has the right of self-determination." Moreover, "in determining the legal status of the Saami people, particular regard shall be paid to the fact that . . . the Saami have not been treated as a people of equal value, and have thus been subjected to injustice" in the past. This clause may serve as a basis for certain types of affirmative action in favour of the Saami in the future. . . .

The central right guaranteed to the Saami, in Chapter I of the Convention, is the right of self-determination. . . . Since the provision does not mention the right of the Saami to determine their political development, it is safe to assume that self-determination under the Convention does not

give a right to secession. . . . [S]uch a restrictive interpretation be contrary to the prevailing concept of self-determination in current international law, which recognizes a right to secede as a necessary and lawful consequence of self-determination only in those cases in which the people concerned are denied any meaningful participation in the domestic political process.

The rights of self-government of the Saami people are regulated by Chapter II. As "the highest representative body of the Saami people" in each of the participating countries, the Saami parliament is the main body competent to exercise those rights. The members of the Saami parliaments are elected in general elections. The draft Convention does not contain any specific provisions on the matters which shall be determined by the Saami parliaments and the powers they shall be given for this purpose. . . . The Convention . . . stops short of recognizing the Saami parliaments as sovereign bodies. . . .

Article 7, which deals with the protection of the Saami against discrimination, expressly mandates the adoption of "special positive measures" for this purpose—measures which, in many legal systems, are known as "affirmative action" or "reverse discrimination." This provision would seem to cover laws like the recent Norwegian statute which created special property rights for Saami in the northern province of Finmark that take precedence over conflicting property rights of persons of non-Saami origin. . . . .

With regard to land and water rights, the draft Convention grants the Saami the right to occupy and use the land or water areas which they have traditionally used "for reindeer husbandry, hunting, fishing or in other ways to the same extent as before," regardless whether they are deemed to be the owners of the land or not. . . . The Convention gives special consideration to reindeer husbandry as a central element of Saami livelihood and an important fundament of Saami culture. . . .

The economic rights are complemented by language and cultural rights. In addition to the more "traditional" rights, like the right to use, develop and pass on the Saami language to future generations and the right of access to education in the Saami language within the Saami areas, the relevant provisions of the draft Convention guarantee a number of innovative concepts. Two examples of such concepts are the creation of a distinct Saami media policy which "provide[s] the Saami population with rich and multi-faceted information" and a right of control over activities by persons of non-Saami origin which use elements of the Saami culture for commercial purposes. This right of control also includes the right to a reasonable share of the resulting revenues. . . .

The Treaty of Waitangi
(English Text)

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands—Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

ARTICLE THE FIRST

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

ARTICLE THE SECOND

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

ARTICLE THE THIRD

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W. HOBSON Lieutenant Governor.

Now therefore, We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.

Matthew S. R. Palmer

Constitutional Realism About Constitutional Protection: Indigenous Rights Under a Judicialized and a Politicized Constitution[*]

In 2005 there were about 4.1 million New Zealanders. Of them, 635,100 or 15 percent were Maori, the indigenous Polynesian people of New Zealand. Seven percent were, ethnically, from the various neighbouring (mainly Polynesian) Pacific Islands and 9 percent were Asian. The Maori population has a much younger age profile than the general population. Due to this fact and relatively higher birth rates amongst Maori and Pasifika peoples, it is projected that, while the European population of New Zealand will grow by 5 percent between 2001 and 2021, the Maori population will grow by 29 percent and the Pasifika population by 59 percent. If immigration trends continue, the Asian population will grow by 145 percent. On these projections, Europeans would still be the largest ethnic group, making up 70 percent of the total population in 2021, but this would be a drop from 79 percent in 2001.

These demographic features are an important difference that permeates the comparisons between New Zealand and Canadian indigenous peoples. Of the 29.6 million Canadians recorded in the 2001 census, some 1

[*] *Excerpted from* 29 DALHOUSIE L.J. 1 (2007).

million or 3 percent identified themselves as North American Indian and 307,845 or 1 percent as Metis.

Just as important is the comparison in location and circumstances of indigenous peoples. Many First Nations in Canada have their own physically separate "reservations." Nunavut is a separate self-governing territory whose population is 85 percent Inuit. In addition to individual tribal traditions, legends and symbols, many First Nations have a separate language. In New Zealand, each Maori *iwi* (tribe) or *hapu* (sub-tribe) has a home *marae* (meeting house and small surrounding area), but there are no separate reservations. Also, with minor regional variations, there is only one Maori language. Although some areas of New Zealand (particularly the East Cape of the North Island) are predominantly Maori, most Maori are urbanised and integrated amongst the rest of the population.

Maori in New Zealand have enjoyed an assertive cultural resurgence since the 1970s. This has been accompanied by political and constitutional demands and is reflected in the legal system as outlined below. Although the comparison is inexact, something of the flavour of the Maori position in New Zealand politics would be captured by combining the moral claims of First Nations in Canada with the political assertiveness of the Quebecois. . . .

The egalitarian and apparently democratic ethic of a colonial society remains strong in New Zealand. Politicians may not be trusted, but at least they can be ejected from government every three years. [Perhaps] influenced by the Supreme Court of Canada's experiment with interpreting ambiguity in the Canadian *Bill of Rights Act* of 1960, § 4 of the New Zealand *Bill of Rights Act* is fulsome in subjecting itself to other legislation:

> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment; by reason only that the provision is inconsistent with any provision of this Bill of Rights. . . .

The signing of the *Treaty of Waitangi* between the British Crown and Maori chiefs in 1840 is taken as marking the founding of New Zealand. Unlike many British treaties with First Nations in Canada, the *Treaty of*

Waitangi was not concerned with a transfer of land, extinguishment of aboriginal title or the creation of reserved areas. Although it did affirm the Crown's exclusive pre-emptive right of purchase of Maori land, it was a general treaty of cession and protection. The problem is that there was, and is, disagreement over what was ceded and protected. . . .

In the English version of Article the First, Maori cede to the Crown "absolutely and without reservation all the rights and powers of Sovereignty." Yet in the Maori version they cede "kawanatanga"—a transliteration of "governorship" that may have resonated with the Maori understanding of the biblical relationship between Governor Pontius Pilate within the Roman Empire or as associated with the remote Governor of New South Wales. In the English version of Article the Second, the Crown "confirms and guarantees" to Maori the "full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession." Yet in the Maori version, Maori are guaranteed their "te tino rangatiratanga" or chieftainship (rangatira being chiefs). This notion may have been closer to the English conception of sovereignty than was kawanatanga. It was "rangatiratanga" that was used to denote the "independence" of New Zealand in the 1835 Declaration of Independence, eventually signed by some 50 Maori chiefs and acknowledged by the Crown. The least problematic is Article the Third, where the Crown guarantees Maori all the rights and privileges of British citizens.

The standard legal doctrine of *contra proferentum* suggests that the Maori version should be given more weight, in legal interpretation, than the English version. Even so, however, the balance between the articles of the Treaty in both versions is general and vague. In working out what the *Treaty of Waitangi* means in a particular context, modern *Treaty* jurisprudence in New Zealand is threaded through with the notion of balance. In particular, in most issues that call for the application of the *Treaty*, there is a need to balance Article One's cession of "sovereignty" or "kawanatanga" with Article Two's guarantee of "full, exclusive and undisturbed possession" or "te tino rangatiratanga." In 1988 the Waitangi Tribunal said:

> [A] careful balancing of interests . . . is required. It was inherent in the Treaty's terms that Maori customary values would be properly respected, but it was also an objective of the Treaty to secure a British settlement and a place where two people could fully belong. To achieve that end the needs of both cultures must be provided for and, where necessary, reconciled. . . .

From a legal perspective, the *Treaty of Waitangi* is unsatisfying as a complete and unambiguous source of British sovereignty. A few years after the *Treaty* was signed Attorney-General William Swainson considered that British sovereignty was based "partly upon discovery, partly upon cession, partly upon assertion and partly upon occupation." But from a symbolic and moral perspective the *Treaty* has power. It symbolized and still symbolizes a mutual agreement between two peoples that gave the Crown legitimacy to exercise a governance role in New Zealand and accorded some level of protection to Maori. Despite the uncertainty and argument over its terms the *Treaty* remains a potent symbol of nation-building. As the then President of the New Zealand Court of Appeal, later Lord Cooke of Thorndon, stated extra-judicially in 1996: "[i]t is simply the most important document in New Zealand's history." Its historical existence as an explicit agreement gives added moral legitimacy to Maori claims.

The *Treaty of Waitangi* does not, of itself, confer legal rights in New Zealand. Its legal status remains that of a treaty unincorporated into domestic law. It is not part of any higher law in New Zealand and it is not even part of ordinary domestic law except to the extent that it is referred to in individual statutes. Yet domestic law was the vehicle of response to increasingly assertive Maori political demands for land rights in the 1970s. The *Treaty of Waitangi Act 1975* created the Waitangi Tribunal as a semi-judicial forum for the investigation of allegations by Maori of contemporary breaches of the *Treaty*. It had recommendatory power only. In 1985 its jurisdiction was extended retrospectively to 1840. In 1988, as a result of Maori litigation and court ordered negotiation, the Tribunal acquired a limited statutory mandate to make binding orders on the Crown in relation to specified forms of redress. Impelled partly by this binding mandate, which constituted a significant fiscal risk, from the early 1990s there have been significant settlements between the Crown and Maori of historical grievances over fisheries, land confiscations and fraudulent land transactions.

There are, of course, some "backdoor" means by which courts can find ways of giving legal bite to the *Treaty*. For example, the *Treaty* can be treated as a relevant consideration in the judicial review of administrative action, with or without statutory references to it. And it can be used as a touchstone in the judicial task of statutory interpretation. But otherwise, in the ordinary courts, as determined by the Privy Council in *Te Heuheu Tukino* (1941), the *Treaty* has no independent legal effect in and of itself.

Parliament has made up for this by referring repeatedly, particularly in the 1980s and 1990s, to the *Treaty* in specific statutes. This legislative hook has usually been a generic reference to the principles of the *Treaty*, though there are signs more recently of Parliament's willingness to explore its specific implications in legislation. The generic references in particular

have faced the New Zealand courts with the challenge and opportunity of considering the meaning of the *Treaty of Waitangi* in various specific contexts and have thereby generated significant, though sometimes tentative, jurisprudence.

So the legal status of the *Treaty of Waitangi* in New Zealand is that it is "half in and half out of the law." Whether it has legal effect depends primarily on the politics in Parliament at the time each new statute is passed and whether it is politically desirable to refer to the *Treaty* or not. The resulting constitutional status of the *Treaty* in New Zealand is truly "politicized," along with the rest of the New Zealand constitution, in distinction to the "judicialized" nature of constitutional protection of First Nations rights in Canada. . . .

The demographics and political power of Maori suggest to many New Zealanders that the position of Maori is strong enough that national conversations about these issues should be held in the political arena—between people who understand policy and politics, principle and pragmatism—not judges. . . .

The seminal *Treaty* cases of the Court of Appeal led by Sir Robin Cooke (now Lord Cooke) in the 1980s were startling at the time in New Zealand but remain relatively orthodox by Canadian standards. Like the Canadian cases, their primary practical import was to impel executive governments to negotiate with Maori. Also like the Canadian cases, initially startling breakthroughs were followed by a more conservative judicial backwash.

The results of political negotiations did lead to significant reforms. For example, the acquisition of compulsory powers of resumption of land by the Waitangi Tribunal in the *Treaty of Waitangi (State Enterprises) Act 1988* was the result of court-mandated negotiation between the Crown and the New Zealand Maori Council. That in turn created the fiscal risk of outstanding historical *Treaty* grievances that proved crucial in convincing the government in the 1990s to conclude significant settlements of grievances.

R v. Symonds
Supreme Court of New Zealand
(1847) N.Z.P.C.C. 387

Chapman J. — [The] practice of extinguishing Native titles by fair purchases is certainly more than two centuries old. It has been long adopted by the Government in our American colonies, and by that of the United

States. . . . Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, than in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new and unsettled.

Wi Parata v. Bishop of Wellington
Supreme Court of New Zealand
(1878) 3 NZ Jur (NS) SC 72

The judgment for the court was delivered by Prendergast CJ.

[Regarding the "well-known legal incidents of a settlement planted by a civilised Power in the midst of uncivilised tribes,"] it is enough to refer, once for all, to the American jurists, Kent and Story, who, together with Chief Justice Marshall . . . have given the most complete exposition of this subject. . . . On the cession of territory by one civilised power to another, the rights of private property are invariably respected, and the old law of the country is administered, to such extent as may be necessary, by the Courts of the new sovereign. . . . But in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based. . . .

The existence of the pact known as the "Treaty of Waitangi," entered into by Captain Hobson on the part of Her Majesty with certain natives at the Bay of Island, and adhered to by some other natives of the Northern Island, is perfectly consistent with what has been said. So far indeed as that instrument purported to cede the sovereignty—a matter with which we are not here directly concerned—it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist. So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which, *jure gentium*, vested in and devolved upon the Crown under the circumstances of the case.

Te Heuheu Tukino v. Aotea District Maori Land Board
Judicial Committee of the Privy Council
[1941] N.Z.L.R. 590 (PC)

The judgment for the court was delivered by Viscount Simon LC.

So far as the appellant invokes the assistance of the Court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the Court to some statutory recognition of the right claimed by him. . . . As regards the appellant's argument that the New Zealand Legislature has recognized and adopted the Treaty of Waitangi as part of the municipal law of New Zealand, it is true that there have been references to the Treaty in the statutes, but these appear to have invariably had reference to further legislation in relation to the Native lands, and, in any event, even the statutory incorporation of a Second Article of the Treaty in the municipal law would not deprive the Legislature of its power to alter or amend such a statute by later enactments.

New Zealand Maori Council v. Attorney-General
Court of Appeal of New Zealand
[1987] 1 N.Z.L.R. 641

COOKE P. This case is perhaps as important for the future of our country as any that has come before a New Zealand Court. Accordingly, although we have reached a unanimous decision, each member of the Court is delivering separate judgment setting out his reasons for joining in the decision. . . .

We are here concerned with interpreting a far-reaching Act passed by the New Zealand legislature. Its significance lies partly in the transformation of State undertakings, partly in its express incorporation of the principles of the Treaty in this field of New Zealand domestic law. . . .

Counsel for the applicants did not go as far as to contend that, apart altogether from the State-Owned Enterprises Act, the Treaty of Waitangi is a Bill of Rights or fundamental New Zealand constitutional document in the sense that it could override Acts of our legislature. Counsel could hardly have done so in face of the decision of the Privy Council in *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board* (1941) that rights conferred by the Treaty cannot be enforced in the Courts except in so far as a statutory recognition of the rights can be found. The submissions were rather that the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the Court will not ascribe to Parliament an intention

to permit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty. But the State-Owned Enterprises Act itself virtually says as much in its own field. The questions in this case are basically about the practical application of the approach in the administration of this Act. . . .

The main complaint by the Maori Council is that where a relevant claim has not been submitted by a Maori to the Waitangi Tribunal before 18 December 1986 the prospect of a restoration of the land to Maori ownership following a later claim will or may be less. The question is whether § 9,[*] on its true interpretation, gives Maoris some added protection against that risk. . . .

[I]n my view . . . § 9 declares the broad principle that nothing in the Act shall permit the Crown to act in a manner inconsistent with the principles of the Treaty; then § 27[**] specifies what Parliament intends to be the practical effect of that broad principle in the particular case of land. . . .

It must be appreciated too, I think, that § 9 may be of very real importance when the Governor-General in Council is considering recommendations of the Waitangi Tribunal, whether they relate to pre-Act or post-Act claims. If, on any successful claim, the Tribunal were to recommend that land be returned to Maori ownership rather than that monetary or other compensation be provided, it might be inconsistent with the principles of the Treaty for the Crown to act inconsistently with that recommendation. The case is hypothetical . . . but attention should be drawn to the possibility.

So, in my opinion, the firm declaration by Parliament that nothing in the Act shall permit the Crown to act inconsistently with the principles of the Treaty must be held to mean what it says. Cases will arise when the machinery provisions made for meeting Maori land claims by § 27 will not be enough. . . .

What is now our responsibility is to say clearly that the Act of Parliament restricts the Crown to acting under it in accordance with the principles of the Treaty. It becomes the duty of the Court to check, when

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[*] Editor's Note: Section 9 of the Act provides: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi."

[**] Editor's Note: Section 27 of the Act provides:

> The submission in respect of any land or interest in land of a claim under section 6 of the Treaty of Waitangi Act 1975 does not prevent the transfer of that land or of any interest in that land or of that interest in land—
>
> (a) By the Crown to a State enterprise; or
>
> (b) By a State enterprise to any other person.

called on to do so in any case that arises, whether that restriction has been observed and, if not, to grant a remedy. Any other answer to the question of interpretation would go close to treating the declaration made by Parliament about the Treaty as a dead letter. That would be unhappily and unacceptably reminiscent of an attitude, now past, that the Treaty itself is of no true value to the Maori people. . . .

[Section 9] of the 1986 Act requires the Court to interpret the phrase "the principles of the Treaty of Waitangi" when necessary. . . .

The principles of the Treaty are to be applied, not the literal words. As is well known, the English and Maori texts in the first schedule to the Treaty of Waitangi Act 1975 are not translations the one of the other and do not necessarily convey precisely the same meaning. The story of the drafting of the Treaty and the procurement of signatures from more than 500 Maori chiefs, including some Maori women of appropriate rank—events in which no lawyer seems to have played a part . . . is an absorbing one, but not within the ambit of this judgment. . . .

Points on which that version may be open to debate include the following. The word rangatiratanga, here rendered as chieftainship, may have no precise English equivalent. Williams' Maori Dictionary gives evidence of breeding and greatness. So too with the kawanatanga given absolutely to the Queen of England. The version proffered for the applicants renders this as complete government. Other alternatives are governance and that of the English text scheduled to the Treaty of Waitangi Act—sovereignty—a concept said to have no equivalent in Maori thinking. Taonga, rendered in the foregoing version as treasures, is represented in the English text as other properties and in Williams as property, anything highly prized. The Waitangi Tribunal has treated the word as embracing the Maori language. The provision that the chiefs "will sell" land to the Queen is treated in the English text as conferring on the Crown an exclusive right of pre-emption, although the meaning of this in the context is itself controversial. The provision in the third article to the effect that, in the words of the attempted reconstruction, the Queen will give the ordinary people of New Zealand the same rights and duties of citizenship as the people of England is commonly rendered as referring to the rights and privileges of British subjects.

The differences between the texts and the shades of meaning do not matter for the purposes of this case. What matters is the spirit. This approach accords with the oral character of Maori tradition and culture. It is necessary also because the relatively sophisticated society for whose needs the State-Owned Enterprises Act has been devised could not possibly have been foreseen by those who participated in the making of the 1840 Treaty. In brief the basic terms of the bargain were that the Queen was to govern

and the Maoris were to be her subjects; in return their chieftainships and possessions were to be protected, but sales of land to the Crown could be negotiated. These aims partly conflicted. The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas.

The Treaty signified a partnership between races, and it is in this concept that the answer to the present case had to be found. For more than a century and a quarter after the Treaty, integration, amalgamation of the races, the assimilation of the Maori to the Pakeha, was the goal which in the main successive Governments tended to pursue. In 1967 in the debates on the Maori Affairs Amendment Bill, a measure facilitating the alienation of Maori land, the responsible Minister, the Hon JR Hanan, saw it as "the most far-reaching and progressive reform of the Maori land laws this century . . . based upon the proposition that the Maori is the equal of the European . . . The Bill removes many of the barriers dividing our two people." Another supporter of the Bill expressed the hope that "it will mark the beginning of the end of what still remains of apartheid in New Zealand." Such ideas are no longer in the ascendant, but there is no reason to doubt that in their day the European Treaty partner and indeed many Maoris entertained them in good faith as the true path to progress for both races. Now the emphasis is much more on the need to preserve Maoritanga, Maori land and communal life, a distinctive Maori identity. . . .

In this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership, to ensure that the powers in the State-Owned Enterprises Act are not used inconsistently with the principles of the Treaty. . . . If the Crown acting reasonably and in good faith satisfies itself that known or foreseeable Maori claims do not require retention of certain land, no principle of the Treaty will prevent a transfer.

I use "reasonably" here in the ordinary sense of in accordance with or within the limits of reason. The distinction is between on the one hand what a reasonable person could do or decide, and on the other what would be irrational or capricious or misdirected. . . .

What has already been said amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. . . . [T]he duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. . . . [T]he duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation.

Not surprisingly the argument for the applicants encountered some difficulty in trying to put such broad propositions into more concrete forms. A duty to remedy past breaches was spoken of. I would accept that suggestion, in the sense that if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it—which would be only in very special circumstances, if ever. . . .

A duty "to consult" was also propounded. In any detailed or unqualified sense this is elusive and unworkable. Exactly who should be consulted before any particular legislative or administrative step which might affect some Maoris, it would be difficult or impossible to lay down. Moreover, wide-ranging consultations could hold up the processes of Government in a way contrary to the principles of the Treaty. . . .

The effect of the Court's decision

The prosaic language of the Court's formal orders should not be allowed to obscure the fact that the Maori people have succeeded in this case. Some might speak of a victory, but Courts do not usually use that kind of language. At the outset I mentioned that each member of the Court was writing a separate judgment. It will be seen that approaching the case independently we have all reached two major conclusions. First, that the principles of the Treaty of Waitangi override everything else in the State-Owned Enterprises Act. Second, that those principles require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith.

That duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the court will be to insist that it be honoured. . . .

I would also mention *Te Heuheu Tukino*'s case itself . . . [that was] the leading case on the Treaty of Waitangi. The Privy Council in a judgment . . . held that without statutory rights Maoris could not rely on the Treaty in the Courts. That judgment represented wholly orthodox legal thinking, at any rate from a 1941 standpoint. . . .

The effect of our present decision, built on the Treaty of Waitangi Act and the State-Owned Enterprises Act, is that in relation to land now held by the Crown it should never again be possible to put aside a Maori grievance in that way. The Crown now has to work out a system to safeguard Maori claims regarding land covered by the 1986 Act before any land can be transferred to a State enterprise. The Maori Council can come

back to the court if not satisfied with the proposed system. In the meantime no outright transfers can be made.

In short the present decision together with the two Acts means that there will now be an effective legal remedy by which grievous wrongs suffered by one of the Treaty partners in breach of the principles of the Treaty can be righted. I have called this a success for the Maoris, but let what opened the way enabling the Court to reach this decision not be overlooked. Two crucial steps were taken by Parliament in enacting the Treaty of Waitangi Act and in insisting on the principles of the Treaty in the State-Owned Enterprises Act. If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity.

New Zealand Maori Council v. Attorney-General
Court of Appeal of New Zealand
[2008] 1 N.Z.L.R. 318

O'REGAN J. . . .

[65] In *New Zealand Maori Council v. Attorney-General* (1996) Richardson P on behalf of six out of seven Judges of this Court considered that *Te Heuheu Tukino v. Aotea District Maori Land Board* was a "clear contrary ruling" to the proposition that the Crown's obligations under the Treaty are directly enforceable in the New Zealand courts in the absence of statutory recognition or adoption.

[66] In reaching a contrary conclusion in the judgment under appeal, Gendall J relied on the decision of this Court in *Attorney-General v. New Zealand Maori Council* (1991) (the *Radio Frequencies* case). That case concerned the Crown's disposal of radio frequencies under the Radiocommunications Act 1989, which contains no equivalent to § 9 of the [State-Owned Enterprises Act]. The Crown's proposal was to sell the frequencies to the highest bidders, reserving some frequencies for Maori. However, Maori indicated a desire to acquire FM frequencies in Auckland and Wellington, which were not reserved for Maori. This would enable Maori content to reach younger audiences and, it was said, the Crown was obliged to effect this disposition in light of a Tribunal report to the effect that the Treaty obliges the Crown to recognise and protect the Maori language. The Tribunal scheduled a hearing to decide whether Maori ought to have a better share of FM frequencies. The Tribunal requested the Minister of Communications to delay the tender process for the disposition of the frequencies until the Tribunal had conducted its hearing. The Minister refused and the tender process commenced. The NZMC brought a

judicial review claim and the High Court enjoined the tender process from continuing. The Crown appealed to this Court.

[67] A majority of 3–2 of this Court dismissed the appeal. . . . However, it is not clear that the majority based its reasoning on the Treaty. . . . [But it is clear that for Cooke] . . . the principles of the Treaty placed an obligation on the Crown to take account of the Tribunal's views. However, it is not clear that the other members of the Court shared Cooke P's views. . . .

[71] [A] majority of 4-1 considered that the case could be decided with reference to ordinary administrative law principles. We do not therefore agree with Gendall J that this case stands for the proposition that fiduciary duties, sourced from the Treaty itself, can form the basis of an action in New Zealand courts.

[72] We are satisfied that the law is as stated in the *Lands* case. We do not see the *Radio Frequencies* case as overriding that statement of principle. That is not to say that the Treaty does not have direct impact in judicial review cases or in cases involving statutory interpretation. . . .

[75] Gendall J's reasoning is further based on the proposition that courts must construe legislation in conformity with Treaty obligations. In support of this, Gendall J relied upon the statement of Cooke P in *Tavita v. Minister of Immigration* (1994) that a failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. However, there is a significant difference between giving practical effect to international instruments which inform the interpretation of New Zealand statutes and enforcing as private law rights the duty of the Crown under the Treaty. . . .

C. Rights of Non-Members

R. v. Kapp
Supreme Court of Canada
2008 SCC 41

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. was delivered by

THE CHIEF JUSTICE AND ABELLA J.—

[1] The appellants are commercial fishers, mainly non-aboriginal, who assert that their equality rights under § 15[*] of the *Canadian Charter of Rights and Freedoms* were violated by a communal fishing licence granting members of three aboriginal bands the exclusive right to fish for salmon in the mouth of the Fraser River for a period of 24 hours on August 19-20, 1998. . . .

[2] [T]he essence of [appellant's] claim is that the communal fishing licence discriminated against them on the basis of race. The Crown argues that the general purpose of the program under which the licence was issued was to regulate the fishery, and that it ameliorated the conditions of a disadvantaged group. These contentions, taken together, raise the issue of the interplay between § 15(1) and § 15(2) of the *Charter*. . . . We have concluded that where a program makes a distinction on one of the grounds enumerated under § 15 or an analogous ground but has as its object the amelioration of the conditions of a disadvantaged group, § 15's guarantee of substantive equality is furthered, and the claim of discrimination must fail. As the communal fishing licence challenged in this appeal falls within § 15(2)'s ambit—one of its objects being to ameliorate the conditions of the participating aboriginal bands—the appellants' claim of a violation of § 15 cannot succeed. . . .

[4] [I]n the last two decades, court decisions have confirmed that pre-contact fishing practices integral to the culture of aboriginal people translate into a modern-day right to fish for food, social and ceremonial purposes: *R. v. Sparrow*. The right is a communal right. . . .

[5] The aboriginal right has not been recognized by the courts as extending to fishing for the purpose of sale or commercial fishing. The participation of Aboriginals in the commercial fishery was thus left to

[*] Editor's Note: Section 15 of the Canadian Charter is set out at pages IV-10 to IV-11, *supra.*

individual initiative or to negotiation between aboriginal peoples and the government. The federal government determined that aboriginal people should be given a stake in the commercial fishery. The bands tended to be disadvantaged economically. . . .

[7] The federal government's policies aimed at giving aboriginal people a share of the commercial fishery took different forms, united under the umbrella of the "Aboriginal Fisheries Strategy." Introduced in 1992, the Aboriginal Fisheries Strategy has three stated objectives: ensuring the rights recognized by the *Sparrow* decision are respected; providing aboriginal communities with a larger role in fisheries management and increased economic benefits; and minimizing the disruption of non-aboriginal fisheries. . . . A significant part of the Aboriginal Fisheries Strategy was the introduction of three pilot sales programs, one of which resulted in the issuance of the communal fishing licence at issue in this case. The licence was granted pursuant to the *Aboriginal Communal Fishing Licences Regulations*, ("*ACFLR*"). The *ACFLR* grants communal licences to "aboriginal organization[s]," defined as including "an Indian band, an Indian band council, a tribal council and an organization that represents a territorially based aboriginal community."

[8] [T]he licence with which we are concerned permitted fishers designated by the bands to fish for sockeye salmon between 7:00 a.m. on August 19, 1998 and 7:00 a.m. on August 20, 1998, and to use the fish caught for food, social and ceremonial purposes, and for sale. Some of the fishers designated by the bands to fish under the communal fishing licence were also licensed commercial fishers entitled to fish at other openings for commercial fishers.

[9] The appellants are all commercial fishers who were excluded from the fishery during the 24 hours allocated to the aboriginal fishery under the communal fishing licence. . . .

[16] Sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies § 15 as a whole. Section 15(1) is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in § 15 and analogous grounds. This is one way of combatting discrimination. However, governments may also wish to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through § 15(2), the *Charter* preserves the right of governments to implement such programs, without fear of challenge under § 15(1). This is made apparent by the existence of § 15(2). . . . [We have] established in essence a two-part test for showing discrimination under § 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground?

(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? . . .

A program does not violate the § 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. In proposing this test, we are mindful that future cases may demand some adjustment to the framework in order to meet the litigants' particular circumstances. . . .

[43] In interpreting this phrase, two issues arise. The first is whether courts should look to the *purpose* or to the *effect* of legislation. The second is whether, in order to qualify for § 15(2) protection, a program must have an ameliorative purpose as its sole object, or whether having such a goal as one of several objectives is sufficient. . . .

[48] Given the language of the provision and its goal of enabling governments to pro-actively combat discrimination, we believe the "purpose"-based approach is more appropriate than the "effect"-based approach: where a law, program or activity creates a distinction based on an enumerated or analogous ground, was the government's goal in creating that distinction to improve the conditions of a group that is disadvantaged? In examining purpose, courts may therefore find it necessary to consider not only statements made by the drafters of the program but also whether the legislature chose means rationally related to that ameliorative purpose, in the sense that it appears at least plausible that the program may indeed advance the stated goal of combatting disadvantage. . . .

[51] We can find little justification for requiring the ameliorative purpose to be the sole object of a program. . . . To prevent such programs from earning § 15(2) protection on the grounds that they contain other objectives seems to undermine the goal of § 15(2). . . .

[58] The Crown describes numerous objectives for the impugned pilot sales program. These include negotiating solutions to aboriginal fishing rights claims, providing economic opportunities to native bands and supporting their progress towards self-sufficiency. The impugned fishing licence relates to all of these goals. . . . The means chosen to achieve the purpose (special fishing privileges for aboriginal communities, constituting a benefit) are rationally related to serving that purpose. . . .

[62] Having concluded that a breach of § 15 is not established, it is unnecessary to consider whether § 25[*] of the *Charter* would bar the appellants' claim. However, we wish to signal our concerns with aspects of

[*] Editor's Note: Section 25 of the Canadian Charter is set out at page IV-11, *supra.*

the reasoning of Bastarache J. and of Kirkpatrick J.A., both of whom would have dismissed the appeal solely on the basis of § 25.

[63] An initial concern is whether the communal fishing licence at issue in this case lies within § 25's compass. In our view, the wording of § 25 and the examples given therein—aboriginal rights, treaty rights, and "other rights or freedoms," such as rights derived from the *Royal Proclamation* or from land claims agreements—suggest that not every aboriginal interest or program falls within the provision's scope. Rather, only rights of a constitutional character are likely to benefit from § 25. If so, we would question, without deciding, whether the fishing licence is a § 25 right or freedom.

[64] A second concern is whether, even if the fishing licence does fall under § 25, the result would constitute an absolute bar to the appellants' § 15 claim, as distinguished from an interpretive provision informing the construction of potentially conflicting *Charter* rights.

[65] These issues raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians. In our view, prudence suggests that these issues are best left for resolution on a case-by-case basis as they arise before the Court.

BASTARACHE J. —

[71] The *Pilot Sales Program* was not related to the specific aboriginal right to fish for food found in *R. v. Sparrow*. Rather, according to the respondent, it was designed to reach negotiated solutions to claims for aboriginal commercial fishing rights and to provide economic opportunities to native bands, to support their progress towards self-sufficiency. . . .

[73] The important point to be made here is that the respondent's position is that the *Aboriginal Fisheries Strategy* and the *Pilot Sales Program* were primarily aimed at management of the fishery and did not have as their primary object the amelioration of conditions of disadvantaged groups or individuals. The respondent therefore does not rely on § 15(2) of the *Charter*. . . .

[96] There is little case law on the issue, but the recent trend has been to see the protective feature in § 25 as a "shield."

[97] [I]s this shield absolute? Obviously not. First, it is restricted by § 28 of the *Charter* which provides for gender equality "[n]otwithstanding anything in this Charter." Second, it is restricted to its object, placing *Charter* rights and freedoms in juxtaposition to aboriginal rights and freedoms. *R. v. Van der Peet* provides guidance in that respect. . . .

[100] Some would like the Court to ignore § 25 because of the uncertainty in its application, particularly with regard to legislative powers contemplated by the *Indian Act*. I think it is unreasonable to suggest that a law should not be applied by this Court because it is too difficult. . . .

[103] I believe that the reference to "aboriginal and treaty rights" suggests that the focus of the provision is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected are those that are unique to them because of their special status. . . .

[111] There are three steps in the application of § 25. The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter* right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under § 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right. . . .

[116] There is in my view a *prima facie* case of discrimination pursuant to § 15(1). . . .

[122] I think it is established, in this case, that the right given by the *Pilot Sales Program* is limited to Aboriginals and has a detrimental effect on non-aboriginal commercial fishers who operate in the same region as the beneficiaries of the program. It is also clear that the disadvantage is related to racial differences. Section 15 of the *Charter* is *prima facie* engaged. The right to equality afforded to every individual under § 15 is not capable of application consistently with the rights of aboriginal fishers holding licences under the *Pilot Sales Program*. There is a real conflict. . . .

[123] Section 25 of the *Charter* applies in the present situation and provides a full answer to the claim. For this reason, I would dismiss the appeal.

Judith Resnik

Dependent Sovereigns: Indian Tribes, States, and the Federal Courts[*]

II. THE INDIAN TRIBES' RELATIONSHIP TO THE UNITED STATES

The Constitution refers explicitly in three places to Indians. First, Indians "not taxed" are excluded for purposes of apportioning members of the House of Representatives among the states. Second, the Constitution gives Congress the power to regulate commerce with the Indian Tribes. Third, the Fourteenth Amendment reiterates the exclusion of "Indians not taxed" for purposes of apportionment. In addition to specific references, the constitutional grants of power to the Congress to make regulations governing the territories and to the President to make treaties have been read as empowering those branches to relate to Indian tribes.

To the extent Indian tribes are discussed in the Constitution, they seem to be recognized as having a status outside its parameters. Indian tribes are treated as entities with whom to have commerce and to make treaties. The tribes also seem to be freed from the taxing power of either the state or federal governments. The constitutional references fit with the fact that the Indian tribes did not take part in the Constitutional Convention and did not join in the federation of powers. As many scholars have discussed, one might describe the relationship between the Indian tribes and the United States as that between two sovereigns, and locate the relevant legal discourse as that of international law. Thus, one might conclude, Indian tribes are not part of the federal system, and hence, are appropriately not part of a discussion of federal courts' jurisprudence.

However, in 1871, the federal government halted its treatymaking with the Indian tribes. By the end of the nineteenth century, the lack of participation by the Indian tribes in the federation process ceased to reflect the distance between the federal government and the Indian tribes, at least insofar as the federal government was concerned. Congress regulated the internal affairs of Indian tribes and the Supreme Court upheld such regulation as within Congress's power to protect its "wards." Although Chief Justice John Marshall cast the emerging claim of federal plenary power over Indian tribes in terms of the right of "discovery," the uncomfortable truth (referred to in several Supreme Court opinions) is that the "right," if that term is apt, derived from conquest. The United States had the physical power and used it. By virtue of force, the federal government took land, removed people from their homes, attempted to dissuade them from observing their customs, and imposed its rule. The United States had official policies aimed at "relocation" and "termination" of Indian tribes, yet

[*] *Excerpted from* 56 U. CHI. L. REV. 671 (1989).

no document authorized that breadth of federal control. No consent of the governed (not even weak versions of consent theory) can be offered in support of the authority exercised by "the federal system" over Indian tribes.

Supreme Court case law repeatedly creates and then recognizes the enormity of the "plenary" federal power over the Indian tribes. Take, for example, a statement quoted in a recent Supreme Court case: "All aspects of Indian sovereignty are subject to defeasance by Congress." Ordinary constitutional exegesis would oblige the Court then to make reference to some provision in the Constitution, or other documents such as treaties, by which the Indian tribes ceded powers to the central government. Moreover, ordinary constitutional exegesis would also describe federal powers as having boundaries, albeit sometimes vague ones. Even when constitutional theorists believe in the plenary power of one branch of the federal government in particular instances, reference is made to constraints, to power that is checked—either by political recall, dependence upon other branches for implementation of the decisions made, or by other constitutional guarantees. Recall the example mentioned above, that Congress has "plenary power" over the federal courts' jurisdiction. While federal courts scholars are used to hearing that claim, they are similarly used to explaining that "plenary power" always comes with the caveat: but see the Bill of Rights.

Not so for Congress's power over the Indian tribes. There is no "but see the Bill of Rights" because the United States Supreme Court has held that the Bill of Rights has little application to Indian law. Members of Indian tribes cannot make Bill of Rights claims against their tribes, and Indian tribes are not protected by the Bill of Rights from federal decisions. For example, the Supreme Court has stated that "Indian occupancy, on land not specifically recognized by action authorized by Congress, may be extinguished by the federal Government without compensation." As William Canby has recently explained, "the sovereignty of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of the tribes."

Moreover, in contrast to the assumption that, whatever Congress might be able to do about the jurisdiction of the federal courts, Congress surely could not use race as a jurisdictional category, jurisdiction in cases involving Indians is jurisdiction based in part upon race. The status of "Indian" is defined, to some extent and in some contexts, by virtue of the quantum of "Indian blood" that an individual has. Federal courts have jurisdiction over certain crimes committed in Indian country that involve "Indians," and Indian tribal courts have criminal jurisdiction over member "Indians" but not over non-Indians.

Even in an era when many are comfortable with penumbras of

constitutional interpretation, it is difficult to "interpret" the Constitution in a manner that supports the proposition that the Congress has "plenary" control over intra-Indian tribe activities or that Congress can make or sanction racially-based jurisdictional decisions. Charles Wilkinson provides an apt description: the relationship between the Indian tribes and the federal government is "both pre-constitutional and extra-constitutional." As a consequence, federal Indian law throws into doubt some of the standard assumptions made by the legal academy in federal courts' jurisprudence. Instead of the expected (if complex) references to consent and to a federal government of limited powers, other, often unspoken rationales—conquest, violence, force—are the primary *sources* of the power exercised by the federal government over Indian tribes. . . .

[M]any commentators on Indian tribal law advance the possibility of creating a legally constrained relationship between the federal government and Indian tribes. Nell Jessup Newton argues for application of equal protection and due process principles to Indian tribes. Charles Wilkinson writes about developing "the constitutional status of tribalism," based in part on treaties among "the three landed sovereigns," Indian tribes, states, and the federal government. Robert Williams wants to turn to international law paradigms to delineate discrete spheres for Indian tribes, thereby enabling "Indian Nations to add their own voice to the competing discourses of the international community." Russel Barsh and James Henderson seek a tribal federalism in which "tribes must have no less political liberty than the states."

What are the bases of a vision that recognizes the autonomy of "sovereigns" within another sovereignty? What is meant by that autonomy? How much of that autonomy is dependent upon a vision of "sovereignty" that, if ever true, has surely vanished? Theories of sovereignty have long rested on the primacy of territory, of a government's control of and physical power over a specific area of land. . . .

The claim of sovereignty arises when one group makes a claim to be or to sustain rules different from another. A central question . . . is how much difference between state and national laws the federal government should encourage or tolerate.

Indian Civil Rights Act of 1968[*]
(United States)

§ 1301. Definitions

For purposes of this subchapter, the term

1. "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

2. "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

3. "Indian court" means any Indian tribal court or court of Indian offense.

§ 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall

1. make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

2. violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

3. subject any person for the same offense to be twice put in jeopardy;

4. compel any person in any criminal case to be a witness against himself;

5. take any private property for a public use without just compensation;

[*] Codified at 25 U.S.C. §§ 1301-03.

6. deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

7. require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;

8. deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

9. pass any bill of attainder or ex post facto law; or

10. deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Oliphant v. Suquamish Indian Tribe
Supreme Court of the United States
435 U.S. 191 (1978)

Mr. Justice REHNQUIST delivered the opinion of the Court.

Two hundred years ago, the area bordering Puget Sound consisted of a large number of politically autonomous Indian villages, each occupied by from a few dozen to over 100 Indians. These loosely related villages were aggregated into a series of Indian tribes, one of which, the Suquamish, has become the focal point of this litigation. By the 1855 Treaty of Point Elliott, the Suquamish Indian Tribe relinquished all rights that it might have had in the lands of the State of Washington and agreed to settle on a 7,276-acre reservation near Port Madison, Wash. Located on Puget Sound across from the city of Seattle, the Port Madison Reservation is a checkerboard of tribal community land, allotted Indian lands, property held in fee simple by non-

Indians, and various roads and public highways maintained by Kitsap County.[1]

The Suquamish Indians are governed by a tribal government which in 1973 adopted a Law and Order Code. The Code, which covers a variety of offenses from theft to rape, purports to extend the Tribe's criminal jurisdiction over both Indians and non-Indians. Proceedings are held in the Suquamish Indian Provisional Court. Pursuant to the Indian Civil Rights Act of 1968, defendants are entitled to many of the due process protections accorded to defendants in federal or state criminal proceedings. However, the guarantees are not identical. Non-Indians, for example, are excluded from Suquamish tribal court juries.

Both petitioners are non-Indian residents of the Port Madison Reservation. Petitioner Mark David Oliphant was arrested by tribal authorities during the Suquamish's annual Chief Seattle Days celebration and charged with assaulting a tribal officer and resisting arrest. After arraignment before the tribal court, Oliphant was released on his own recognizance. Petitioner Daniel B. Belgarde was arrested by tribal authorities after an alleged high-speed race along the Reservation highways that only ended when Belgarde collided with a tribal police vehicle. Belgarde posted bail and was released. Six days later he was arraigned and charged under the tribal Code with "recklessly endangering another person" and injuring tribal property. Tribal court proceedings against both petitioners have been stayed pending a decision in this case.

Both petitioners applied for a writ of habeas corpus to the United States District Court for the Western District of Washington. Petitioners argued that the Suquamish Indian Provisional Court does not have criminal

[1] According to the District Court's findings of fact "[The] Madison Indian Reservation consists of approximately 7276 acres of which approximately 63% thereof is owned in fee simple absolute by non-Indians and the remainder 37% is Indian-owned lands subject to the trust status of the United States, consisting mostly of unimproved acreage upon which no persons reside. Residing on the reservation is an estimated population of approximately 2928 non-Indians living in 976 dwelling units. There lives on the reservation approximately 50 members of the Suquamish Indian Tribe. Within the reservation are numerous public highways of the State of Washington, public schools, public utilities and other facilities in which neither the Suquamish Indian Tribe nor the United States has any ownership or interest."

The Suquamish Indian Tribe, unlike many other Indian tribes, did not consent to non-Indian homesteading of unallotted or "surplus" lands within their reservation pursuant to 25 U.S.C. § 348 and 43 U.S.C. §§ 1195-1197. Instead, the substantial non-Indian population on the Port Madison Reservation is primarily the result of the sale of Indian allotments to non-Indians by the Secretary of the Interior. Congressional legislation has allowed such sales where the allotments were in heirship, fell to "incompetents," or were surrendered in lieu of other selections. The substantial non-Indian landholdings on the Reservation are also a result of the lifting of various trust restrictions, a factor which has enabled individual Indians to sell their allotments.

jurisdiction over non-Indians. . . . We granted certiorari to decide whether Indian tribal courts have criminal jurisdiction over non-Indians. We decide that they do not. . . .

Respondents do not contend that their exercise of criminal jurisdiction over non-Indians stems from affirmative congressional authorization or treaty provision. Instead, respondents urge that such jurisdiction flows automatically from the "Tribe's retained inherent powers of government over the Port Madison Indian Reservation." Seizing on language in our opinions describing Indian tribes as "quasi-sovereign entities," the Court of Appeals agreed and held that Indian tribes, "though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress." According to the Court of Appeals, criminal jurisdiction over anyone committing an offense on the reservation is a "sine qua non" of such powers.

The Suquamish Indian Tribe does not stand alone today in its assumption of criminal jurisdiction over non-Indians. Of the 127 reservation court systems that currently exercise criminal jurisdiction in the United States, 33 purport to extend that jurisdiction to non-Indians.[7] Twelve other Indian tribes have enacted ordinances which would permit the assumption of criminal jurisdiction over non-Indians. Like the Suquamish these tribes claim authority to try non-Indians not on the basis of congressional statute or treaty provision but by reason of their retained national sovereignty.

The effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians, however, is a relatively new phenomenon. And where the effort has been made in the past, it has been held that the jurisdiction did not exist. Until the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than on punishment. In 1834 the Commissioner of Indian Affairs described the then status of Indian criminal systems: "With the exception of two or three tribes, who have within a few years past attempted to establish some few laws and regulations among themselves, the Indian tribes are without laws, and the

[7] Of the 127 courts currently operating on Indian reservations, 71 (including the Suquamish Indian Provisional Court) are tribal courts, established and functioning pursuant to tribal legislative powers; 30 are "CFR Courts" operating under the Code of Federal Regulations; 16 are traditional courts of the New Mexico pueblos; and 10 are conservation courts. The CFR Courts are the offspring of the Courts of Indian Offenses, first provided for in the Indian Department Appropriations Act of 1888. By regulations issued in 1935, the jurisdiction of CFR Courts is restricted to offenses committed by Indians within the reservation. The case before us is concerned only with the criminal jurisdiction of tribal courts.

chiefs without much authority to exercise any restraint."

It is therefore not surprising to find no specific discussion of the problem before us in the volumes of the United States Reports. But the problem did not lie entirely dormant for two centuries. A few tribes during the 19th century did have formal criminal systems. From the earliest treaties with these tribes, it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect. . . . According to the Attorney General in 1834, tribal criminal jurisdiction over non-Indians, is *inter alia*, inconsistent with treaty provisions recognizing the sovereignty of the United States over the territory assigned to the Indian nation and the dependence of the Indians on the United States. . . .

Congress's concern over criminal jurisdiction in this proposed Indian Territory contrasts markedly with its total failure to address criminal jurisdiction over non-Indians on other reservations, which frequently bordered non-Indian settlements. The contrast suggests that Congress shared the view of the Executive Branch and lower federal courts that Indian tribal courts were without jurisdiction to try non-Indians. . . .

While not conclusive on the issue before us, the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight. . . .

While in isolation the Treaty of Point Elliott would appear to be silent as to tribal criminal jurisdiction over non-Indians, the addition of historical perspective casts substantial doubt upon the existence of such jurisdiction. In the Ninth Article, for example, the Suquamish "acknowledge their dependence on the government of the United States." As Mr. Chief Justice Marshall explained in *Worcester v. Georgia* (1832), such an acknowledgment is not a mere abstract recognition of the United States' sovereignty. "The Indian nations were, from their situation, necessarily dependent on [the United States] . . . for their protection from lawless and injurious intrusions into their country." By acknowledging their dependence on the United States, in the Treaty of Point Elliott, the Suquamish were in all probability recognizing that the United States would arrest and try non-Indian intruders who came within their Reservation. . . .

By themselves, these treaty provisions would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction. But an examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. Indian

tribes do retain elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal Government. But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers "*inconsistent with their status.*"

Indian reservations are "a part of the territory of the United States." Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority." Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. "[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished." [B]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents. . . .

We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to *anyone* tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians. They have little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians. The judgments below are therefore *reversed.*

Mr. Justice MARSHALL, with whom THE CHIEF JUSTICE joins, dissenting.

I agree with the court below that the "power to preserve order on the reservation . . . is a sine qua non of the sovereignty that the Suquamish originally possessed." [I]n the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a necessary aspect of

their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation. . . .

D. Multiple Memberships: Indigenous Peoples as Citizens of Nation-States

Santa Clara Pueblo v. Martinez
Supreme Court of the United States
436 U.S. 49 (1978)

MARSHALL, J., delivered the opinion of the Court. . . .

This case requires us to decide whether a federal court may pass on the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members.

Petitioner Santa Clara Pueblo is an Indian tribe that has been in existence for over 600 years. Respondents, a female member of the tribe and her daughter, brought suit in federal court against the tribe and its Governor, petitioner Lucario Padilla, seeking declaratory and injunctive relief against enforcement of a tribal ordinance denying membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe. Respondents claimed that this rule discriminates on the basis of both sex and ancestry in violation of Title I of the Indian Civil Rights Act of 1968 (ICRA), which provides in relevant part that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws."

Title I of the ICRA does not expressly authorize the bringing of civil actions for declaratory or injunctive relief to enforce its substantive provisions. The threshold issue in this case is thus whether the Act may be interpreted to impliedly authorize such actions, against a tribe or its officers in the federal courts. For the reasons set forth below, we hold that the Act cannot be so read.

Respondent Julia Martinez is a fullblooded member of the Santa Clara Pueblo, and resides on the Santa Clara Reservation in Northern New Mexico. In 1941 she married a Navajo Indian with whom she has since had several children, including respondent Audrey Martinez. Two years before this marriage, the Pueblo passed the membership ordinance here at issue, which bars admission of the Martinez children to the tribe because their father is not a Santa Claran. Although the children were raised on the reservation and continue to reside there now that they are adults, as a result

of their exclusion from membership they may not vote in tribal elections or hold secular office in the tribe; moreover, they have no right to remain on the reservation in the event of their mother's death, or to inherit their mother's home or her possessory interests in the communal lands.

After unsuccessful efforts to persuade the tribe to change the membership rule, respondents filed this lawsuit in the United States District Court for the District of New Mexico, on behalf of themselves and others similarly situated. Petitioners moved to dismiss the complaint on the ground that the court lacked jurisdiction to decide intratribal controversies affecting matters of tribal self-government and sovereignty. The District Court rejected petitioners' contention, finding that jurisdiction was conferred by 28 U.S.C. § 1343(4)[*] and 25 U.S.C. § 1302(8).[**] The court apparently concluded, first, that the substantive provisions of Title I impliedly authorized civil actions for declaratory and injunctive relief, and second, that the tribe was not immune from such suit. Accordingly, the motion to dismiss was denied.

Following a full trial, the District Court found for petitioners on the merits. While acknowledging the relatively recent origin of the disputed rule, the District Court nevertheless found it to reflect traditional values of patriarchy still significant in tribal life. The court recognized the vital importance of respondents' interests, but also determined that membership rules were "no more or less than a mechanism of social . . . self-definition," and as such were basic to the tribe's survival as a cultural and economic entity.[6] In sustaining the ordinance's validity under the "equal protection clause" of the ICRA, 25 U.S.C. § 1302(8), the District Court concluded that the balance to be struck between these competing interests was better left to the judgment of the Pueblo:

> [T]he equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and should therefore be preserved. . . . Such a determination should be made by the people of Santa Clara; not only because they can best decide

[*] Editor's Note: Section 1343(4), amended in 1979, gave the district courts, at the time of this judgment: "jurisdiction of any civil action authorized by law to be commenced by any person . . . to secure equitable or other relief under any Act of Congress providing for the protection of civil rights."

[**] Editor's Note: Section 1302(8) provides: "No Indian tribe in exercising powers of self-government shall—(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."

[6] The Santa Clara Pueblo is a relatively small tribe. Approximately 1,200 members reside on the reservation; 150 members of the Pueblo live elsewhere. In addition to tribal members, 150-200 nonmembers live on the reservation.

> what values are important, but also because they must live with the decision every day. . . .
>
> To abrogate tribal decisions, particularly in the delicate area of membership, for whatever "good" reasons, is to destroy cultural identity under the guise of saving it.

[T]he Court of Appeals for the Tenth Circuit upheld the District Court's determination that 28 U.S.C. § 1343(4) provides a jurisdictional basis . . . "since [the ICRA] was designed to provide protection against tribal authority, the intention of Congress to allow suits against the tribe was an essential aspect . . . . Otherwise, it would constitute a mere unenforceable declaration of principles." The Court of Appeals disagreed, however, with the District Court's ruling on the merits. While recognizing that standards of analysis developed under the Fourteenth Amendment's Equal Protection Clause were not necessarily controlling in the interpretation of this statute, the Court of Appeals apparently concluded that because the classification was one based upon sex it was presumptively invidious and could be sustained only if justified by a compelling tribal interest. . . . Because of the ordinance's recent vintage, and because in the court's view the rule did not rationally identify those persons who were emotionally and culturally Santa Clarans, the court held that the tribe's interest in the ordinance was not substantial enough to justify its discriminatory effect.

Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. . . . Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." [T]hey have power to make their own substantive law in internal matters. See *Roff v. Burney* (1897) (membership)**;** *Jones v. Meehan* (1899) (inheritance rules); *United States v. Quiver* (1916) (domestic relations), and to enforce that law in their own forums, see, e.g., *Williams v. Lee* (1959).

As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus, in *Talton v. Mayes* (1896), this Court held that the Fifth Amendment did not "operat[e] upon" "the powers of local self-government enjoyed" by the tribes. In ensuing years the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment.

As the Court in *Talton* recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. . . . Title I of the ICRA, 25 U.S.C. §§ 1301-1303, represents an exercise of that authority. In 25 U.S.C. § 1302,

Congress acted to modify the effect of *Talton* and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment. In 25 U.S.C. § 1303, the only remedial provision expressly supplied by Congress, the "privilege of the writ of habeas corpus" is made "available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

[The Court held that Indian tribes had "common-law immunity from suit traditionally enjoyed by sovereign powers" and that ICRA had not expressly waived it, but that as "an officer of the Pueblo," petitioner Lucario Padilla was not immune and therefore that the Court had to decide whether the statute created rights enforceable in federal court.]

In addressing this inquiry, we must bear in mind that providing a federal forum for issues arising under § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself. Even in matters involving commercial and domestic relations, we have recognized that "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves," may "undermine the authority of the tribal court . . . and hence . . . infringe on the right of the Indians to govern themselves." *A fortiori*, resolution in a foreign forum of intratribal disputes of a more "public" character, such as the one in this case, cannot help but unsettle a tribal government's ability to maintain authority. Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in § 1303, a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent. . . . With these considerations of "Indian sovereignty . . . [as] a backdrop against which the applicable . . . federal statut[e] must be read," we turn now to those factors of more general relevance in determining whether a cause of action is implicit in a statute not expressly providing one. We note at the outset that a central purpose of the ICRA and in particular of Title I was to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans," and thereby to "protect individual Indians from arbitrary and unjust actions of tribal governments." There is thus no doubt that respondents, American Indians living on the Santa Clara Reservation, are among the class for whose especial benefit this legislation was enacted. . . . Moreover, we have frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms. . . . These precedents, however, are simply not dispositive here. Not only are we unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA, but to the contrary, the structure of the statutory scheme and the legislative history of

Title I suggest that Congress's failure to provide remedies other than habeas corpus was a deliberate one. . . .

Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members *vis-à-vis* the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-government." [S]ection 1302, rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed, selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments. . . . Thus, for example, the statute does not prohibit the establishment of religion, nor does it require jury trials in civil cases, or appointment of counsel for indigents in criminal cases. . . .

Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other. Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self- government. Not only would it undermine the authority of tribal forums . . . but it would also impose serious financial burdens on already "financially disadvantaged" tribes. . . .

Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. . . . Nonjudicial tribal institutions have also been recognized as competent law-applying bodies. . . . Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief. . . .

By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts. Our relations with the Indian tribes have "always been . . . anomalous . . . and of a complex character." Although we early rejected the notion that Indian tribes are "foreign states" for jurisdictional purposes under Art. III, we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways

foreign to the constitutional institutions of the federal and state governments. . . .

As we have repeatedly emphasized, Congress's authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. . . . Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that §1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers. . . .

Mr. Justice WHITE, dissenting. The declared purpose of the Indian Civil Rights Act of 1968 (ICRA or Act), 25 U.S.C. §§ 1301-1341, is "to insure that the American Indian is afforded the broad constitutional rights secured to other Americans." [T]he ICRA itself gives no indication that the constitutional rights it extends to American Indians are to be enforced only by means of federal habeas corpus actions. On the contrary, since several of the specified rights are most frequently invoked in non-custodial situations, the natural assumption is that some remedy other than habeas corpus must be contemplated. . . . While I believe that the uniqueness of the Indian culture must be taken into consideration in applying the constitutional rights granted in § 1302, I do not think that it requires insulation of official tribal actions from federal-court scrutiny. Nor do I find any indication that Congress so intended. . . .

Vann v. Kempthorne
United States District Court for the District of Columbia
467 F. Supp. 2d 56 (D.D.C. 2006)

KENNEDY, District Judge.

Marilyn Vann, Ronald Moon, Hattie Cullers, Charlene White, and Ralph Threat bring this action against the United States Department of the Interior and its Secretary ("DOI" or "Secretary"), seeking declaratory and injunctive relief. Plaintiffs allege that they are direct descendants of former slaves of the Cherokees, or free Blacks who intermarried with Cherokees, who were made citizens of the Cherokee Nation in the nineteenth century and are known as Cherokee Freedmen (the "Freedmen"). The Freedmen contend that the Cherokee Nation, with the approval of the Secretary, prevented them from participating in certain tribal elections in 2003 (the

"2003 Elections") and seek a court order declaring the 2003 Elections invalid and enjoining the Secretary from recognizing the results of such elections until the Freedmen are permitted to participate in voting. The Cherokee Nation has been granted limited intervention for the purpose of challenging this court's jurisdiction. . . .

In this suit, the Freedmen allege violations of their rights under the Thirteenth Amendment, the Fifteenth Amendment, the Cherokee Constitution, the Act of 1970, the Treaty of 1866 and the Indian Civil Rights Act of 1968, ("ICRA"). They seek review under the Administrative Procedures Act, contending that the Secretary has "breached [his] fiduciary duty to protect the voting rights of the Freedmen" by failing to require the Cherokee Nation to file its election procedures and by recognizing the new leaders, which would result in "millions of dollars of United States funds being dispersed to officials empowered by an unlawful election." The Freedmen also seek a declaratory judgment that the 2003 Elections are invalid, and an order enjoining the Secretary and from recognizing the results of such elections until the Freedmen are permitted to participate. . . .

Although American Indian nations retain some of the sovereignty they enjoyed prior to the founding of the United States, that sovereignty is "subject to the superior and plenary control of Congress." The tribes' "incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others." Accordingly, Congress has "plenary" authority to abrogate tribal immunity.

One of the federal laws that operates to abrogate the Cherokee Nation's immunity is the Thirteenth Amendment. Section 1 of the Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." Section 2 further provides that "Congress shall have power to enforce this article by appropriate legislation."

Judith Resnik

Dependent Sovereigns: Indian Tribes, States, and the Federal Courts[*]

A. The Interdependencies of Norms

1. *Sovereignty and Membership*

Neither the Santa Clara Pueblo membership rule nor the Martinez lawsuit can be understood outside the context of federal Indian law. . . . In the General Allotment Act of 1887, Congress authorized the President to "allot" land to individual Indians on reservations. The act provided for allotted land to be held in trust for a specified period of time and then conveyed to individuals. Further, the act authorized the Secretary of Interior to negotiate the purchase of "excess" lands remaining after allotment. Many commentators describe allotment as intended to erode Indian identity; individual land-holding was designed to break tribal connections. . . . As Justice O'Connor has explained, the legislation "seemed in part animated by a desire to force Indians to abandon their nomadic ways . . . to 'speed . . . assimilation' and in part a result of pressure to free new lands for further white development."

By 1934, Allotment Act policies had diminished Indian land holdings from 138 million acres to 48 million acres. [Government policy changed during the New Deal] . . . [I]n 1934, Congress passed the Indian Reorganization Act (IRA) . . . [which is] at variance with the prior effort to end all tribal identification. The act stopped allotment and required the Secretary of the Interior to attempt to restore "surplus" tribal lands acquired during allotment. The IRA also proclaimed Congress to be supportive of Indian self-governance. To further that goal, the IRA provided for the creation of tribal constitutions and laws, but required that such enactments be submitted to the Secretary of Interior for approval. The Act did permit Indians to decline to organize under its provisions, and some groups, including the Navajos, have not done so.

The Santa Clara Pueblo was among those tribes that organized under the provisions of the IRA. In 1935, the Secretary of the Interior approved the Santa Clara Pueblo's Constitution and Bylaws, which began with a preamble that states: "We, the people of Santa Clara Pueblo, in order to establish justice, promote the common welfare and preserve the advantages of self-government, do ordain and establish this constitution." Under the 1935 constitution, membership in the Santa Clara Pueblo extended to four groups of people: 1) those "of Indian blood" whose names appeared on the 1935 census roll; 2) all "persons born of parents both of whom are members of the Santa Clara pueblo;" 3) all "children of mixed marriages between

[*] *Excerpted from* 56 U. CHI. L. REV. 671 (1989).

members of the Santa Clara pueblo and nonmembers, provided such children have been recognized and adopted by the council;" and 4) all "persons naturalized as members of the pueblo."

After setting forth its articles of governance, the Santa Clara Constitution provided for amendment, . . . [approved in] November 21, 1939 [by] the Assistant Secretary of the Interior. . . . The 1939 rules extended membership in the Santa Clara Pueblo to only two groups: "all children born of marriages between members of the Santa Clara Pueblo" and "children born of marriages between male members of the Santa Clara Pueblo and non-members." [T]he 1939 amendment stated: "Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members . . ." and that "persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances."

2. New and Old Customs

One of the questions that preoccupied the district and appellate courts that decided *Santa Clara* was whether the Santa Clara Pueblo had "changed" its membership rules in 1939. The parties to the case offered evidence about how children of women married to non-Santa Clarans had been treated prior to the 1939 Ordinance, and about the inclusion of children of unmarried Santa Claran women as members of the Pueblo. The lower court concluded that there had not been a "hard and fast rule" about the treatment of children of mixed marriages, but case-by-case decisionmaking. Given that the prior custom had not been reduced to a single specified rule and that male lineage was not always a prerequisite to being a "Santa Claran," the parties offered the courts information from anthropologists and Pueblo members about the impact of gender on one's life in the Pueblo.

The briefs and court opinions attempted to describe the Santa Clara Pueblo's pre-1939 membership rule in terms of whether it was matrilineal, matrilocal, and matriarchal or patrilineal, patrilocal, and patriarchal. These categories address whether membership in a given culture, religion, or tribe is dependent upon the genes of either mothers or fathers, whether choice of residence is controlled by the location of the families of either women or men, and whether power is held by either women or men. These concepts, formulated by Western anthropologists, assume gender as an organizing category, assume the utility of description of societies by these terms, sometimes assume interrelationship among lineage, locality, and gender control, and generally assume that societies are either one or the other.

Diverse information is available about gender relations at the Santa Clara Pueblo. Pueblo members and anthropologists (some of whom testified at the trial) offer varying descriptions of whether the Santa Clara Pueblo was matrilineal, patrilineal, or neither. Prior to 1939, the Pueblo unquestionably

made some distinctions based upon gender. Role differentiation between sexes was reported, but translating the meaning of the distinctions drawn is more complex. For example, one anthropologist of Pueblo culture has written: "Distinctions of sex are marked in the Pueblo culture, in dress, in occupations, and in the ceremonial life. The distinctions are a matter of division of functions between the sexes rather than of subordination of one sex to the other." In contrast, another scholar has reported that "women were considered second-class citizens at Santa Clara Pueblo."

The difficulty in interpreting this information stems from the problem of disentangling the viewer from the viewed. Recent feminist work has raised questions both about the perspective of the anthropologists who study culture and about the patrilineal/matrilineal categories themselves, which may reflect more about the dualistic modeling of nineteenth and twentieth century anthropologists than the societies that they study. In addition to perceiving the inadequacies of the dichotomization, feminist anthropologists have distinguished between the official holders of positions of authority and those who hold power, and have attempted to be careful about transplanting Western values about roles onto other societies. To be concrete, because the United States culture devalues the daily activities of food-making does not mean that those who do such tasks in other cultures are similarly devalued. Because United States culture exhibits dichotomized, stable gender-based hierarchies does not, inevitably, mean that other cultures must. In short, the task of federal court construction of a description of Santa Clara practices regarding women risks imposing one culture's categories upon another. While the 1939 Ordinance reflects a gendered hierarchy, the prior practices about treatment of children of mixed marriages are less obviously male supremacist.

Although the *Santa Clara Pueblo* case was litigated with much discussion of these issues, I must pause to ask whether it should matter, to a federal court or the Congress, whether the Santa Clara rule was an old or a new one. The longevity of a particular membership rule or of general rulemaking about membership may not have any relevance. An alternative conception is that tribal "sovereignty" means that its membership rules are not subject to another "sovereign's" authority. If the claim is that Santa Clara Pueblo is itself "sovereign" (either because its political life predates the federal government or because the federal government recognizes the Pueblo's autonomy), then the sovereign is entitled to change its rules, to invoke rules of recent vintage as well as those that rely upon ancient practices. . . . The Supreme Court opinion seems to have adopted (implicitly) the view that the vintage of the rule was not relevant. . . .

One possible response to arguments based on historic continuity is to say that continuity over time has little normative significance, that the Pueblo's authority to decide membership rules should be grounded in a

current right to be different rather than upon proof that these membership rules were longstanding. To insist upon historical continuity may be either a search by romantics for the picturesque, or by conservatives, unwilling to recognize that which did not predate themselves and wanting the world as they know it not to change. Yet neither the emotive power of long-held traditions nor the potential for the oppression embodied in those long-held traditions should be denied. Southern states had a history of slavery and claimed their social self was constituted by practices about which "outsiders" should not dictate.

The longevity of a tradition and the role that tradition played in a community's social ordering is of relevance to the concern that "outsiders" are "intruding." However, the existence of a tradition does not decide whether the outsiders are really "outside," whether intrusion is really "intrusive," or whether one should indeed intrude. Before sharing the Supreme Court's assumption that the Santa Clara Pueblo's decision about its 1939 membership rules was an act of sovereignty with which the federal courts should not interfere, more information is required about the evolution of those rules in the context of the relationship between the Pueblo and the United States government.

3. Codification of Membership Rules

The Santa Clara Pueblo membership rule is part of the written codification of Santa Clara laws that began in 1934 with the Pueblo's adoption of a constitution. Recall the words of the Santa Clara Constitution's preamble: "We, the people of Santa Clara Pueblo, . . . do ordain and establish. . . ." The phrases are familiar because the words in the Pueblo document come from the United States Constitution. Consider the process by which tribal constitutions came into being. . . . In the 1930s, the Department of Interior prepared model constitutions for tribes. "The boilerplate provisions of this model were adopted with a few alterations by virtually all tribes which voted to organize under that Act. . . ." The BIA's 1987 book, entitled *Developing and Reviewing Tribal Constitutions and Amendments: A Handbook for BIA Personnel*, details BIA policy for drafting constitutions. . . . [A]pproval is only accorded to "appropriate" constitutions. . . . When "a major change in membership requirements which would drastically alter or increase the size of the tribe" is made, "central office" rather than branch office review is required. . . .

In 1935, the Department made a "declaration" of its views on "Membership in Indian Tribes"; a circular addressed to all "engaged in Indian Reorganization Act" stated that "Congress [has] a definite policy to limit the application of Indian benefits . . . ." To implement that policy, the Department planned "to urge and insist that any constitutional provision conferring automatic tribal membership upon children hereafter born, should

limit such membership to persons who reasonably can be expected to participate in tribal relations and affairs." Suggested tests for such membership included having both parents be recognized tribal members or be residents of the reservation or that an individual possess a "certain degree of Indian blood." . . .

To acknowledge the United States' role in these rules is not to deny the role of the Pueblo. Cultural interaction was, of course, at work—and interaction "works" in two directions. Indian tribes, such as the Iroquois Confederacy (which included the Mohawk, Seneca, Onadaga, Oneida, and Cayuga tribes) had a structure of government that predated and may have influenced the drafting of the United States Constitution. Some Indian tribes, such as the Cherokee in the nineteenth century, had detailed written laws that were in some respects similar to those of the United States. . . .

4. *The Need for [and Benefits of] Membership*

[M]embership . . . is a category created by the Santa Clara Pueblo in the context of its interaction with the United States. Membership is a category imposed by the United States, which has "counted" Indians for a variety of purposes since the cavalry went around naming and numbering Indians in the nineteenth century. . . .

The availability of federal benefits is central to understanding why the Martinez family tried to obtain recognition of its children as members of the Pueblo. According to the trial court opinion, the "most important of the material benefits that Ms. Martinez's children sought is that referred to as land use rights." The United States government holds the Pueblo land in trust for the Pueblo as a whole. The Santa Clara Council has authority to specify individual use of land. The United States government, through the Department of Housing and Urban Development, gives monetary assistance to member Indians who build homes on Pueblo land. Federal policy looked to tribal decisions; the Martinez family argued that, without the Pueblo's recognition of them as members, the Martinez children could not receive federal health and housing assistance. Thus, being a "member" of the Santa Clara Pueblo was not simply an event of moment for purposes of that community. . . .

6. Membership and Gender

The 1939 Santa Clara membership rules are . . . congruent with United States' traditions of subordination of women. United States common law rules were that the husband conferred status upon the wife and the father conferred status on the child. . . .

7. Joint Venturing

The "Santa Clara Rule" is intertwined with United States' rules and culture. James Clifford has said it well: "Modern Indian lives—lived within and against the dominant culture and state—are not captured by categories like tribe or identity." Implicit in the Court's opinion, in its references to Santa Clara Pueblo as a distinct political entity, is what Clifford calls the erroneous "idea of cultural wholeness." The restrictive, gender-discriminatory membership rule "of" the Santa Clara Pueblo is generated out of conditions of adversity, conditions imposed by centuries of United States policy towards Indian tribes. The rule is written in the light of limited federal benefits to be divided amongst those who bear the label "Santa Claran." The rule is comprehensible to the "dominant culture" because it too accepts subordination of women.

Many commentators sympathetic to tribal sovereignty have heralded the *Santa Clara Pueblo* case as an important marker in federal Indian law. From the perspective of tribes, the Indian Civil Rights Act of 1968 is an example of federal intrusion; *Santa Clara Pueblo* is, to some extent, a buffer. I have not explored the *Santa Clara Pueblo* case to offer a "better" answer on the tribal sovereignty/federal intrusion issue than that given by the Court, nor am I claiming that the role the United States played in creating tribal rules justifies further intrusion. Rather, my purpose is to demonstrate that the case tells more about United States' norms than it does about tribal norms. I am skeptical about how much of a safe haven *Santa Clara Pueblo* provides for those seeking tribal sovereignty. Because federal norms about the treatment of women were not really threatened by the Santa Clara Pueblo membership rule, the case was an "easy" one for the Court to proclaim its commitment to tribal sovereignty. For those of us who believe in women's rights and are also concerned about federal government imperialism, the case becomes hard. . . .

Kitok v. Sweden

Office of the High Commissioner for Human Rights
Human Rights Committee Communication No. 197/1985

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights, adopts the following:

1. [Ivan Kitok,] a Swedish citizen of Sami ethnic origin, born in 1926. . . . claims to be the victim of violations by the Government of Sweden of articles 1 and 27 of the Covenant.[*]

[*] Editor's Note: Article 1 of the International Covenant on Civil and Political Rights provides:

2.1 It is stated that Ivan Kitok belongs to a Sami family which has been active in reindeer breeding for over 100 years. On this basis, the author claims that he has inherited the "civil right" to reindeer breeding from his forefathers as well as the rights to land and water in Sorkaitum Sami Village. It appears that the author has been denied the exercise of these rights because he is said to have lost his membership in the Sami village ("sameby," formerly "lappby"), which under a 1971 Swedish statute is like a trade union with a "closed shop" rule. A non-member cannot exercise Sami rights to land and water.

2.2 In an attempt to reduce the number of reindeer breeders, the Swedish Crown and the Lapp bailiff have insisted that, if a Sami engages in any other profession for a period of three years, he loses his status and his name is removed from the rolls of the lappby, which he cannot re-enter except with special permission. Thus it is claimed that the Crown arbitrarily denies the immemorial rights of the Sami minority and that Ivan Kitok is the victim of such denial of rights.

2.3 With respect to the exhaustion of domestic remedies, the author states that he has sought redress through all instances in Sweden, and that the Regeringsrätten (Highest Administrative Court of Sweden) decided against him on 6 June 1985, although two dissenting judges found for him and would have made him a member. . . .

9.2 The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an-ethnic community, its application to an individual may fall under article 27 of the Covenant. . . .

9.5 According to the State party, the purposes of the Reindeer Husbandry Act are to restrict the number of reindeer breeders for economic

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> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 27 of the Covenant provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

and ecological reasons and to secure the preservation and well-being of the Sami minority. Both parties agree that effective measures are required to ensure the future of reindeer breeding and the livelihood of those for whom reindeer farming is the primary source of income. The method selected by the State party to secure these objectives is the limitation of the right to engage in reindeer breeding to members of the Sami villages. The Committee is of the opinion that all these objectives and measures are reasonable and consistent with article 27 of the Covenant.

9.6 The Committee has none the less had grave doubts as to whether certain provisions of the Reindeer Husbandry Act, and their application to the author, are compatible with article 27 of the Covenant. Section 11 of the Reindeer Husbandry Act provides that:

> A member of a Sami community is:
>
> 1. A person entitled to engage in reindeer husbandry who participates in reindeer husbandry within the pasture area of the community.
>
> 2. A person entitled to engage in reindeer husbandry who has participated in reindeer husbandry within the pasture area of the village and who has had this as his permanent occupation and has not gone over to any other main economic activity.
>
> 3. A person entitled to engage in reindeer husbandry who is the husband or child living at home of a member as qualified in subsection 1 or 2 or who is the surviving husband or minor child of a deceased member.

Section 12 of the Act provides that:

> A Sami community may accept as a member a person entitled to engage in reindeer husbandry other than as specified in section 11, if he intends to carry on reindeer husbandry with his own reindeer within the pasture area of the community.
>
> If the applicant should be refused membership, the Landsstyrelsen may grant him membership, if special reasons should exist.

9.7 It can thus be seen that the Act provides certain criteria for participation in the life of an ethnic minority whereby a person who is ethnically a Sami can be held not to be a Sami for the purposes of the Act.

The Committee has been concerned that the ignoring of objective ethnic criteria in determining membership of a minority, and the application to Mr. Kitok of the designated rules, may have been disproportionate to the legitimate ends sought by the legislation. It has further noted that Mr. Kitok has always retained some links with the Sami community, always living on Sami lands and seeking to return to full-time reindeer farming as soon as it became financially possible, in his particular circumstances, for him to do so.

9.8 In resolving this problem, in which there is an apparent conflict between the legislation, which seems to protect the rights of the minority as a whole, and its application to a single member of that minority, the Committee has been guided by the ratio decidendi in the *Lovelace* case (1977), namely, that a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole. After a careful review of all the elements involved in this case, the Committee is of the view that there is no violation of article 27 by the State party. In this context, the Committee notes that Mr. Kitok is permitted, albeit not as of right, to graze and farm his reindeer, to hunt and to fish.