2002

Aboriginal Governments and the Charter: Lessons from the United States

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Twenty years have passed since the enactment of the *Canadian Charter of Rights and Freedoms* as one of the additions to the Constitution contained in the *Constitution Act, 1982*. Since then, an on-going debate has ensued over the application of the *Charter* to Aboriginal governments. Discussions of this issue usually centre on two questions, one legal and the other normative: first, does the *Charter* apply to Aboriginal governments as a matter of Canadian constitutional law, and second, *should* the *Charter* apply to Aboriginal governments?

These questions obviously beg a preliminary question of what is meant by “Aboriginal governments.” In an earlier article, I identified three categories of Aboriginal governments that need to be considered in this context: (1) traditional Aboriginal governments, defined as “Indian, Inuit, and Métis governments which do not have a statutory or explicit constitutional base, but which exist or could be constituted by Aboriginal peoples as expressions of their inherent right of self-government”; (2) *Indian Act* band council governments; and (3) other forms of Aboriginal government, arising out of land claims agreements or statutory provisions. To these should now be added the Nunavut Government, a territorial government created by federal statute, like those of the Yukon and the

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2 Ibid. at 63-64 in *Emerging Justice* at 217.
4 The other forms of Aboriginal government discussed in the article are Cree local government under the James Bay and Northern Quebec Agreement and Sechelt Indian government under the *Sechelt Indian Band Self-Government Act, S.C. 1986, c. 27.* A more recent example can be found in the Nisga’a Final Agreement, initialed August 4, 1998. Chapter 2, para. 9, of this Agreement provides: “The *Canadian Charter of Rights and Freedoms* applies to Nisga’a Government in respect of all matters within its authority, bearing in mind the free and democratic nature of Nisga’a Government as set out in this Agreement.”

*Canadian Journal of Law and Society / Revue Canadienne Droit et Société,* 2002, Volume 17, no. 2, pp. 73-105
Northwest Territories, that is under the *de facto* control of the Inuit who comprise about 80 per cent of the population of the territory.\(^7\)

This article is limited to the application of the *Charter* to traditional Aboriginal governments, as defined above, which will be referred to hereinafter simply as Aboriginal governments. In the main, the article leaves aside the unresolved question of whether the *Charter* currently applies to these governments as a matter of Canadian constitutional law,\(^8\) seeking instead to shed some light on the normative issue of whether the *Charter* should apply. It is not my intention, however, to attempt to resolve this controversial political issue, or even to survey and assess the various arguments others have made for and against the application of the *Charter* in this context.\(^9\) Rather, my modest goal is to contribute what I can to this debate by looking south of the border to the American experience with the

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\(^7\) Note that s.32(1)(a) of the *Charter* provides that it applies "to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and the Northwest Territories". Given that the Constitution is a "living tree" that has to be interpreted so as to apply in contemporary contexts (*Edwards v. Canada (A.G.)* [1930] A.C. 124 at 136 (P.C.)), the courts would probably hold the Nunavut Government to be subject to the *Charter*, as are the governments of the Yukon and Northwest Territories.


application of civil rights guarantees to tribal governments, and see whether there is anything we in Canada can learn from that experience.  

Tribal Governments and Civil Rights in the United States

Indian Sovereignty and the American Constitution

Ever since the decisions of Chief Justice Marshall in Cherokee Nation v. Georgia and Worcester v. Georgia in the early 1830s, Indian tribes in the United States have been regarded in American law as quasi-independent nations. While their original sovereignty was diminished by European colonization and their inclusion within the boundaries of the United States, they retained authority over their own territories and internal affairs. This authority does not depend on any delegation of jurisdiction from the United States; instead, it is derived from the tribes' "inherent powers of a limited sovereignty which has never been extinguished." This residual sovereignty is nonetheless subject to the plenary power of Congress over the Indian tribes, which can be used to diminish their authority. But to the extent that tribal sovereignty is not inconsistent with the tribes' incorporation into the United States and has not been limited by Congress, tribal governments can continue to exercise the inherent sovereignty of the Indian nations.

Given that Indian sovereignty pre-dates the formation of the United States and entails inherent rather than delegated authority, tribal governments are outside the scope of the American Constitution. As a consequence, tribal governments are not subject to the civil rights guarantees...
contained in the Bill of Rights Amendments to the Constitution. In *Talton v. Mayes*,16 this issue arose in the context of the grand jury requirement in the Fifth Amendment. The Supreme Court decided that this requirement does not apply to a tribal court exercising criminal jurisdiction under the laws of the Cherokee Nation. In the words of the Supreme Court,

... the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States. It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment.17

The *Talton* decision had far-reaching effect, for it "meant that such constitutional guarantees as free speech, the free exercise of religion, the right to an attorney in a criminal case, and similar benefits were not available to American Indians [in their relations with their own tribal governments] unless specifically provided for in a tribal code or constitution."18 Nor did a 1924 federal statute19 conferring citizenship on all Indians born in the United States extend these constitutional protections to them in relation to their own governments.20 In *Native American Church v. Navajo Tribal Council*,21 a Tribal Ordinance prohibiting importation and use of peyote on the Navajo Reservation was challenged as a violation, *inter alia*, of the First Amendment guarantee of freedom of religion, since members of the plaintiff church used it in their religious ceremonies. The Tenth Circuit Court of Appeals denied relief, stating:

No provision in the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so. It follows that neither, under the Constitution or the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations, even though they may have an impact to some extent on forms of religious worship.22

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16 163 U.S. 376 (1896).
17 Ibid., 384. For a critical assessment of this decision, see Schwartz, *supra* note 9 at 366-70. For affirmation of the ruling in *Talton v. Mayes* that the U.S. Bill of Rights does not apply to the Indian tribes, see *Duro v. Reina*, 495 U.S. 676 (1990) at 693; *Nevada v. Hicks*, 121 S.Ct. 2304 (2001) at 2323 (Souter J.).
20 J. Chaudhuri, "American Indian Policy: An Overview" in V. Deloria, Jr., ed., *American Indian Policy in the Twentieth Century* (Norman : University of Oklahoma Press, 1985) 15 at 30. See also Note, "The Constitutional Rights of the American Tribal Indian" (1965) 51 Virginia L. Rev. 121 at 135 [thereinafter "Constitutional Rights"] where it is argued that the extension of American citizenship to Indians generally should have subjected tribal governments to constitutional guarantees.
21 272 F.2d 131 (10th Cir. 1959).
This decision was consistent with the same Court’s earlier decision in *Martinez v. Southern Ute Tribe*, where the Court relied on *Talton* to reject a due process challenge to tribal membership determinations. Similarly, in *Glover v. United States* a Federal District Court denied a writ of *habeas corpus* to a petitioner who alleged that he had been denied legal counsel and a right to appeal by a tribal court because, in the Court’s words, “the provisions of the Federal constitution guaranteeing due process and the right to counsel do not apply in prosecutions in tribal courts.”

Tribal immunity from constitutional protections has meant that tribal members and others have been denied recourse for alleged violations of their civil rights by tribal governments and courts. This denial of constitutional guarantees came under close scrutiny in the early 1960s as the civil rights movement gained momentum in the United States. The result was the *Indian Civil Rights Act*, enacted by Congress in 1968 to place tribal governments and courts under limitations similar to those placed on the federal and state governments by the Amendments to the Constitution.

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25 *Ibid.* at 21. See also *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), cert. denied, 358 U.S. 932 (1959); *Twin Cities Chipewa Tribal Council v. Minnesota Chipewa Tribe*, 370 F.2d 529 (8th Cir. 1967) at 533. It seems, however, that *habeas corpus* would lie against a detention order issued by a tribal court in violation of the Constitution if that court was established under an Act of Congress and was in effect acting as a federal agency: See *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965), and *Settler v. Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969), cert. denied, 398 U.S. 903 (1970). Also, the prohibition against slavery in the Thirteenth Amendment, which limits private as well as federal and state actions, has been held to invalidate a tribal custom permitting slavery. See *In re Sah Quah*, 31 F.327 (D. Alaska 1886), and Cohen’s *Handbook*, supra note 14 at 665, 671-72 (note, however, that *In re Sah Quah* was decided before *Talton v. Mayes*, supra note 17).


27 *E.g.*, legal commentators used instances of violations of civil rights by tribal governments to support their argument that the Bill of Rights should be applied to those governments: see “Constitutional Rights”, supra note 20; Note, “The American Indian – Tribal Sovereignty and Civil Rights” (1966) 51 Iowa L. Rev. 654; R.L. Barsh & J.Y. Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980) at 254. See also the reports cited in note 33, *infra*.

28 Pub. L. 90-284, Titles II-VII: see *infra* notes 45-47.
The Indian Civil Rights Act

Legislative History

The Indian Civil Rights Act resulted from investigations undertaken by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, chaired by Senator Sam Ervin of North Carolina. Preliminary inquiries by Ervin's subcommittee revealed numerous allegations of violations of the civil rights of Indians by tribal authorities as well as by federal, state and local officials. But while there are constitutional protections against such violations by non-tribal officials, we have seen that tribal authorities are not subject to those constitutional guarantees. Senator Ervin accordingly decided to investigate the matter. Citing his own subcommittee's preliminary study and two other recent reports on Indian affairs as justifications, he announced to Congress on August 25, 1961, that his subcommittee was going to conduct hearings on "the constitutional protections afforded reservation Indians as compared to those of other American citizens.

The hearings conducted by Senator Ervin's Subcommittee on Constitutional Rights continued until 1965. Testimony revealed that, of 435 tribes, 247 had organized constitutions; of these, 117 had constitutional provisions protecting individual civil rights. In tribal courts, Anglo-American due process protections — such as rights to legal counsel, to remain silent, to trial by jury, and to appeal — were often lacking. While cultural differences provided a partial explanation why tribal governments and courts operated in accordance with norms different from those of the rest of

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30 Whether Indians generally were in a position to make use of these protections is another matter. During the hearings which Ervin's subcommittee ended up holding, testimony revealed that most complaints involved violations of civil rights in "the enforcement of state criminal laws by local authorities in communities relatively near Indian reservations," ibid. at 584 [footnote omitted]. See also Nations Within, supra note 23 at 207-8. Obviously the constitutional protections were not very effective in practice.
32 On Ervin's motives for undertaking this task, see Burnett, supra note 29 at 574-76.
36 Burnett, supra note 29 at 579.
37 Burnett, supra note 29 at 579-81. See also "Indian Bill of Rights", supra note 26 at 1356-58.
American society, practical considerations were also important, at least for tribal courts. In particular, given their limited resources many tribal justice systems could not afford legally-trained personnel, jury trials, or appeal judges.\(^{38}\) The general counsel for the Warm Springs Confederation, one of the larger, more affluent tribes, testified that, without financial assistance, “imposition upon the tribal courts of all the requirements of due process as we non-Indians know them, would mean the end of our tribal courts.”\(^{39}\) Tribal councils, however, were accused by some witnesses of violations of fundamental rights, such as freedom of religion, that did not stem from financial constraints.\(^{40}\) But testimony also revealed that some of the problems resulted from failure by the Bureau of Indian Affairs (BIA) to respect due process requirements on reservations. According to Donald Burnett, Jr.,

\[\text{[t]he thrust of the testimony was that the BIA was less interested in the adequacy of law enforcement on the reservations and in the constitutional rights of the people for whom it was responsible than in maintaining control over tribal courts and councils and over the affairs of individuals. The attitude was neatly expressed, said the Shoshone-Bannock attorney, in a remark attributed to a BIA employee at Fort Hall: “We didn’t have any trouble with the Indians until they found out they had constitutional rights.”}\(^{41}\)

In proposing legislation to Congress to remedy the problems which the hearings had revealed, Senator Ervin nonetheless decided to concentrate on violations of civil rights by tribal authorities.\(^{42}\) He acknowledged that these violations occur, “not from malice or ill will, or from a desire to do injustice, but from the tribal judges’ inexperience, lack of training, and unfamiliarity with the traditions and forms of the American legal system.”\(^{43}\) He offered the following rationale for a legislative solution: “It is, of course, preferable that the tribes themselves assure basic rights to each member, but when this is not the case it is incumbent upon Congress to take action.”\(^{44}\) Several bills were introduced by Senator Ervin in Congress, culminating in passage on April 11, 1968, of the Indian Civil Rights Act.\(^{45}\) For reasons not relevant to

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\(^{38}\) Burnett, supra note 29 at 581.

\(^{39}\) Hearings on Constitutional Rights of the American Indian Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 88th Congress, 1st Sess., pt. 4 at 872 (1963), as cited in Burnett, supra note 29 at 581. On the same page, Burnett pointed out that “[a]verage family incomes of $1,500, land held in trust by the BIA, and meagre royalties received for white development of reservation resources provided inadequate bases for tribal revenue” [footnotes omitted].

\(^{40}\) Burnett, supra note 29 at 581-82; “Indian Bill of Rights”, supra note 26 at 1358-59.

\(^{41}\) Burnett, supra note 29 at 583 [footnote omitted].

\(^{42}\) Ibid. at 588-89.

\(^{43}\) 113 Cong. Rec. S13473 (23 May 1967) (statement of Senator Ervin) [emphasis added].

\(^{44}\) “Rights of Indians”, supra note 31.

the present discussion,\textsuperscript{46} this legislation was included as Titles II to VII of another statute, the \textit{Civil Rights Act} of 1968.\textsuperscript{47}

\textbf{Provisions and Expressed Concerns}

The \textit{Indian Civil Rights Act (ICRA)} replicates most of the American Bill of Rights and the equal protection and due process aspects of the Fourteenth Amendment, with certain exceptions to be discussed below.\textsuperscript{48} The relevant provisions are in §§ 1302-1303,\textsuperscript{49} which need to be reproduced in full:

\textbf{§ 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;

(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

\textsuperscript{46} On the tactics of enactment, see Burnett, \textit{supra} note 29 at 604-14.

\textsuperscript{47} Pub. L. 90-284, 82 Stat. 77.

\textsuperscript{48} The relevant provisions are contained in Title II of the \textit{Civil Rights Act} of 1968. Titles III to VII deal with other Indian matters that are beyond the scope of this article, including the drafting of a model code for Courts of Indian Offenses, limitations on state jurisdiction over Indian reservations, the addition of assault resulting in serious bodily injury to the major crimes committed by reservation Indians over which the federal courts have jurisdiction, federal government approval of employment of legal counsel by Indians, and revision and publication of certain works relating to Indian affairs, including Cohen's \textit{Handbook} (1st ed. 1942), \textit{supra} note 14.

\textsuperscript{49} § 1301 is an interpretive section containing the following definitions:

(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

(3) “Indian Court” means any Indian tribal court or court of Indian offense. In 1990 and 1991, § 1301(2) was amended to include “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians”: Pub. L. 101-511, § 8077(b), 104 Stat. 1856, 1892; Pub. L. 102-37, 105 Stat. 646 (this was to reverse the effect of \textit{Duro v. Reina, supra} note 17, where it had been held that Indian tribes do not have criminal jurisdiction over non-member Indians): see Nell Jessup Newton, “Permanent Legislation to Correct \textit{Duro v. Reina}” (1992) 17 Am. Indian L. Rev. 109; A.T. Skibine, “\textit{Duro v. Reina} and the Legislation that Overturned It: A Power Play of Constitutional Dimensions” (1993) 66 S. Cal. L. Rev. 767.
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 $5000, or both; 50

(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;51 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.

The part of the First Amendment prohibiting the establishment of religion was deliberately omitted from § 1302 so that the theocratic governments of some Indian tribes, particularly the Southwest Pueblos, would not be threatened. 52 The Second Amendment right to keep and bear arms was left out as well.53 The Fifth Amendment requirement of a grand jury for capital and other infamous crimes was also omitted, no doubt because Congress had used its plenary power in 1885 to assume jurisdiction over major crimes that would otherwise have been within the jurisdiction of the tribes.54 Unlike the


51 This provision comes from the original Constitution, art. I,§ 9, cl. 3, not from the Amendments.


53 See Lazarus, supra note 26 at 339, where it is suggested that this omission was perhaps due to recollections of the Sioux and Apache military campaigns of the nineteenth century. However, the omission would hardly be effective to keep the tribes from arming, as Indians would still have the right to keep and bear arms under the Second Amendment to the Constitution unless prohibited from doing so by their own tribal governments, to which the Amendment does not apply.

54 By the Major Crimes Act, supra note 50, Congress severely restricted the impact of Ex Parte Crow Dog, 109 U.S. 556 (1883), where the Supreme Court had held that the Indian tribes had jurisdiction over crimes committed by Indians against Indians in Indian Country; See S.L. Harring, Crow Dog’s Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century (New York: Cambridge University Press, 1994).
Sixth Amendment, exercise of the right to counsel in criminal proceedings was made to be at the expense of the accused so that the limited financial resources of the tribes would not be strained. Finally, the right to a jury trial was limited to offenses punishable by imprisonment. Rather than simply applying the American Bill of Rights to the Indian tribes, Congress thus made some attempt to acknowledge and take account of their unique circumstances.

Application of even this modified version of the Bill of Rights was nonetheless opposed by some Indian tribes, especially the Pueblos in the Southwest. A 1991 report of the United States Commission on Human Rights, based on a five-year study of the enforcement of the ICRA, summarized some of their objections:

Among the general concerns raised were that the ICRA was an infringement on tribal right to self-government, that implementation of the ICRA's requirements would diminish or eliminate tribal customs and traditions, that the ICRA was unnecessary in light of similar guarantees and traditions in tribal law; and concern about where the funding for these new guarantees was to come from in light of the tribes' meager resources.


56 Some of the arguments against inclusion of a right to trial by jury, especially in civil matters, included cost, the difficulty of finding impartial jurors in small communities, and the inappropriateness of this form of trial in societies where kinship predominates: Civil Rights Commission Report, supra note 55 at 9. During the Congressional hearings on the legislation, Domingo Montoya, Chairman of the All Indian Pueblo Council of New Mexico, said this: "it [was] no more logical to use a jury system for the settlement of internal matters within the extended 'family' that makes up a pueblo than it would be to use a similar system within the framework of an Anglo-American family as a means for enforcing internal rules or resolving internal disputes": Rights of Members of Indian Tribes: Hearing Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Congress, 2nd Sess. (1968) [hereinafter Rights of Members Hearings] at 37.


58 This Commission was established by Congress in 1957 as an independent, bi-partisan agency to investigate allegations of discriminatory denial of the right to vote, collect information and study legal developments in relation to discrimination and equal protection, appraise federal laws and policies regarding discrimination and equal protection, and submit reports and recommendations to Congress and the President: Civil Rights Commission Report, supra note 55, inside front cover.

59 The sources of information for the Report are described thus: "At the core of the study were hearings in five locations in which testimony was received from scores of individuals including, among others, tribal judges, tribal council members, Indian law scholars, tribal lay advocates, United States Attorneys, attorneys who practice before tribal courts, representatives of tribal judges associations, and the Bureau of Indian Affairs. Information was also gathered through field interviews, staff research, oral and written correspondence, statements submitted by tribes, and responses to Commission requests for information. In all, 162 persons provided testimony, and hundreds of others were interviewed." Civil Rights Commission Report, supra note 55 at 1-2 [footnotes omitted].

60 Ibid. at 8 [footnotes omitted]. The financial concerns appear to have been well founded: see ibid. at 37-44, 71-72 (Findings 2, 4 and 5). Maria Odum, in an article in the New York
Some more specific concerns were that elections based on the principle of one person, one vote, were incompatible with the political structures of some Indian tribes, that allowing actions to be brought in federal courts would undermine the authority of tribal courts and weaken community unity, and that the sentencing limits could interfere with tribal efforts to maintain order.\(^6\)

Another example of how the Act could have a negative impact on tribal traditions and customs was given by John S. Boyden on behalf of the Ute and Hopi Tribes. In reference to the prohibition against compulsory self-incrimination, he said this:

> The defendants' standard of integrity in many Indian courts is much higher than in the State and Federal Courts of the United States. When requested to enter a plea to a charge the Indian defendant, standing before respected tribal judicial leaders, with complete candor usually discloses the facts. With mutual honesty and through the dictates of experience, the Indian judge often takes a statement of innocence at face value, discharging the defendant who has indeed, according to tribal custom, been placed in jeopardy. The same Indian defendants in off-reservation courts soon learn to play the game of “white man's justice,” guilty persons entering pleas of not guilty merely to throw the burden of proof upon the prosecution. From their viewpoint, it is not an elevating experience. We are indeed fearful that the decisions of Federal and State Courts, in light of non-Indian experience, interpreting “testifying against oneself” would stultify an honorable Indian practice.\(^6\)

More generally, imposition of the due process requirements of an adversarial system of justice could undermine tribal traditions.\(^6\) A number of years after the enactment of the ICRA, Chief Justice Tom Tso of the Navajo Nation Supreme Court wrote of the adjustments necessary for his Nation to conform to Anglo-American standards of due process:

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\(^6\) See Nations Within, supra note 23 at 213, suggesting that the rights-based approach of the ICRA would replace the complex systems of responsibilities and duties that are fundamental to traditional Indian societies.
For the Navajo people, dispute settlement required the participation of the community elders and all those who either knew the parties or were familiar with the history of the problem. Everyone was permitted to speak. Private discussions with an elder who could resolve a problem was also acceptable. It was difficult for Navajos to participate in a system where fairness required the judge to have no prior knowledge of the case, and where who can speak and what they can say are closely regulated.\(^6\)

Concern was also expressed over the appropriateness of Congressional imposition of civil rights guarantees on all the Indian tribes without their consent. At the Senate Hearings prior to enactment of the ICRA, Arthur Lazarus, Jr., General Council of the Association of American Indian Affairs, said this:

> Perhaps the major problem ... is the attempt in this legislation to impose upon all Indian communities at one fell swoop a sophisticated legal system that has been developing in our society over a period of centuries. I suggest that Indian tribes vary - each having different resources, customs, size, degree of education or assimilation, etc. - and that the proposed establishment of one set of legal rules for all tribes is unworkable and unwise. I further suggest that it is not realistic to expect Indians (or any other nation) to learn respect for our constitutional principles when their application is required by legislative direction from outside and does not grow out of the actual operations of tribal government.\(^6\)

The crux of the debate over the ICRA, both before and after its enactment, has thus been tension between the application to Indian governments of the Anglo-American approach to protection of individual rights and freedoms on the one hand, and respect for Indian sovereignty and tribal traditions on the other.\(^6\) While the legislative history and the provisions of the Act itself reveal that Senator Ervin and Congress did attempt to achieve some balance between these different values, the extent to

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\(^6\) Hearings on S. 961-68 and S.J. Res. 40 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Congress, 1st Sess. 1 (1965) at 65, as quoted in G.K. Reiblich, "Indian Rights Under the Civil Rights Act of 1968" (1968) 10 Ariz. L. Rev. 617 at 620 n.1. See also Chaudhuri, \textit{supra} note 20 at 30: "Students of the law are keenly aware that the nationalization of the Bill of Rights and its application to the states has a complex history and one that is still in process. However, at least the Fourteenth Amendment was ratified by the states. No such ratification was sought from the tribes in the context of the Indian Civil Rights Act. The 'rights' were extended unilaterally by Congress thereby again raising many questions of the role and meaning of 'consent' in democratic theory."

which they succeeded has been hotly debated. The ideological controversy has since been fueled by judicial interpretation of the statute.

**Judicial Interpretation:** Santa Clara Pueblo v. Martinez

It is both impossible and unnecessary for the purposes of this article to provide anything like a comprehensive survey of the case law that the ICRA has spawned over the 34 years since its enactment. This case law has been produced by both federal and tribal courts. Prior to the 1978 decision of the United States Supreme Court in Santa Clara Pueblo v. Martinez, federal courts were adjudicating generally on allegations of infringements of the ICRA by tribal governments. After that decision, actions in federal courts have been limited to jurisdictional matters and habeas corpus. Since Martinez, application of the substantive provisions of the ICRA has thus been mainly within the exclusive jurisdiction of the tribal courts.

The Martinez case involved an application to the United States District Court by Julia Martinez, a member of the Santa Clara Pueblo in New Mexico, and her daughter Audrey Martinez, on behalf of themselves and similarly situated individuals, alleging that a 1939 Pueblo Ordinance violated the equal protection provision in §1302(8) of the ICRA. The Ordinance granted membership in the Pueblo to children whose fathers were members and mothers were non-members, but denied it to children whose mothers were members and fathers were non-members. As Martinez had married a Navajo man, the Ordinance excluded their children from membership in the Pueblo. This exclusion meant that the children were denied, among other things, the right to live in the community after their mother's death, to inherit her land rights, to vote in Pueblo elections, and to hold secular office in the Pueblo.

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68 For references to the pre-Martinez federal court decisions, see Civil Rights Commission Report, supra note 55 at 12-15; McCarthy, supra note 60 at 471-72. For critical assessment of the earlier decisions, see Zontz, supra note 67 at 20-58.

69 See McCarthy, supra note 60 at 473-78.

70 See Civil Rights Commission Report, supra note 55 at 11-28. For a very useful survey of reported tribal court decisions dealing with the ICRA, see McCarthy, supra note 60 at 489-515.

71 Martinez, supra note 68 at 52-53. For a more detailed description of the benefits of Pueblo membership, see the District Court’s decision in Martinez v. Santa Clara Pueblo, 402 F.Supp. 5 (D.N.M. 1975) [hereinafter Martinez (D.N.M.)].
The District Court dismissed a motion challenging the Court's jurisdiction to decide the matter, but went on to find for the Pueblo on the merits. While acknowledging the vital importance of the applicants' interests, Mechem D.J. held that the equal protection guarantee in the ICRA... should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and therefore should be preserved and which of them are inimical to cultural survival and should therefore be abrogated. Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they must live with the decision every day.

The Tenth Circuit Court of Appeals upheld the District Court's decision that it had jurisdiction to adjudicate on the application of the ICRA to tribal governments, but reversed on the merits. While agreeing that the equal protection provision in the ICRA should not necessarily be interpreted and applied in the same way as the Fourteenth Amendment to the U.S. Constitution, the Tenth Circuit decided that the Pueblo's interest in the Ordinance, especially given its relatively recent enactment, was not compelling enough to justify the sexual discrimination inherent in it.

The Supreme Court reversed again, this time on the jurisdictional issue. Justice Thurgood Marshall, delivering the opinion of the Court, started his analysis of this issue by reaffirming that the "Indian tribes are 'distinct, independent, political communities, retaining their original natural rights' in matters of local self-government." He then reiterated the position adopted in Talton v. Mayes that, "[a]s 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." Relying, however, on its plenary power, Congress had enacted the ICRA, thereby "imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." The first question to be answered,

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74 Ibid. at 18. While the flexible approach to the construction and application of the provisions of the ICRA taken by Mechem D.J. was consistent with a number of federal court decisions, in other cases the requirements of the Act have been held to be identical to equivalent provisions in the U.S. Bill of Rights: see Civil Rights Commission Report, supra note 55 at 14-15. See also infra notes 153-57 and accompanying text.
75 Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976) [hereinafter Martinez (10th Cir.).
76 The Tenth Circuit thought the Ordinance was motivated primarily by what it called "practical economic considerations" (preservation of tribal property): ibid. at 1048. See also at 1040-41, 1047.
77 White J. dissented. Rehnquist J. concurred with the majority, except on the issue of the sovereign immunity of the Indian tribes.
78 Martinez, supra note 68 at 55, quoting Worcester v. Georgia, supra note 12 at 559.
79 Supra note 16.
80 Martinez, supra note 68 at 56.
81 Ibid. at 57. See also at 63, esp. n.14, where Marshall J. specified some of the differences between the ICRA and the Bill of Rights and Fourteenth Amendment.
therefore, was whether Congress had intended to limit the tribes’ sovereign immunity from suit.

The Supreme Court’s answer to this question was no. Any waiver of sovereign immunity, Marshall J. said, “cannot be implied but must be unequivocally expressed.”\(^{82}\) As nothing in the ICRA purported to subject tribes to the jurisdiction of federal courts in civil actions,\(^ {83}\) he concluded that the tribes’ sovereign immunity protected them from federal court actions for violation of the Act.\(^ {84}\) But as the sovereign immunity of the Santa Clara Pueblo did not extend to its Governor, who had also been named as a defendant in the action, Marshall J. also found it necessary to determine whether the ICRA implicitly empowered federal courts to adjudicate on allegations of violation of the Act by tribal officers.

The Court answered this second question in the negative as well. Marshall J. expressed a number of concerns that influenced this part of the Court’s decision. He pointed out that the Supreme Court had shown reluctance in the past to submit even matters of commercial and domestic relations on Indian reservations to an outside forum, as that might infringe the right of self-government and undermine tribal courts.\(^ {85}\) “A fortiori,” he said, “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.”\(^ {86}\) He noted as well that the provisions of the ICRA manifested “[t]wo distinct and competing purposes ... 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.’”\(^ {87}\) He found evidence for the latter intention in the fact that the ICRA had “selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of the tribal governments.”\(^ {88}\) Moreover, he acknowledged that allowing actions in federal courts to enforce the ICRA would “impose serious financial


\(^{83}\) Regarding the habeas corpus jurisdiction provided by § 1303, he observed that the respondent in such action would be the individual custodian of the prisoner, not the tribe: Martinez, supra note 68 at 59.

\(^{84}\) For discussions of the impact of this aspect of the Court’s decision, see Civil Rights Commission Report, supra note 55 at 63-67; McCarthy, supra note 60 at 478-83.

\(^{85}\) Martinez, supra note 68 at 59. Marshall J. relied on Williams v. Lee, 358 U.S. 217 (1959) (a state court does not have jurisdiction over a debt arising on a reservation between a reservation Indian and a non-Indian merchant), and Fisher v. District Court, 424 U.S. 382 (1976) (a state court does not have jurisdiction over adoption where the parties are all tribal members and residents on the reservation).

\(^{86}\) Martinez, supra note 68 at 60.


\(^{88}\) Martinez, supra note 68 at 62-63. For the most important omissions and modifications, see supra notes 52-56 and accompanying text. Marshall J. referred as well to other provisions of the ICRA (not discussed in this article) that were clearly intended to strengthen self-government, such as §§ 1321-1323, by which Congress repealed and replaced § 7 of Pub. L. 83-280, 67 Stat. 588 (1953), making tribal consent necessary for state assumption of civil and criminal jurisdiction over Indian reservations: see Kennerly v. District Court, 400 U.S. 423 (1971).
burdens on already ‘financially disadvantaged’ tribes.”89 Finally, Marshall J. found that, apart from habeas corpus for which express provision had been made by § 1303, there was no need for federal court jurisdiction, as tribal courts provided an appropriate forum for bringing complaints of violations of the ICRA.90 The legislative history behind the Act revealed that, after consideration of various options for federal court review of tribal criminal proceedings, a conscious decision had been made to limit judicial review to habeas corpus, as that “would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments.”91 Other proposals for federal review of tribal actions involving civil matters were also rejected. Marshall J. accordingly concluded:

These factors, together with Congress’ rejection of proposals that clearly would have authorized causes of action other than habeas corpus, persuade us that Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303 ...

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 ... As suggested by the District Court’s opinion in this case, ... efforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a tribe’s ability to maintain itself as a culturally and politically distinct entity.92

As the jurisdictional issue decided in Martinez has not been re-visited by the Supreme Court, the decision is still the leading case on the ICRA. Attempts have been made in Congress to reverse the impact of the decision by amending the ICRA to restrict the sovereign immunity of the Indian tribes and to give the federal courts broader jurisdiction to enforce the Act, but these initiatives have failed.93 Nonetheless, almost twenty-five years after it

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90 Martinez, supra note 68 at 65.
91 Ibid. at 67.
92 Ibid. at 70-72.
was delivered, the *Martinez* decision still generates controversy in both political and legal circles.

**Critical Assessment**

The *Martinez* case exemplifies the efforts the courts of the United States have made to interpret the *ICRA* so as to strike a balance between the protection of individual civil rights and maintenance of Indian sovereignty and traditions. The District Court and the Tenth Circuit both assumed jurisdiction, but tried to apply the Act in a way that would be sensitive to the traditions of the Santa Clara Pueblo.94 As we have seen, they came to different conclusions on the merits, indicating how difficult it can be for judges who are outsiders to adjudicate on matters that involve assessments of the culture of an Indian nation.95 The Supreme Court avoided making such an assessment by denying jurisdiction to the federal courts, except where a writ of *habeas corpus* is sought.96 This meant that the only forum available to Julia and Audrey Martinez for a remedy for their complaint was within the Santa Clara Pueblo.97 Given that the judicial authority of the Pueblo was vested in the Tribal Council,98 their chances of obtaining a remedy were therefore nil.99

The fact that the decision effectively left Julia and Audrey Martinez without a remedy for the gender discrimination they experienced has troubled many commentators.100 Professor Catherine MacKinnon found...

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95 E.g., the District Court and the Ninth Circuit disagreed over the extent to which the Ordinance was based on tradition or motivated by more recent, practical considerations: see *Martinez* (D.N.M.), supra note 72 at 16-18; *Martinez* (10th Cir.), supra note 75 at 1040-41, 1047-48. This kind of inquiry inevitably involves determinations (or, more commonly, assumptions) about the meaning of tradition, which raises the problematic issue of whether it can be created on an on-going basis. See J. Resnik, "Dependent Sovereigns: Indian Tribes, States, and the Federal Courts" (1989) 56 U. Chicago L. Rev. 671 at 709-11; R. Laurence, "A Quincentennial Essay on *Martinez v. Santa Clara Pueblo*" (1991-92) 28 Idaho L. Rev. 307 at 334.


97 In a footnote to their judgment, the Supreme Court in *Martinez*, supra note 68 at 66 n.22, suggested that, where tribal constitutions require Department of the Interior approval for tribal ordinances, "persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department". The effectiveness of this remedy was questioned in Civil Rights Commission Report, supra note 55 at 20-28, 71 (Finding 3(b)). Moreover, as the Supreme Court pointed out in the same footnote, the Santa Clara Constitution did not contain such a requirement.

98 *Martinez*, supra note 68 at 66 n. 22.

99 Julia Martinez had in fact made concerted efforts to have the Pueblo Council change the Ordinance and accept Audrey as a member, without success: *Martinez* (D.N.M.), supra note 72 at 11, where Mechem D.J. concluded: "Plaintiffs have exhausted all available remedies within the Pueblo."

100 In addition to the works referred to in the text of this article, see Byram, supra note 66; R.C. Jeffrey, Jr., "The Indian Civil Rights Act and the *Martinez* Decision: A Reconsideration" (1990) 35 S.D.L. Rev. 355; Resnik, supra note 95; G. Schultz, "The
Martinez to be "a difficult case on a lot of levels." She acknowledged that it "poses difficult tensions, even conflicts, between equality of the sexes, on the one hand, and the need to approach those questions within their particular cultural meanings, in an awareness of history and out of respect for cultural diversity and the need for cultural survival, on the other." By "word of mouth," she had learned that the Santa Clara Ordinance was a response to threats to Pueblo land caused by the 1887 General Allotment Act, rather than an outgrowth of tribal tradition. MacKinnon accordingly concluded that the Ordinance was a "male supremacist solution to a problem male supremacy created." She suggested that "cultural survival is as contingent upon equality between women and men as it is upon equality among peoples," but did not propose any means for achieving gender equality within Indian tribes without federal court enforcement of the ICRA's equal protection provision.

Carla Christofferson expressed pessimism about the willingness of Indian tribes to implement gender equality on their own. She thought that past assimilationist policies of the United States Government had destroyed traditional equality in Indian cultures, so that Indian women became disadvantaged:

Now the United States has stepped back from the discriminatory culture it helped to create, leaving Indian women to fend for themselves. Although the ICRA is designed to protect individual rights from encroachment by the tribe, Native American women are powerless to enforce such rights after the Santa Clara [Martinez] decision.
Obviously, Christofferson did not regard enforcement of the ICRA by tribal courts as a means of protecting the rights of Indian women.\textsuperscript{110} She proposed amendments to the ICRA that would expressly disallow discrimination against women by Indian tribes and provide federal courts with jurisdiction to enforce this provision after tribal remedies had been exhausted. For her, this amendment would strike an appropriate balance between gender equality and tribal sovereignty.\textsuperscript{111}

Other commentators, especially Native Americans, have regarded the ICRA, even as interpreted by the Supreme Court in \textit{Martinez}, as an assault on Indian values and traditions.\textsuperscript{112} Rennard Strickland, while he was the Langston Hughes Distinguished Visiting Professor at the University of Kansas, related the ICRA to the well-intentioned attempts by nineteenth century reformers to assimilate the Indians by imposing Euro-American values upon them:

> The almost inevitable response is “how tragic” and “how absurd” that white society should seek to impose such values on Indian people. We think, “What fools were these nineteenth century men who did not see that cultural values differ from group to group.” How quaintly dated, how Victorian, we muse. And yet, when we look at the present day era we find, for example, much of this same attitude emerging in the Indian Civil Rights Act of 1968.\textsuperscript{113}

Vine Deloria and Clifford Lytle were more specific:

> The real impact of the Indian Civil Rights Act ... was to require one aspect of tribal government - the tribal court - to become a formal institution more completely resembling the federal judiciary than the tribal government itself resembled either the state or federal governments. The informality of Indian life that had been the repository of cultural traditions and customs was suddenly abolished, and in its place came the rigid requirements that were necessary to identify those instances in which the actions of the tribal government impinged upon the rights of tribal members.\textsuperscript{114}

\textsuperscript{110} Despite the title of her article, however, Christofferson offered virtually no evidence that tribal courts were not protecting the equality rights of female tribal members, as the equal protection provision in the ICRA requires them to do. She seems to have assumed that, because Julia and Audrey Martinez could not obtain a remedy within the Santa Clara Pueblo, other Indian women would be similarly disadvantaged. However, examination of the reported decisions of tribal courts concerning the ICRA has revealed that they are doing a reasonably good job enforcing its provisions: see \textit{infra} notes 142-52 and accompanying text.

\textsuperscript{111} Christofferson, \textit{supra} note 108 at 179-85. She expressly rejected proposals by Senator Orrin Hatch (see \textit{supra} note 93) for broad federal court enforcement of the ICRA after exhaustion of tribal remedies: \textit{ibid.} at 179-81. See also R.A. Williams, Jr., “Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law” (1989) 31 Ariz. L. Rev. 237 at 271-75.


\textsuperscript{114} \textit{Nations Within, supra} note 23 at 213. See also commentary in note 63, \textit{supra}. 
If the Indian nations did not submit to the constitutional norms and procedural standards of American society, they risked losing even more of the limited sovereignty that they had been able to retain.

Professor Robert Laurence, a self-described “tribal advocate,” thought that the Martinez decision itself was responsible for an erosion of tribal sovereignty. The “great irony” of the decision, he wrote, is that it “honored tribal sovereignty so much that it threatens to destroy it.” Laurence saw a connection between Martinez and Oliphant v. Suquamish Indian Tribe, decided in the period between the argument and decision in Martinez. In Oliphant, the Supreme Court held that tribal courts do not have inherent criminal jurisdiction over non-Indians. This was the first of a series of decisions in which the Supreme Court has systematically narrowed the jurisdiction of Indian tribes over non-members, first in criminal and then in civil matters.

Laurence’s point was that, by limiting federal court jurisdiction over violations of the ICRA to writs of habeas corpus, Martinez virtually assured that the Supreme Court would reduce the jurisdiction of the Indian tribes so that the civil rights of non-members would be protected. As a result, the Court has been converting the territorial sovereignty of the Indian tribes into personal jurisdiction over their members. If this process continues, Laurence feared that the governmental status of Indian tribes could be reduced to something like the status of private clubs. To avoid this, he suggested that Congress reverse both the Martinez and the Oliphant decisions.

Unfortunately, the recent decision of the Supreme Court in Hicks reveals that the connection Professor Laurence saw between limited federal court enforcement of the ICRA and Supreme Court reduction of tribal

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115 Laurence, supra note 95 at 315.
116 Ibid. at 337.
117 435 U.S. 191 (1978) [hereinafter Oliphant].
118 Marshall J., who authored the Martinez decision, wrote a dissenting opinion in Oliphant that was joined in by Burger C.J.
119 Oliphant was followed in 1987 by Duro v. Reina, supra note 17, where the Supreme Court decided that Indians who are not members of a tribe are not subject to the criminal jurisdiction of that tribe’s court. This was changed by legislation giving tribal courts criminal jurisdiction over non-member Indians: see supra note 49.
121 Laurence, supra note 95 at 337-39. See also R. Laurence, “Martinez, Oliphant and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act” (1988) 10 Campbell L. Rev. 411. Implicit in this argument, of course, is an assumption that tribal courts are inadequate protectors of non-members’ rights. Though the evidence so far is meagre, it is not at all clear that this is the case: see M.D. Rosen, “Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act” (2000) 69 Fordham L. Rev. 479 at 572-77 (examining the ten reported cases where non-members relied on the ICRA in tribal courts and concluding that, with a couple of possible exceptions, the non-members were not unfairly treated). See also infra notes 146-49 and accompanying text.
122 Laurence, supra note 95 at 339.
123 Supra note 17.
jurisdiction is well founded. In *Hicks*, the Court decided that a tribal court did not have jurisdiction over a tort claim brought by a tribal member against state officials in their individual capacities in relation to execution of a search warrant on reservation lands. In a concurring judgment, Souter J., joined by Kennedy and Thomas JJ., said that non-members need “to know where tribal jurisdiction begins and ends,” in part because tribal courts

... differ from traditional American courts in a number of significant respects. To start with the most obvious one, it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes. See *Talton v. Mayes*. Although the *Indian Civil Rights Act of 1968* (ICRA) makes a handful of analogous safeguards enforceable in tribal courts, ... “the guarantees are not identical,” *Oliphant*, at 194 ..., and there is a “definite trend by tribal courts” toward the view that they “ha[ve] leeway in interpreting” the ICRA’s due process and equal protection clauses and “need not follow the U.S. Supreme Court precedents ‘jot-for-jot.’” In any event, a presumption against tribal-court civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not tribal members be “protected ... from unwarranted intrusions on their personal liberty,” [*Oliphant*] at 210.

Souter J. went on to observe that tribal courts differ as well in their structures, the laws they apply, and “the independence of their judges.” Moreover, even when tribal court decisions involve non-tribal law they cannot be appealed to state or federal courts. Justice Souter concluded: “The result, of course, is a risk of substantial disuniformity in the interpretation of state and federal law, a risk underscored by the fact that “[t]ribal courts are often ‘subordinate to the political branches of tribal governments.’” Souter J.’s message is clear: tribal courts cannot be trusted to protect the civil rights of non-members.

As a major criticism of the *Martinez* decision has been that the remedies available for enforcement of the ICRA within Indian tribes are inadequate, it is important to assess whether this is actually true. At the time of the decision in 1978, it appears that many tribes did not have their own courts where remedies could be sought, though this problem has been alleviated by rapid expansion of tribal court systems since *Martinez.* Where tribal courts are in place, complaints have been made that they lack the judicial

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124 Ibid. at 2323.
125 Ibid.
126 Ibid. [emphasis added], citing a passage from *Duro v. Reina*, supra note 17 at 693, which quoted from Cohen’s *Handbook*, supra note 14 at 334-35.
127 Compare Rosen, *supra* note 121 at 572-77.
128 See McCarthy, *supra* note 60 at 486 [footnotes omitted]: “There were 119 tribal courts in 1978. Ten years later, the number had increased to about 150, handling an estimated 230,000 cases annually. The growth of tribal judiciaries in the most recent decade has been astounding. Today, of the more than 500 federally recognized tribal governments, virtually all have some system of civil dispute resolution and most have criminal court systems.”
independence necessary to make impartial decisions when violations of the ICRA by tribal governments are alleged.\textsuperscript{129} In their 1991 Report on the ICRA, the United States Commission on Civil Rights acknowledged this to be a problem in some tribes; however, in their view the solution was not federal court review, but increased funding for tribal courts, education of tribal councillors on the role of the judiciary and the importance of judicial independence, and intertribal appellate systems.\textsuperscript{130} They wrote:

The Commission believes that respect for tribal sovereignty requires that prior to any further intrusion by the Federal Government into tribal justice systems, such as by way of imposing Federal court review, tribal forums be first given the opportunity to institute proper mechanisms that would operate with adequate resources, training, funding, and support from the Federal Government. Because of the great diversity of customs, traditions, resources, and even size, among tribes, the solutions they adopt will necessarily vary.\textsuperscript{131}

The sovereign immunity of the Indian tribes, which was upheld by the Supreme Court's decision in Martinez that the ICRA did not implicitly take that immunity away where a federal court action was brought for violation of the Act, has also been regarded as problematic. While some tribes have statutorily waived their sovereign immunity in some instances, others have not.\textsuperscript{132} Some tribal court judges have interpreted the Martinez decision as permitting suit against tribal governments in tribal courts, but other tribal court judges have disagreed.\textsuperscript{133} The problem, of course, is that the ICRA is little more than a statement of principle insofar as violations of civil rights by tribal governments are concerned if they can hide behind their sovereign immunity. On the other hand, financially-pressed tribes fear that exposure to civil damage claims might threaten their viability. Recognizing the seriousness of this problem, the United States Commission on Civil Rights recommended that the Federal Government provide funds "for the establishment of several pilot projects to assist tribal governments in an exploration of the extent to which they might enact statutory waivers of sovereign immunity to allow civil rights suits against the tribe, without jeopardizing the tribal government's viability."\textsuperscript{134} Otherwise, the

\textsuperscript{129} Besides safeguarding civil rights, it appears that an independent judiciary is important factor in economic development on Indian reservations: see S. Cornell and J.P. Kalt, \textit{"Sovereignty and Nation-Building: The Development Challenge in Indian Country Today"} (1998) 22:3 Am. Indian Culture & Rsch. J. 187, at 197-98.

\textsuperscript{130} Civil Rights Commission Report, \textit{supra} note 55 at 44-51.

\textsuperscript{131} \textit{Ibid.} at 51. See also \textit{American Indians, American Justice, supra} note 14 at 135-37.

\textsuperscript{132} See Civil Rights Commission Report, \textit{supra} note 55 at 63.

\textsuperscript{133} See \textit{ibid.} at 66-67 ; McCarthy, \textit{supra} note 60 at 478-83. According to the Civil Rights Commission Report, tribal judges who have found that the ICRA did abrogate sovereign immunity in tribal court suits have often relied on this passage from Martinez, \textit{supra} note 68 at 65 : "Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply."

Commission saw a risk that Congress or the Supreme Court would impose a solution that would be detrimental to tribal sovereignty. In response to this problem, many tribes have in fact waived their sovereign immunity in civil rights cases, at least to the extent of allowing injunctive or declaratory relief.

Sovereign immunity apart, evidence has been accumulating that the tribal courts are doing a reasonably good job enforcing the provisions of the *ICRA*. In its 1991 Report, the United States Commission on Civil Rights found that, while a lack of judicial independence has hampered application of the Act by some tribal courts, inadequate federal funding of tribal court systems is a more serious problem. The Commission observed that, in enacting the statute, Congress "did not fully take into account the practical application of many of the *ICRA*'s provisions to a broad and diverse spectrum of tribal governments, and that it required these procedural protections of tribal governments without providing the means and resources for their implementation."

They concluded:

The failure of the United States Government to provide proper funding for the operation of tribal judicial systems, particularly in light of the imposed requirements of the Indian Civil Rights Act of 1968, has continued for more than 20 years. Funding for tribal judicial systems may be further hampered in some instances by the pressures of competing priorities within a tribe. In their recommendations, the Commissioners strongly encouraged Congress to live up to the trust obligations of the Federal Government by providing more funding to strengthen tribal governments and courts. Instead of imposing further restrictions on tribal sovereignty by amending the *ICRA* to provide for federal judicial review, the Commissioners were of the view that "respect for tribal sovereignty requires that prior to considering such an imposition, Congress should afford tribal forums the opportunity to operate with adequate resources, training, funding, and guidance, something they have lacked since the inception of the *ICRA*."

More recent assessments of tribal court enforcement of the *ICRA* have also concluded that the most serious problem with tribal court systems is inadequate funding. Robert McCarthy surveyed the reported tribal court decisions involving the *ICRA* in the thirty-year period up to 1998. He observed:

Tribal court criticism seems to be based to a large extent on anecdotal evidence, since there has been virtually no scholarship dealing with

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136 See Newton, *supra* note 93 at 338-41.


138 Ibid. at 72.

139 Ibid.

140 Ibid. at 74.

141 McCarthy, *supra* note 60 at 489-513.
actual construction of the ICRA by tribal courts. Yet an analysis of published tribal court opinions suggests that despite serious financial constraints, tribal courts have been no less protective of civil rights than have federal courts. With unique cultural perspectives, tribal courts appear to have looked to federal precedent as well as tribal traditions to discern the essential fairness implied by the requirement of due process. There is an inherent risk in relying on self-selected case reports as a barometer of due process in tribal courts, and the number of reported decisions is relatively few. Nonetheless, with those caveats, tribal courts appear to be no less protective – and much more accessible – than federal courts have been in protecting civil rights on Indian reservations.\(^\text{142}\)

McCarthy noted that most tribal members are too poor to avail themselves of the ICRA’s right to counsel. For him, this is a much greater barrier to justice than lack of access to federal courts, as bringing suit in federal court would not be a realistic option for the average tribal member. He concluded:

Any proposal which truly values extension of civil rights to tribal members must recognize the need for increased tribal court advocacy. Judges do not generally raise ICRA claims on their own initiative. As important as a trained and well-funded judiciary is to effective implementation of the ICRA, real progress requires real guarantees of equal access to the courts. Effective implementation of the ICRA depends not so much on federal courts located far from poor reservation communities, more so on well-trained and financed tribal courts, but mostly on an Indian civil rights movement in which low income Native Americans have equal access to justice in tribal courts, in traditional peacemaking practices, and in the larger society.\(^\text{143}\)

Professor Nell Newton studied the 85 tribal court decisions published in the Indian Law Reporter in 1996, of which 22 cases raised civil rights issues.\(^\text{144}\) She found that the tribal court had agreed with the party making the civil rights claim in 11 of those cases. Moreover, non-Indians had been either plaintiffs or defendants in 18 of the 85 cases studied, and were probably parties in 19 others. Newton observed that “these non-Indian parties were treated fairly.”\(^\text{145}\) One instance occurred in *Simplot v. Ho-Chunk Nation Department of Health*,\(^\text{146}\) where the Ho-Chunk Tribal Court found that the non-Indian plaintiffs had been denied the due process they were entitled to under the ICRA when their employment was terminated by the defendant, and ordered that they be reinstated and paid damages.\(^\text{147}\) Newton concluded:

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\(^{142}\) Ibid. at 489-90. See also at 513: “The evidence suggests that efforts to strip tribes of sovereign immunity or to greatly expand federal review of tribal courts are overbroad remedies for an exaggerated problem, unfairly based on anecdote and cultural prejudice.” Accord R.D. Probasco, “Indian Tribes, Civil Rights, and Federal Courts” (2001) 7 Tex. Wesleyan L. Rev. 119 at 150-55.

\(^{143}\) McCarthy, *supra* note 60 at 414-15.

\(^{144}\) Newton, *supra* note 93 at 290, 341.

\(^{145}\) Ibid. at 352.

\(^{146}\) 23 Indian L. Rep. 6235 (Ho-Chunk Tribal Ct. 1996).

\(^{147}\) See Newton, *supra* note 93 at 345-46, 352.
As demonstrated through this relatively small sample of tribal court cases, the tribal courts, although forced to engraft Western legal principles onto their consensual form of decision making, have been highly successful in doing so. In part, this is because they are sensitive to the potential loss of their independent adjudicatory systems if they were to overstep the boundaries placed upon them by the Congress and the courts, and in part because they have had to become adept at melding the traditions and customs of their cultures with those legal principles guiding the majority culture. Unlike their critics, tribal courts do not dismiss well-reasoned opinions of the majority culture’s courts but choose, instead, to use these Western principles with their own customary and traditional norms.

Professor Newton thought that tribal court opinions need to be reported more extensively and distributed more widely so they are more available to other judges, legislators, scholars, and majority and minority communities. This would “serve to eradicate misconceptions,” she wrote, and might “allow for a critical dialogue with these opinions without eradication of the courts themselves.”

An even more extensive examination and analysis of case law involving the ICRA was published in 2000 by Professor Mark Rosen. Like Robert McCarthy and Nell Newton, he found that the evidence did not reveal a need for the expanded federal court jurisdiction or curtailed tribal court jurisdiction proposed by some commentators and members of Congress. He found as well that these proposals were based on concerns arising from anecdote rather than detailed evaluation of the available empirical evidence:

Close examination of the tribal case law suggests that [these concerns] are grossly overstated if not entirely misplaced. The study suggests that ICRA’s regime of multiple authoritative interpreters [primarily the judges of various tribal courts] has worked well. Tribal courts have found significant individual protections in ICRA even though they express the values of due process, equal protection, and so on, in ways that reflect and support tribal culture. This finding casts doubt on the wisdom of curtailing the powers of the tribal courts.

Federal courts, on the other hand, have not always shown sensitivity to Indian cultures and traditions when petitions for writs of habeas corpus have been made under § 1303 of the ICRA. In Poodry v. Tonawanda Band of Seneca Indians, the Second Circuit Court of Appeals dismissed arguments based on tribal tradition and decided that a writ of habeas corpus would lie

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148 Ibid. at 352-53.
149 Ibid. at 353.
150 Rosen, supra note 121.
151 Ibid. at 581-82. See also at 512-77, for extensive analysis of the case law.
152 85 F.3d 874 (2nd Cir. 1996).
against a banishment order by a tribal council.\textsuperscript{153} Cabranes Cir. J. observed that there was a tension

\ldots in any case involving questions of rights and questions of culture: whether the principles that guide our inquiry into the "criminal" or "civil" nature of the tribal action in this case or the severity of the restraint imposed must be "culturally defined" by the tribe, or whether we can approach these questions guided by general American legal norms or certain universal principles.\textsuperscript{154}

After a brief discussion of this essential question, he gave a categorical response:

In sum, there is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations, even with respect to those communities whose distinctive "sovereignty" our country has long recognized and sustained.\textsuperscript{155}

While not all federal judges have taken such a rigid approach, Professor Rosen pointed out that there is still a tendency on the part of federal courts to permit variation from federal doctrines

\ldots only when the Indian practice being challenged "differ[s] significantly from those 'commonly employed in Anglo-Saxon society.'" But when tribes adopt procedures akin to those found in general society, these courts have held, the tribes are subject to the ordinary federal requirements imposed by due process, equal protection, and so forth.\textsuperscript{156}

The thorny question of what counts as "tradition" obviously figures prominently in this kind of superficially balanced approach.

Our discussion of the commentary on the Martinez decision and the assessments that have been made of tribal court enforcement of the ICRA reveal the complexity of the issues and the range of opinions on how to achieve an appropriate balance between civil rights and Indian sovereignty and traditions. Fortunately, for the purposes of this article it is not necessary to try to resolve the controversies that the ICRA and the Martinez decision have provoked. Instead, my goal is to attempt to identify lessons that we in Canada can learn from the American experience that will assist us in determining whether the Canadian Charter of Rights and Freedoms should apply to traditional Aboriginal governments. For while recognizing that the historical and constitutional contexts are quite different in our two countries, I nonetheless think that the fundamental issues are remarkably similar.

\textsuperscript{153} Among other things, the majority questioned whether the banishment really was in accordance with tribal tradition: \textit{ibid.} at 889, 900. On the problem of judges who are not from the community determining what is traditional, see \textit{supra} note 95.

\textsuperscript{154} \textit{Ibid.} at 900.

\textsuperscript{155} \textit{Ibid.} at 900-01.

\textsuperscript{156} Rosen, \textit{supra} note 121 at 580-81, quoting \textit{Randal} v. \textit{Yakima Nation Tribal Court}, 841 F.2d 897 (9th Cir. 1988), at 900, which relied on, among other cases, \textit{Howlett} v. \textit{Salish and Kootenai Tribes of Flathead Reservation}, 529 F.2d 233 (9th Cir. 1976), at 238.
Lessons for Canada

Our starting point must be the U.S. Supreme Court's consistent adhesion for more than 100 years to the principle that the Indian nations are not subject to the American Constitution when they are exercising their inherent powers of self-government. Of course this principle is rooted in the recognition by Chief Justice Marshall in the 1830s that the Indian nations retained limited inherent sovereignty after European colonization and incorporation of their territories into the United States. While there is no such history of judicial acknowledgement of the inherent sovereignty of the Aboriginal nations in Canada, I think there are sufficient indications that the Supreme Court of Canada will move in the direction of the U.S. Supreme Court in this regard when an appropriate case comes before it. When that happens, it will become necessary to interpret the Canadian Constitution in a way that accommodates the right of the Aboriginal peoples to exist as distinct political communities. This interpretive approach will have to be applied to the Charter as well as to the rest of the Constitution. I have argued in the past that, as a matter of construction, the Charter does not apply of its own force to Aboriginal governments that are exercising inherent powers. In my opinion, this conclusion can be supported by the long-standing American principle that the Indian nations are not subject to the U.S. Bill of Rights. In addition to the fact that, like the provisions of the American Bill of Rights, s.32 of the Charter does not explicitly refer to Aboriginal governments, preservation of the distinctive cultures and traditions of the Aboriginal nations is as much a constitutional principle in modern-day Canada as it is in the United States.


159 See McNeil, supra note 2. Compare the works cited supra note 8.

160 S.32(1) provides that “[t]his Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and the Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.” For conflicting opinions on whether Aboriginal governments can be brought within the scope of this provision, compare RCAP Vol. 2, supra note 8 at 227-32 (arguing that they can), with McNeil, supra note 2 at 68-79 (Emerging Justice? at 220-31), and Wilkins, supra note 8 at 58-80 (arguing that they cannot). For a valuable assessment of the arguments both ways, see Macklem, supra note 8 at 198-210. See also Russell, supra note 9 at 184-86.

161 The Constitution Act, 1982, supra note 1, s.35(1), acknowledged this by providing constitutional protection to the existing Aboriginal and treaty rights of the Aboriginal peoples. In interpreting this provision, the Supreme Court has emphasized the importance of preserving the distinctive practices, customs, and traditions of the Aboriginal peoples: see R. v. Van der Peet, [1996] 2 S.C.R. 507.
In the 1960s, American policy-makers grappled with the fact that the Bill of Rights does not apply to the Indian nations as a matter of constitutional law. Before any decision was made by Congress to deal with the situation, extensive hearings were conducted by Senator Sam Ervin’s Subcommittee on Constitutional Rights, beginning in 1961. The legislation he proposed was revised in important respects before its eventual enactment as the ICRA in 1968, in part to take account of concerns expressed by some of the Indian nations. As we have seen, the provisions in § 1302 of the Act are modelled on, but do not mirror, the Bill of Rights and the Fourteenth Amendment. As the Supreme Court recognized in Martinez, the ICRA was designed to strike a balance between the protection of civil rights and maintenance of Indian traditions and tribal sovereignty.

In contrast to this, the debate in Canada over whether the Charter should apply to Aboriginal governments has generally proceeded as though the answer is either yes or no. Those who think the Charter should apply tend to regard s.25, which provides that the guarantee of certain rights and freedoms in the Charter “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,” as a means for ensuring that Aboriginal cultures and traditions are protected. Peter Hogg and Mary Ellen Turpel, after finding it “probable that a court would hold that Aboriginal governments are bound by the Charter,” thought it likely that some actions of Aboriginal governments would be exempt from the Charter by virtue of section 25 and that the Charter would be interpreted in a manner deferential to and consistent with Aboriginal culture and traditions. Interpretations of the Charter that are consistent with Aboriginal cultures and traditions would likely be found when the court is faced with a situation where different

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162 See Burnett, supra note 29 at 588-603.
163 See supra notes 52-56 and accompanying text.
164 Martinez, supra note 68 at 62-64.
166 Hogg & Turpel, supra note 8 at 416. While they predicted that Canadian courts would apply the Charter to Aboriginal governments, it is not clear whether they thought the courts should do so (compare the other works by Turpel cited supra note 9). They recommended that Aboriginal peoples include Charters of rights that reflect their particular traditions and values in their own constitutions. While they did not think these Aboriginal Charters would displace the Canadian Charter, they predicted that “they would not be ignored by the courts, which would then be more likely (invoking section 25) to respect laws and decisions that had been made by an Aboriginal government within the framework of its constitution”: ibid. at 419-20.
standards apply and the difference is integral to culturally-based policy within an Aboriginal community.\textsuperscript{167} I do not share their optimism that Canadian courts would apply the Charter to Aboriginal governments in culturally appropriate ways.\textsuperscript{168} The American experience reveals that, while some federal court judges in \textit{habeas corpus} cases have made sincere efforts to balance the protections accorded to civil rights by the ICRA against tribal values and interests, others have shown much less sensitivity.\textsuperscript{169} As we have seen, the U.S. Supreme Court itself in the \textit{Martinez} decision concluded that "efforts by the federal judiciary to apply the statutory prohibitions of § 1302 [of the ICRA] in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."\textsuperscript{170}

I find it remarkable that proponents of the Charter's application to Aboriginal governments in Canada appear prepared to go ahead without the kind of serious investigation that was conducted in the United States to assess the potential impact the Charter might have on Aboriginal cultures and traditions. The Royal Commission on Aboriginal Peoples, for example, concluded that the Charter does apply to Aboriginal governments, and depended on s.25 and Canadian courts to temper its application so that it does not have a negative impact on Aboriginal cultures and traditions.\textsuperscript{171} Dan Russell, an Aboriginal lawyer practicing in Toronto, is also critical of the Commission's position. In his perceptive book, \textit{A People's Dream: Aboriginal Self-Government in Canada}, he wrote in reference to this aspect of the Commission's Report:

One of the most serious concerns is the lack of substantive discussion about the problems created when Aboriginal communities' collective values conflict with the individualistic norms imposed by the Charter ... The commission indicated that it had heard various Aboriginal leaders from across the country, many of whom had indicated a concern about the implications of the Charter for their collective rights. Seemingly, these concerns had little impact on the commissioners.

There is no discussion in the report about how Aboriginal values concerning clan mother elections are threatened by the democratic rights reflected in Section 3 of the Charter. No mention is made of the damage that threatens a community's values when an individual is insulated from having to speak on his or her own behalf in court. Neither is an Aboriginal community protected from imposition of the

\textsuperscript{167} \textit{Ibid.} at 418. This view was endorsed by the Royal Commission on Aboriginal Peoples: \textit{RCAP Vol. 2, supra} note 8 at 232-33.

\textsuperscript{168} E.g., the "integral to the distinctive culture" test for Aboriginal rights created by the Supreme Court in \textit{R. v. Van der Peet, supra} note 161, reveals that, even at that level, some judges have static, historical conceptions of Aboriginal cultures: see J. Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 Am. Indian L. Rev. 37; R.L. Barsh & J.Y. Henderson, "The Supreme Court's \textit{Van der Peet} Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993.

\textsuperscript{169} See \textit{supra} notes 153-57 and accompanying text.

\textsuperscript{170} \textit{Martinez, supra} note 68 at 72: see \textit{supra} note 92 and accompanying text.

\textsuperscript{171} \textit{RCAP Vol. 2, supra} note 8 at 226-34.
Chartier's double jeopardy clause, which would deny the community the ability to deal in a culturally significant way with an offender. Plainly, none of these issues appears to have been considered by the commission. If they were, the report itself is entirely silent on these matters.172

Unlike the Commission, Russell engaged in a detailed analysis of the possible effects of specific Charter provisions on Aboriginal communities.173 He concluded that the "Charter's impact on self-governing Aboriginal communities could have profound implications for many traditional values and customs."174

Our examination of the American experience has revealed that, since the Martinez decision in 1978, the main debate has been over whether the federal courts should have general jurisdiction over ICRA violations by Indian nations. In Canada, those who think the Charter does or should apply to Aboriginal governments generally appear to assume that Charter complaints against those governments could be brought in Canadian courts. This is probably because there is not any Canadian equivalent to the system of tribal courts that exists in the United States.175 However, this means that the main protection that the U.S. Supreme Court's interpretation of the ICRA provided to Indian traditions and tribal sovereignty — namely, exclusive tribal court jurisdiction except where a writ of habeas corpus is sought — would be missing in Canada if the Charter were to apply to Aboriginal governments. Aboriginal nations would have to depend entirely on the sensitivity of Canadian judges to safeguard their cultures against the potentially negative effects of the Charter, a situation that the U.S. Supreme Court, as we have seen, thought might "substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."176

A major concern in the United States in the aftermath of Martinez has been that Indian women, especially in tribes that have not created an independent judiciary or have not waived their sovereign immunity, may be left with no remedy against gender discrimination by their tribal governments. In my opinion, we are unlikely to encounter this problem in

172 Russell, supra note 9 at 183 [footnotes omitted].
173 Ibid., at 103-13.
174 Ibid. at 127. See also Wilkins, supra note 8 at 84-99, concluding at 99 that "it makes much more sense to deal case by case with allegations of real abuse and injustice in the exercise of inherent self-government rights than to begin by demanding compliance with a rights regime [the Charter] that threatens the very traditions on which such rights are based" [footnote omitted].
175 Modern treaties may, however, provide for the creation of Aboriginal courts: e.g., see the Nisga'a Final Agreement, initialled 4 August 1998, ch. 12, paras. 30-49. Although ch. 2, para. 9, of that Agreement provides that the Charter "applies to Nisga'a Government in respect of all matters within its authority", the jurisdiction conferred on the Nisga'a Court by ch. 12, paras. 38-41, does not explicitly include enforcement of the Charter. This may mean that Charter challenges against the Nisga'a Government can only be brought in a Canadian court. But even if the Nisga'a Court could entertain Charter challenges, it would not have the last word (as tribal courts in the United States do, except where imprisonment is involved) because decisions of the Nisga'a Court are generally appealable to the British Columbia Supreme Court: ibid., ch. 12, paras. 45-48.
176 Martinez, supra note 68 at 72.
Canada, even if the *Charter* does not apply to Aboriginal governments.\footnote{Section 35(4) of the *Constitution Act, 1982*, specifies that "the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons." This provision, which was added by an amendment agreed to by four national Aboriginal organizations in 1983, complements s.28 of the *Charter*, which provides that, "[n]otwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons." As I am of the view that self-government is an Aboriginal right that is recognized and affirmed by s.35(1), I think the exercise of that right is subject to the gender equality mandated by s.35(4). While it can be argued that Aboriginal courts should have at least initial jurisdiction to ensure that their own governments respect these provisions, I think Canadian courts would assume jurisdiction, thereby avoiding the problem of enforcement of gender equality that arose in the United States as a result of *Martinez*.}

We have seen that the studies that have been done of tribal court enforcement of the ICRA have emphasized the need for adequate federal support and funding for tribal court systems. In Canada, where tribal courts are generally non-existent, there is a pressing need for recognition and support for Aboriginal justice systems. The American experience reveals that effective self-government involves not only the power to make and administer Aboriginal laws, but also the authority to enforce those laws within Aboriginal communities. No community can be truly self-governing as long as disputes arising within the community have to be resolved, especially at first instance, by judges who have no connection with the

\footnote{For other views, see works cited *supra* note 9, esp. Native Women's Association of Canada, Nahanea, and McLvor.}

\footnote{*Constitutional Amendment Proclamation, 1983*, SI/84-102. The four organizations were the Assembly of First Nations, the Inuit Committee on National Issues, the Métis National Council, and the Native Council of Canada.}


\footnote{See McNeil, *supra* note 2 at 76-78 (*Emerging Justice?* at 227-29).}

\footnote{Ibid. at 78-79 (*Emerging Justice?* at 229-30).}

\footnote{This approach would accomplish much the same thing as the amendments to the ICRA proposed by Christofferson, *supra* note 108 : see notes 108-11 and accompanying text. Recall, however, that she thought federal court jurisdiction over gender discrimination should be subject to exhaustion of tribal remedies : see *supra* note 111 and accompanying text. [You have to read the text accompanying note 111 as well as the note itself to understand the difference between her views and Hatch's – I have attempted to make this clearer to the reader by italicizing generally in note 111.]}

community and no experience with its culture and traditions. The application of the Charter to Aboriginal governments is therefore related to a much larger issue, namely the extent to which Canadian courts should have jurisdiction over legal disputes arising within Aboriginal communities. It seems to me that attempting to resolve the issue of the application of the Charter without addressing this larger issue would be a serious mistake, especially if it is thought that the Charter issue can be answered with a simple yes or no.

The American experience reveals that the application of civil rights guarantees to Aboriginal governments is much more complicated than we in Canada have generally thought, and demonstrates that we should be considering a range of possible solutions rather than one simple answer. We need to have a much clearer idea of what effect the Charter might have on Aboriginal cultures and traditions. This necessitates a careful assessment of the potential impact of each of the Charter's provisions in the context of the unique cultures of the various Aboriginal nations. If application of the Charter's provisions, either in their current form or modified to take account of Aboriginal values and traditions, is determined to be appropriate, the issue of whether Canadian courts should have jurisdiction to enforce those provisions, either at first instance or by way of appeal, will need to be addressed in the broader context of Aboriginal justice systems. And non-Aboriginal governments have to be prepared to provide the resources, and give Aboriginal justice systems a chance to work. All this should be done in co-operation with the Aboriginal peoples, through agreements negotiated with them. Imposition of Canadian values and norms on the Aboriginal peoples perpetuates colonialism and – as our history teaches us so well – simply does not work.

Résumé

Le débat entourant l’application de la Charte canadienne des droits et libertés aux gouvernements autochtones se poursuit. Selon l’auteur, on n’a pas assez tenu compte au Canada de l’expérience américaine de l’application des droits garantis à ces gouvernements. Cette expérience montre qu’au cours des quarante dernières années décideurs politiques et juges se sont affrontés à cette question et ont tenté de trouver un équilibre entre la protection des droits individuels et le respect de la souveraineté et des traditions autochtones. À la lumière de l’expérience américaine, il serait trop simpliste de répondre par un simple oui ou non à la question de l’application de la Charte aux gouvernements autochtones. Il faudra notamment réfléchir à l’impact de la Charte sur les cultures autochtones et au rôle des tribunaux canadiens dans l’adjudication de disputes à l’intérieur de communautés autochtones.

184 One view of the common law is that it is the expression of the values and norms of society by judges who are very much a part of that society: See C.K. Allen, Law in the Making, 7th ed. (Oxford : Clarendon Press, 1964) at 71-77.
Abstract
The debate over the application of the *Canadian Charter of Rights and Freedoms* to Aboriginal governments remains unresolved. In the author's opinion, insufficient attention has been paid in Canada to the American experience with the application of civil rights guarantees to tribal governments. This experience reveals that for the past forty years American policy-makers and judges have been struggling with this contentious issue, and have attempted to achieve a balance between the protection of individual rights and preservation of tribal sovereignty and traditions. In light of the American experience, the author argues that a simplistic yes or no answer to the Charter's application to Aboriginal governments is inappropriate. In particular, more consideration has to be given to the impact of the Charter on Aboriginal cultures and to the role of Canadian courts in adjudicating disputes that arise within Aboriginal communities.

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